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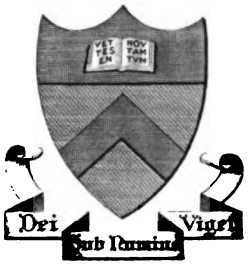

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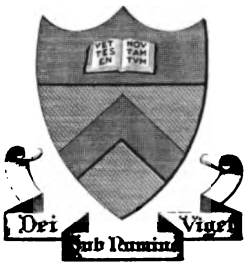

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Central Law Journal.

ST. LOUIS, MO., JULY 5, 1901.

Mr. E. C. Brandenburg, in charge of bankruptcy matters at Washington, in his report of November, 1900, to which we gave extended editorial mention in our issue of November 30, 1900, stated that the only section of the Bankrupt Act of 1898 that as construed by the courts was meeting with almost universal disapproval was section 57g referring to the construction put upon that section by the decision in the case of *In re* Fixen, 51 Cent. L. J. 359, in which it was held that a payment made on account by an insolvent debtor, in the ordinary course of business, within four months prior to his adjudication in bankruptcy, constitutes a preference under the bankrupt act, and must be surrendered by the creditor in order to entitle him to participate in the assets of the bankrupt estate. This decision aroused widespread criticism among certain business interests, but we asserted our belief at the time the decision was rendered that any criticism of the construction thus put upon this section was quite unwarranted, it being clearly the only logical construction that could be placed on the plain wording of that much disputed section. Naturally we have awaited with much interest the opinion of the supreme court on this most important question which was handed down May 27, 1901, in the case of Carson, Pirie, Scott & Co. v. Chicago Title & Trust Company. The court expressly sustained the decision of Justice Morrow in the case of *In re* Fixen, and held that a payment of a debt in money is a transfer of property within the purview of Bankruptcy Act 1898, sec. 60a, providing that a debtor shall be deemed to have given a preference, if, being insolvent, he has made a transfer of any of his property, and the effect of the enforcement of has actually received a preference, by a partial payment of his debt, within four months before the bankruptcy of the debtor, cannot have his claims allowed against the estate of the bankrupt without surrendering the preference; and this notwithstanding the fact that he received the payment innocently, and that he had no knowledge or cause to believe that the debtor was insolvent or that a preference was intended. Although four justices dissented, we fail to see on what ground objection can be made to this construction of these sections, unless it be the oft-asserted ground of expediency, that it will "harass and embarrass the business of the country." While we believe the fear thus expressed to be more imaginary than real, still, even if otherwise, congress alone has power to grant relief. It is only in cases of the most apparent absurdity that a judicial tribunal is permitted to disregard the ordinary meaning of the plain terms of the instrument under consideration. This rule was expressed in no uncertain terms in the case of Sturgis v. Crowninshield, 4 Wheat. 202: "If in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

The rule relating to preferences may be therefore succinctly stated as follows: A preference is any transfer of property, including payment in money made by the debtor while insolvent, and which has the effect of giving one creditor a greater percentage of his debt than any other creditor of the same class. If a preference is given within four months preceding bankruptcy, and the creditor has cause to believe that a preference was intended, such [illegible]

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of retaining the preference and not participating in the estate, or of surrendering the preference and sharing equally with other creditors in the distribution of the assets. Thus, if the payment constituting the preference gives him a larger percentage than other creditors, that is his advantage and he may keep it; if the percentage gained by the preference is smaller than that he would obtain by participating in the bankrupt estate, he may surrender his preference and prove up his claim along with other creditors.

One question is yet undecided. Is the time limit of four months provided for in section 60b in regard to preferences which may be recovered by the trustee applicable also to sections 60a and 57g in regard to preferences which must be surrendered to entitle the creditor to participate in the estate of the bankrupt? In section 60a no limit is set to when a payment may be a preference, except the insolvency of the debtor. It would therefore seem that the decision in the case of *In re* Jones, reported in 4 Am. B. R. 563, and holding that section 57g compels a surrender of a preferential payment of money, even though received more than four months prior to bankruptcy, as a condition precedent to sharing in the assets, is the only logical deduction to be drawn from the plain wording of these sections and the construction put upon them by the supreme court. The question of expediency under such construction becomes even more vital than before, but it is one for congress and not the judiciary to determine.

NOTES OF IMPORTANT DECISIONS

CORPORATIONS—ISSUE OF STOCK FOR PROPERTY.—One of the most important provisions of the Revised Corporation Act of New Jersey has just been construed by the Court of Chancery of that State in the case of Donaldo v. American Smelting and Refining Co., 48 Atl. Rep. 786, which illustrates the liberal policy which characterizes not only the legislative department, but likewise the judiciary of that State in their attitude toward corporations. The Revision of the New Jersey Statutes of 1896 provides that any corporation formed under the act may purchase property and issue stock to the amount of the value of the property, and in the absence of actual fraud, the judgment of the directors as to the value of the property purchased shall be conclusive. A corporation, capitalized for $65,000,000, proposed to issue $45,000,000 additional stock for property of a competing company. There was evidence that the property was not worth $10,000,000, but the business of the company sought to be amalgamated was prosperous, and the company possessed a world-wide and valuable reputation. Held, that the consolidation would not be enjoined at the suit of a stockholder, since the evidence did not show that the directors were knowingly about to purchase the plants at an excessive valuation. The court said: "The fraud referred to in the forty-ninth section is fraud upon the law; and in the words of Allen, J., in Douglas v. Ireland, *supra*, no other fraudulent intent must be proved 'than that which is evidenced by the act of knowingly issuing stock for property in excess of its value.' It must be remembered, however, that a wide discretion in the matter of valuation, as in other matters, is confided to directors. As long as 'they act in good faith, with honest motives, for honest ends,' the exercise of their discretion will not be interfered with. Given *bona fides*, and the court will not put its opinion as to values against theirs. The test will be conscious overvaluation, and not ill-advised action."

DEPOSIT OF SHARE CERTIFICATES — RIGHT OF FORECLOSURE. — Full as the books are of cases on the remedies of mortgagees, the subject is frequently raising new points for judicial decision. In the recent case of Harrold v. Plenty (*Times*, 23d ult.). reported in the latest issue of the *Solicitor's Journal*, Cozens-Hardy, J., has held that a deposit of a share certificate by way of security without writing gives to the depositee a right of foreclosure as well as a right of realizing the security by sale. That the right of sale is incident to such a security there is no doubt, and, as appears from the recent case of Deverges v. Sandeman, Clark & Co., 49 W. R. 167. there is no necessity to go to the court to enforce it. The depositee of shares of a fluctuating nature is entitled, after due notice to the depositor, to sell them even though no express power of sale has been conferred upon him. But to obtain a right to foreclosure there must be a deposit under such circumstances as to raise an inference of an agreement to execute a legal mortgage. Strictly speaking, foreclosure supposes that there has been a transfer of the legal estate, and the effect of foreclosure is simply to extinguish the right of redemption which equity allows to the mortgagor. "The principle upon which the court acts," said Jessel, M. R., in Carter v. Wake, 4 Ch. D. p. 606, "is that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the court simply removes the stop it has itself put on." And it is the same where there is an express or implied agreement to execute a legal mortgage.

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The agreement must be performed, and foreclosure then follows as an incident of the legal ownership. The remedy by foreclosure applies therefore to a deposit of title deeds, since this is treated as an agreement to execute a legal mortgage, though, as was held in Carter v. Wake, no such agreement is implied upon a pledge of chattels, and the only remedy is by sale. In that case railway bonds were treated as chattels, and an order for foreclosure was refused. In the present case of Harrold v. Plenty, Cozens-Hardy, J., has placed share certificates upon a different footing, and has held that the deposit of such certificates by way of security implies an agreement to execute a transfer by way of mortgage, and there is consequently the right of foreclosure. It may be noticed that the nature of the right of foreclosure was discussed also in Sadler v. Worley, 42 W. R. 476 (1894), 2 Ch. 170, where it was held to be incident to a charge on land created in favor of debenture-holders, though it is not incident to a charge created by will. *Re* Owen, 43 W. R. 55 (1894), 3 Ch. 320.

CONSITUTIONAL LAW—PHYSICIAN'S LICENSE—REVOCATION BY STATE BOARD.—The constitutionality of laws establishing State boards of health, having power to issue and revoke licenses for the practice of medicine, are upheld in a strong opinion by the Supreme Court of Rhode Island, in the case of State Board of Health v. Roy, 48 Atl. Rep. 802. In this case the board of health revoked the license of a practicing physician for what it deemed grossly unprofessional conduct. The defendant contested the revocation of his license on the ground, first, that the said board had no jurisdiction to try defendant on said charge. The court said:

"We do not think the defendant's motion should be granted upon this ground. In Dent v. West Virginia, 129 U. S. 114, 122, 9 Sup. Ct. Rep. 231, 32 L. Ed. 623, the court says: 'The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end, it has been the practice of different States from time immemorial to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subject, scientific or otherwise, with which such pursuits have to do. * * * Few professions require more careful preparation by one who seeks to enter it than that of medicine. * * * The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications.' If the defendant in the case at bar obtained his certificate to practice medicine by misrepresentation and fraud in palming off upon the State board of health a diploma issued by Laval University to another as one that was issued to himself, he is guilty of conduct likely to deceive and defraud the public by inducing the public to believe that he is lawfully entitled to practice medicine by reason of the possession of qualifications that would honestly entitle him to the certificate. That such conduct would be grossly unprofessional seems to us too plain to require argument. The contention that the gross unprofessional conduct must occur after the granting of the certificate to practice has no application here, for the deception and fraud that was initiated at the granting of the certificate was kept up and continued every time he practiced medicine in this State under the pretended authority of a fraudulently obtained certificate.

"The third ground for the motion to quash is because § 5, ch. 105, Gen. Laws R.I., is unconstitutional, in that it conflicts with § 1, art. 10, of the constitution of the State. That section provides that the judicial power of this State shall be vested in one supreme court and in such inferior courts as the general assembly may, from time to time, ordain and establish; the contention being that the State board of health is not a court, and that the powers granted to it in Gen. Laws R. I. ch. 165, § 5, are judicial powers.

While, perhaps, there may be force in the contention that the State board of health is not strictly a judicial body, yet we do not deem it necessary to decide that question here; for, even if it is not a judicial body, it does not follow, in our opinion, that the act is unconstitutional. Statutes similar to the one under consideration, restricting the practice of medicine to persons who are able to demonstrate their qualifications, have been held constitutional, as a proper exercise of the police power of the State, in very many States of the Union, as well as in the Supreme Court of the United States. See State v. Webster, 150 Ind. 607, 616, 50 N. E. Rep. 750, 41 L. R. A. 212, where the cases have been collected. In this last named case the Supreme Court of Indiana, in referring to the State board of medical registration and examination of that State, said (page 621, 150 Ind., page 755, 50 N. E. Rep. and page 218, 41 L. R. A.): 'While in some respects *quasi* judicial, the action of the board is not judicial, any more than is the action of a county surveyor in fixing a boundary line, or of a county superintendent in giving or refusing a teacher's certificate, or the action of numberless other officers or boards in making investigations or decisions in matters committed to them. Neither is the circumstance that an appeal is al-

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lowed from a decision of the board an indication that its action is judicial. "The right of appeal from the action of boards in their administrative character," it was said by this court in Board v. Heaston, 144 Ind. 583, 41 N. E. Rep. 457, 43 N. E. Rep. 651, 55 Am. St. Rep. 192, "is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court that it may be determined judicially." Even if the State board of health is only an administrative board, and not a court, we see nothing objectionable, on constitutional grounds, to the method provided in said chapter 165, for getting the matter involved before a court that it may be determined judicially. The way provided to determine, in the first instance, whether a trial before the appellate division of the supreme court is desired, is speedy and inexpensive. He whose application for a license has been refused, or whose license is proposed to be revoked, can have a judicial trial without terms or condition, by taking an appeal, which is practically for the asking, and then his case is tried in full before the highest court in the State. If the State board of health decides in his favor he gets all he asks, with little trouble and expense. If the decision is not in his favor he gets for the asking a trial before the highest tribunal in the commonwealth. It is difficult to see how his rights could be better protected."

LIABILITY OF TELEGRAPH COMPANIES FOR ERROR OR DELAY IN TRANSMISSION OR DELIVERY.

It may be laid down as a general rule that the highest degree of care is not required of a telegraph company in the transmission and delivery of telegraphic messages. It is, however, essential that ordinary care be exercised by its agents, operators and employees.[1] The engagement of a telegraph company with its customers is that each message shall be transmitted and delivered with reasonable care and dispatch under the existing circumstances of the particular case;[2] and unless a special contract securing insurance is secured, those using the telegraph must accept losses sustained by reason of error, delay, or even total failure of transmission and delivery arising from such accidents or obstruction to the company's lines, or to a rule requiring messages to be transmitted in the order of their receipt.[3] Where, however, the dispatch upon its face indicates that it is a commercial message, that serious loss may result through failure of prompt transmission, and the company is so informed, it is liable for any damage that may result by reason of negligent delay in sending the message. But the sender must furnish such information to the telegraph company, it is not sufficient that it be furnished by the addressee.[4] Where the face of the message does not indicate that delay may result in loss to the sender, and such information is not furnished to the telegraph company by the sender, only nominal damages may be recovered for failure of prompt transmission.[5] Where no pecuniary loss results from the failure of the telegraph company to fully and properly perform its contract, but the injury sustained is purely mental, quite another question is presented, and the cases evidence two distinct lines of decision. Shearman and Redfield in the work upon Negligence lay down the following rule: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company at fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damages ought not to be enhanced by evidence of circumstances which could not reasonably have been anticipated as probable from the language of the message."

Out of this statement grew the Texas rule as to the liability of telegraph companies in damages for mental pain occasioned by failure or delay in the transmission and deliver-

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rule may be said to be as follows: Mental anguish or pain may constitute an element of actual damage, in an action against a telegraph company for failure to deliver a message, for which compensation may be recovered upon breach of contract, where such anguish is the direct and natural result of such breach, and provided the defendant was put upon inquiry as to the likelihood of such mental anguish resulting from failure or delay in the performance of the contract.[8] But such damages are to be strictly compensatory, and exemplary damages will lie only in cases where the breach of contract complained of is willful, wanton or malicious.[9] So following this rule it has been held that where the dispatch delivered for transmission sets the telegraph company upon inquiry as to the near relationship of the persons to whom it referred, and to whom it was addressed, it is sufficient to apprise the company that mental suffering is likely to result from a failure to transmit the message with diligence, and the telegraph company will be liable in damages for mental pain and anguish resultant upon its failure to promptly perform its contract.[10] While some cases may be found permitting the addressee in such cases to recover damages against the telegraph company for mental suffering in an action in tort independent of the right of the sender to sue in contract,[11] a more conservative reading of this line of decisions would seem to indicate that upon this point some doubt exists. It is questionable whether the tort is not merged into the breach of contract or at least so closely resultant upon it that it forms a part thereof. Certainly there can be no privity of contract between the telegraph company and the addressee, and it would seem that, apart from the duty it owes the general public in its character of *quasi*-public servant, it is under no obligation to the addressee to properly and promptly transmit and deliver the dispatch, hence is no way liable in damages to the sendee for mental pain consequent upon its failure to do so. It is certainly policy to restrict in so far as possible actions, the losses of which are in such a measure shadowy and uncertain. If suits of this nature be recognized who shall define the limits of their existence? Granted that in actions *ex delicto* the wrongdoer is liable for the natural and probable consequences of his wrongful act, but in such cases as these by what standard are the damages to be measured?

As to the right of the sender to recover damages for mental suffering occasioned by reason of the failure of a telegraph company to promptly transmit and deliver his message, where the Texas rule is followed no doubt can exist. In Alabama it has been held that where the face of the dispatch plainly suggests the necessity for prompt delivery, the sender's mental anguish is an element for which he may recover damages in an action against a telegraph company for the delay in the delivery of such telegraphic message.[12] Until recently the Indiana courts permitted such recovery, not because of the mere breach of contract, but because of the failure of the telegraph company to perform a duty which rests upon it as a servant of the people.[13] But in the case of the W. U. Tel. Co. v. Ferguson,[14] this decision has been overruled, the court holding that the principle upon which it was based was totally foreign to the law. In Illinois the courts while evincing a leaning toward the Texas rule have inclined to a more conservative view, and have held that the sender of a telegraphic message may recover nominal damages at least for the mental suffering sustained by reason of the failure of the telegraph company to promptly deliver such message.[15] The primary objection to permitting recovery in damages for injuries of this kind must lie in the fact that the wrong sustained is necessarily of such a nature as to be, to a certain extent at least, shadowy and uncertain. The grief of the one man cannot be measured by that of another. It is indeed questionable whether the damages sustained can properly be assessed, or their monetary value estimated. It is obvious that there can exist no true legal basis for

[8] Loper v. Tel. Co., 70 Tex. 689; Tel. Co. v. Simpson, 73 Tex. 422.

[9] Relle v. Tel. Co., 55 Tex. 308; Tel. Co. v. Cooper, 71 Tex. 507; Tel. Co. v. Broesche, 72 Tex. 422.

[10] Tel. Co. v. Moore, 76 Tex. 66; Tel. Co. v. Adams, 75 Tex. 531; Tel. Co. v. Feegles, 75 Tex. 537; Tel. Co. v. Kirkpatrick, 76 Tex. 217.

[11] Stewart v. W. U. Tel. Co., 66 Tex. 580.

[12] W. U. Tel. Co. v. Henderson, 89 Ala. 510.

[13] Reese v. W. U. Tel. Co., 123 Ind. 294.

[14] 59 N. E. Rep. 416.

[15] Logan v. Tel. Co., 84 Ill. 468.

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an action *ex contractu* by the addressee, in such cases; in an action *ex delicto*, if the damages be by reason of their nature, not assessable public policy, it would seem should prohibit recovery. The sender's remedy is properly in an action for the breach of the contract, where the mental pain might be adduced in evidence to enhance the measure of damages. It is, however, essential in such cases, that the telegraph company be notified, or at least put upon such inquiry as would constitute presumptive knowledge, that damages of this character are likely to result from its failure to properly and promptly transmit and deliver such message. If this be not the case, no true construction of the law of contracts can permit the injured party to introduce in evidence injury to the feelings, for the purpose of enhancing the award of damages, in an action for the breach of a simple contract. The Texas rule, in some insta with certain modifications, has been followed by the tribunals of South Carolina,[16] Tennessee[17] and Kentucky;[18] and expressly dissented from by those of Kansas,[19] Dakota,[20] Mississippi,[21] Missouri,[22] Florida,[23] Wisconsin,[24] Minnesota[25] and by the Federal Courts of Arkansas[26] and Georgia.[27]

The true rule for the recovery of damages by the sender against a telegraph company, for the latter's failure of prompt and accurate transmision and delivery, is that laid down by Baron Alderson in the well-known case of Hadley v. Baxendale:[28] "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the natural course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances from such breach of contract." A ruling that has been so generally followed by our own courts that it constitutes an integral part of our telegraph law.[29] In Indiana, a statutory penalty for failure of prompt transmission and delivery has been enacted, and it has been held that a telegraph company cannot defend such an action on the grounds that the contents of the telegram related to an apparently illegal transaction, provided it was not designed to promote the commission of a crime or a tort.[30]

The liability of a telegraph company for the delivery of an altered telegraphic message presents several questions of interest, the decisions being, in a measure, in conflict. The English rule would seem to be that damages can be obtained by the sender alone and that, since the injury is one growing out of the breach of contract, damages can be awarded only in an action *ex contractu*.[31] Where this view is taken it is obvious that all recovery by the addressee is barred, since there can be no privity of contract between the telegraph company and the sendee.[32] At least one

[16] Young v. Tel. Co., 107 N. Car. 370; Sherill v. Tel. Co. (N. Car.), 14 S. W. Rep. 94.
[17] Wadsworth v. Tel. Co., 86 Tenn. 695.
[18] Chapman v. Tel. Co. (Ky.), 13 S. W. Rep. 880.
[19] West v. Tel. Co., 39 Kan. 93.
[20] Russell v. Tel. Co., 3 Dak. 315.
[21] Tel. Co. v. Rogers, 68 Miss. 748.

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case, however, is to be found wherein it is held that the party interested in the dispatch, whether sender or sendee, is the real contracting party, and such person may recover against a telegraph company when it has delivered an altered message to his detriment.[33] In still another decision, the court held the telegraph company to be agent of both sender and addressee and permitted both to recover in contract for the delivery of an altered message.[34] Another line of decisions permits the addressee to recover damages in an action in tort, against a telegraph company for the wrongful injury to him and the consequent loss sustained by reason of the delivery of an altered telegraphic message, because of the public duty which a telegraph company owes to any one beneficially interested in the message.[35] The entire question is full of extremely interesting possibilities. Many cases may arise where the sender of a telegraphic message suffers absolutely no injury, no material loss, by reason of alterations in a telegraphic dispatch which he has originated, the entire damage being to the addressee; still others may be presented, where the error, or negligence, of the telegraph company's agents or operators entails injury to both sender and sendee, in equal or varying proportions. Where the sender alone is damaged, the question presents little or no difficulty; what may, however, be considered the true rule governing all cases of this nature? A conservative view of the decisions would seem to indicate that a telegraphic company is liable for damages sustained by reason of the delivery of an altered telegraphic message: 1. To the sender, either for breach of contract or in an action in tort, there can be no such merger of the tort unto the contract as to inhibit recovery *ex delicto* and compel recovery *ex contractu*: 2. To the addressee in tort for the injury sustained. The failure of the telegraph company to perform a duty owed to the public forms no true part of the question at issue provided no statutory liability is imposed. In no case is the telegraph company the agent of either sender or addressee, its liability to either, or both, is solely as pincipal.[36] The question is not one concerning the equitable rights of the parties, but rather demands the proper consideration of well known and applicable rules of law.

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[33] De Rutte v. Tel. Co., 30 How. Pr. 403.
[34] Dryburg's Case, 35 Pa. St. 298.
[35] Rose's Case, Allen Tel. Cas. p. 340; Allen's Case, 66 Miss. 549; Thompson Elec., secs. 427-8; Grey Com. Tel., sec. 78.
[36] Shingleur v. W. U. Tel. Co. (Miss.), 18 S. W. Rep. 425; Tel. Co. v. Brown (Ind.), 8 N. E. Rep. 171; Tel. Co. v. Hope, 11 Ill App. 289; Cooley, Torts, pp. 103, 104; Rich v. R. R. Co., 87 N. Y. 382.

CONTRACT—CONSIDERATION—FORBEARANCE.

PRICE v. FIRST NAT. BANK OF ATCHISON.

Supreme Court of Kansas, April 6, 1901.

1. An agreement to forbear and forbearance to issue execution upon a judgment which clearly has no legal existence, and upon which no execution could lawfully issue, is not a sufficient consideration for a new promise on the part of a supposed judgment debtor.

2. In such case, an assignment, as collateral security, of an insurance policy upon the life of a husband, made through a mistake of the law by the wife, the beneficiary therein, cannot be upheld, when the assignment, in legal effect, provides that the proceeds of the policy shall be applied to the payment of the amount justly due upon such judgment. The judgment having been extinguished, nothing is due upon it, and the insurance money cannot be applied by the assignee in substantial compliance with the terms of the contract.

It appears by the record that, in 1890, John M. Price and his wife were indebted to the First National Bank in about the sum of $10,000. On July 10th of that year Price and wife executed to the bank two renewal notes therefor, and conveyed by deed to David Auld, in trust for the bank to secure said renewal notes, several parcels of real estate in the city of Atchison and vicinity. In the fall of 1893 the homestead property of Price and wife, which was not included in said deed, had been sold for delinquent taxes, amounting at that time to about $1,200, on which sale a deed was due in September, 1893. Price went to the bank to borrow money to pay off the debts against said homestead. The bank finally offered to loan him $3,200 in cash, and thereafter to loan him $600 more upon condition that he should include the homestead, which was worth about $10,000, to the security for the new loan, and should also make said homestead liable for the old loan, and in addition thereto should assign to the bank the policy in controversy in this action. That assignment was made and the policy was delivered to the bank by John M. Price on the 19th day of January, 1894, at which time the bank paid to Price the $3,200, less the amount

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required to pay the taxes and mechanic's lien upon the homestead, which were paid off by the bank. On the same day the bank took two renewal notes, of $4,434. 10 each, for the balance due it upon the old debt of $10,000, contracted previous to 1890, and upon which payments had been made, and these two renewal notes, together with the notes for the $3,200, and twelve notes for $50.00 each, for the amount which the bank agreed to loan in the future, were all included in the new mortgage, which covered the homestead alone, while the two notes of $4,434.10 each remained secured by the deed previously given to Auld in trust for the bank as renewals of the original debt. On the 21st day of March, 1896, the bank brought a suit in foreclosure case No. 7,907 against Price and wife to foreclose the mortgage last given, to-wit, upon the homestead, and in said action took a personal judgment upon all of said notes against Price and wife for $16,348.44, and an order for the sale of the homestead and application of the proceeds. After bringing said action, the bank brought another action, No. 7,908, based upon the two renewal notes of $4,434.10 each, to recover a personal judgment against Price and wife thereon, and to foreclose the deed given to Auld as a mortgage to secure the same; and after the rendition of said judgment of $16,348.44, in said action No. 7,908, the bank recovered judgment in the other action brought subsequently upon said two notes, and the interest thereon, which last judgment amounted to $11,674.86, against Price and his wife, and in said action a foreclosure of said deed was decreed, and the property therein described was ordered sold, and the proceeds applied to said last-named judgment. Soon after the rendition of the last judgment a stipulation was entered into between the bank and Price and wife, in which it was agreed as follows: "(1) That execution shall be stayed on such judgment of foreclosure in said cause No. 7.907 for ten months from the rendition thereof; (2) that in case the said John M. Price and Eliza J. Price shall fail to keep the taxes promptly paid on the real estate hereinbefore described in said first entitled cause No. 7,907, and to keep said premises well and adequately insured for the benefit of the said plaintiff bank, then, and in such event or failure, said bank may pay all such taxes and insurance, and keep the said property free and clear of all taxes and liens, and adequately insured, up to the time of the sale of such property on execution under such judgment." It was therein further agreed that said bank was to retain in its possession said policies of insurance upon the life of said John M. Price as collateral security, and, if the said policies should mature and payment of death losses thereon be made before the sale of said homestead under execution, the proceeds of the policies should be applied on said judgment in said case No. 7,907; and in case of sale thereof before the said policies should mature, and if the proceeds of the sale should be insufficient to satisfy such judgment in case No. 7,907, then said policies of insurance were still to be retained by the bank, "to secure whatever deficiency there may then remain unpaid on such judgment 7,907, until such deficiency is fully paid, or until the said life policies mature."

ELLIS, J. (after stating the facts): The insurance policy in the New York Life Insurance Company had been paid up since 1874. It was the property of Eliza J. Price, the beneficiary named therein. The unconditional assignment to the bank of January 19, 1894, was void because such bank could not have an insurable interest in the life of John M. Price. Insurance Co. v. Sturges, 18 Kan. 93. Parol evidence was admissible for the purpose of showing that, although such assignment was absolute on its face, the real intent of the parties was that the insurance policy should be turned over to the bank, under such assignment for the purpose of collateral security merely. To show such an intention, it was necessary to prove an agreement to that effect between the bank and the owner of the policy, Eliza J. Price; for there was no evidence in the case that John M. Price had authority to act as her agent in that behalf, and his agency could not be presumed from the mere fact that he was her husband. The only evidence in the record showing any agreement other than an unconditional assignment on the part of Mrs. Price is the stipulation bearing date May 21, 1897, and entered into some time after that date. That stipulation, if based upon a sufficient consideration, might be held to be a ratification of a former agreement which seems to have been entered into with John M. Price, to the effect that the bank should hold the policy as collateral security, subject, however, to the reservation that it should only be held as collateral security for the payment of whatever should be justly and legally due on the judgment rendered in action No. 7,907; for such were the express terms of the stipulation. The court holds in this case that at the time of the execution of such stipulation that judgment was extinguished; that the debt thereby evidenced had been merged in judgment 7,908, rendered later by the district court of Atchison county, in an action between the same parties. For the reasons for such decision and the authorities upon which the same is based, reference is hereby made to the opinion of Mr. Justice Greene in the case of Price v. Bank (No. 11,887, rendered at the present term of this court) 64 Pac. Rep. 637.

Now, the only consideration for such stipulation is the agreement on the part of the bank to forbear to issue execution upon said judgment 7,907 for the period of 10 months from the date of its rendition. Because the judgment was extinguished, because it no longer existed, the plaintiff had no right to cause an execution to issue upon it within 10 months or at any other time. An agreement to forbear to do an act which a party has no legal right to do cannot

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constitute a sufficient consideration for a promise and undertaking on the part of another. "In order to constitute forbearance a valuable consideration, there must be a subsisting legal right in the claimant which he agrees to forbear; for, if the claim be invalid or illegal, the forbearance is ineffectual." 6 Am. & Eng. Enc. Law (2d Ed.), 742, and cases cited. See, also, Gould v. Armstrong, 2 Hall, 266; Chit. Cont. 35, 36; Bates v. Sandy, 27 Ill. App. 552, and cases cited; Haynes v. Thom, 8 Fost. 386; May v. Coffin, 4 Mass. 341, 347; Warder v. Tucker, 7 Mass. 449; Robinson v. Jewett, 116 N. Y. 40, 22 N. E. Rep. 224; Widiman v. Brown, 83 Mich. 241, 47 N. W. Rep. 231; Cowper v. Green, 7 Mees. & W. 633; McDonald v. Neilson, 2 Cow. 140; Crosby v. Wood, 6 N. Y. 369; Cline v. Templeton, 78 Ky. 550; Schroeder v. Fink, 60 Md. 436; Gunning v. Royal, 59 Miss. 45; Davisson v. Ford, 23 W. Va. 617; Appeal of Lukens (Pa.), 22 Atl. Rep. 892, 13 L. R. A. 581.

In the case of Wade v. Simeon, 2 C. B. 548, the declaration averred that the plaintiff had brought an action, and in consideration of the new promise had forborne to prosecute the case thus commenced. The court held that the previous action could not have been maintained, and in the opinion Chief Justice Tindal said: "In order to constitute a binding promise, the plaintiff must show a good consideration,—something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be, for, in contemplation of law, the defense, upon such an admitted state of facts, must be successful."

In the case of Graham v. Johnson, L. R. 8 Eq. 36, the defendant held a bond executed by the plaintiff, which the latter was entitled to have canceled as being voluntary. At the plaintiff's request the defendant forbore suit on the bond, the plaintiff agreeing to pay from an expected inheritance. It was held, nevertheless, that the plaintiff was entitled to a decree of cancellation, and that the promise to pay the defendant was not binding. Lord Romilly, M. R., in rendering the opinion, said: "The question I have to consider is whether, assuming, as I must assume, that the plaintiff when he made the promise was ignorant that the court of chancery would restrain an action on the bond without requiring him to pay off what had been paid by Barlow to the obligee, his promise, made in consideration of Barlow's forbearance to sue, is binding on him. I think it is not." And, following, the court expressly held that, because the action could not have been maintained, the agreement to forbear would not be a consideration for a promise of the defendant to pay.

We have examined the case of Callisher v. Bischoffsheim, L. R. 5 Q. B. 449, and Ockford v. Barellis, 25 Law T. (N. S.) 504, which are sometimes quoted as antagonizing, though they do not overrule, Wade v. Simeon, *supra*, and Graham v. Johnson, *supra*. They were considered and decided as cases of compromise, and are clearly distinguishable from the case at bar.

In Bank v. Colcord, 15 N. H. 119, the court held that forbearance to sue is not a good consideration for a promise where there is no debt in existence.

In Gould v. Armstrong, *supra*, the court held: "A promise to forbear from prosecuting a suit which could not be maintained would, of course, be without consideration, and so not binding."

In Chit. Cont., *supra*, the rule is laid down that, in order to render the agreement to forbear and the forbearance of a claim a sufficient consideration for a new promise, it is essential that the demand forborne should be sustainable at law or in equity, and the consideration will fail if the demand is without foundation.

In Haynes v. Thom, *supra*, the court held: "A promissory note, given to discharge a merely supposed liability, or to avoid an ideal danger, which has no foundation in fact or in law, is without consideration." And in the same case the court said: "If the note was given under a misapprehension of the defendant's liability, and with no valid consideration passing between the parties, he is not bound to pay it. An ideal danger, which has no foundation in fact or in law, can form no consideration for a note."

In Appeal of Lukens, *supra*, the Supreme Court of Pennsylvania held: "Abandonment of legal proceedings, which are without merit, is no consideration for the revocation of a valid and binding contract."

The case of Prout v. Fire Dist., 154 Mass. 450, 28 N. E. Rep. 679, was purely one of compromise. The court said: "The plaintiff's claim, whether on a final determination it might or might not be found to be valid, was sufficiently substantial to furnish a good consideration for the promise." In the same opinion occurs the following: "The case of Palfrey v. Railroad Co., 4 Allen, 55 is to be distinguished on the ground that there it was plain that the plaintiff had no real claim to be compromised, and Wade v. Simeon, 2 C. B. 548, rests on the same ground."

In Robinson v. Jewett, *supra*, it was decided that the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new promise.

In Moon v. Martin, 122 Ind. 211, 23 N. E. Rep. 668, the court sustained a compromise of a suit actually commenced, and held that the discontinuance of the suit was a sufficient consideration for a promise to pay money. But in the same case the court held: "A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and for which there is no legal foundation whatever, is not sufficient to sustain a suit at law. Jarvis v. Sutton, 3 Ind. 289; Mortgage Co. v. Henderson, 111 Ind. 24, 12 N. E. Rep. 88, and cases cited. Emery v. Royal, 117 Ind. 290, 20 N. E. Rep. 150, and cases cited."

In Cline v. Templeton, *supra*, the court said:

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"It is laid down, both in Parsons on Contracts and in Chitty on Contracts, that an agreement to forbear to prosecute a claim which is wholly and certainly unsustainable at law or in equity is no consideration for a promise. * * * This proposition appears to be so well established that further citation of authorities seems to us unnecessary."

In Schroeder v. Fink, *supra*, defendant's father died owing plaintiff, and the latter threatened suit. In consideration of his forbearance, defendants gave their note in compromise of the claim. The estate of deceased was insolvent, and plaintiff could have no action against defendants. In the action upon the new note the court said: "There was no consideration for the new promise. * * * Defendants could not be held liable to pay."

In Gunning v. Royal, *supra*, it was held that "the existence of a dispute or controversy between parties is not a sufficient consideration to support a promise to pay money in settlement of it, where no valid demand for anything whatever exists in favor of the promisee."

In Davisson v. Ford, *supra* the syllabus reads: "* * * If there is no foundation for such claim of liability, then the promise made to settle this assumed liability has no sufficient consideration to sustain it, and no suit can be based on such promise." And at page 627 the court said: "But, to make such consideration good, it is not only necessary that the dispute should be one in which one party sets up that there was a liability on the other, but if it be assumed that such liability exists, when in fact or law there is no foundation for such liability, a promise made by the party who is thus claimed to be liable, but who clearly is not liable, either in law or equity, would be a promise made on no valuable or sufficient consideration, and it could not be enforced by suit." "As the consideration must have some value and reality, the assumption of a supposed danger or liability, which has no foundation in law or in fact, is not a valuable or sufficient consideration, nor is the performence of that which the party was under a previous valid legal obligation to do; and where one, through mistake of the law acknowledges himself under an obligation which the law does not impose, he is not bound by such promise." 1 Pars. Cont. 437, 439, and cases cited. See, also, Warder v. Tucker, *supra*.

Now, in the case at bar, the bank did not stipulate to refrain from doing any act which it had a legal right to do. Mrs. Price, supposing herself liable to pay the judgment rendered in 7,907, agreed to turn over to the bank the insurance policy in controversy in this case, with the understanding that the proceeds of such policy should be applied by the bank in satisfaction of such extinguished judgment. As the judgment itself had bound by such promise." For these reasons the judgment of the district court will be reversed, and the case remanded, with directions to enter judgment in the court below in favor of Eliza J. Price and against the defendant, the First National Bank of Atchison, Kansas, in accordance with this opinion. All the justices concurring.

NOTE.—*Recent Cases on the Validity as a Valuable Consideration to Support a Contract of an Agreement to Forbear.*—Forbearance is a valuable consideration to support a contract whenever there is a legal or doubtful right in the claimant which is enforceable at the time of the agreement, but which he agrees to forbear. For instance a promise in writing to pay the debt of another, in consideration of forbearance to sue is founded on sufficient consideration and is valid in law. But if the creditor has not the legal right to sue at any time during which he promises to forbear suit, the promise to pay in consideration of such forbearance is without consideration, and consequently void. Martin v. Black, 20 Ala. 309. It is no objection to the validity of the defendant's agreement that there was no particular time specified as the period of forbearance. The law presumes that it shall be for a reasonable time. Hakes v. Hotchkiss, 23 Vt. 231; Moore v. Kenney, 83 Me. 80; Strong v. Sheffield, 144 N. Y. 392; Howe v. Taggart, 133 Mass. 284. It must be borne in mind, however, that a promise of forbearance, in order to constitute a sufficient consideration for a promise must be for a reasonable time. A "short time," for instance, would not be a good consideration as the promisor might bring suit in an hour after the promise was made. Gates v. Hackethal, 57 Ill. 534.

The exact limits of this subject will be suggested by the following carefully selected cases. We shall confine the citation of authorities, however, to cases involving the forbearance of legal remedies. For instance, forbearance to eject a tenant at will for nonpayment of rent is a good consideration to a guarantor of past and future rent. Vinal v. Richardson, 95 Mass. 521. A agreed to pay what he owed to B, and also the debt of another, the money to be sent by express within a week. B agreed to wait for a week. Held, that B's promise was upon a good consideration, and that a suit brought by him was prematurely brought. Leslie v. Conway, 59 Cal. 442; Morgan v. Bank, 44 Ill. App. 582. There must of course be an agreement to forbear, not a mere forbearance. Thus a mere forbearance by a creditor of a deceased person to pursue his claim against the estate, there being no agreement on his part to that effect, is not a sufficient consideration to support a promise by the widow of deceased to pay the claim. Shadburne v. Daly, 76 Cal. 355. When a creditor, as surety of an insolvent debtor, having in his hands property of the debtor, which he desires to retain or have applied on his claim, promises another creditor that, if he will not institute legal proceedings against the common debtor, he will pay the debt, the promise is founded on a sufficient consideration and, if accepted, will constitute a valid contract. Mathews v. Seaver, 34 Neb. 592. Forbearance of execution on a judgment is a sufficient consideration for the surrender of a

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92 Iowa, 557. Where in consideration of the holder of a junior trust deed agreeing to pay the interest on a prior trust deed, the holder of the latter agrees not to foreclose until the junior incumbrancer has had time to sell of certain nursery stock on the premises in the ordinary course of business, the forbearance will be construed to be for a reasonable time, and will support the contract. Chiles v. Wallace, 83 Mo. 84. One who has made a contract in consideration that another will forbear to enforce a legal right which he is pursuing cannot have relief from his contract on the ground that the motives of the second person in pursuing his right were blameworthy. Benler v. Van Norden, 27 La. Ann. 473.

We now note the exception announced in the principal case that an agreement to forbear from doing what one has no legal right to do or a promise to do what one is already under legal obligation to do, is not a valuable consideration to support a contract to do something in return. For instance, an agreement not to sue on a note, which is due, in consideration of the payment at the end of each year of interest not exceeding the rate provided for by the note, is without consideration. Holmes v. Boyd, 90 Ind. 332. A contract between a city contractor, for the construction of a sewer in a street, and a railway company having a right of way over the street, that the contractor will pay the company for supporting its tracks while he builds the sewer is without consideration and void, since the railroad right of way is subject to the paramount right of the city to build the sewer, and it is incumbent on the company to protect its own tracks. Kansas City, etc. Ry. Co. v. Morley, 45 Mo. App. 304. A promise made by the owner of property in order to obtain possession thereof from one wrongfully withholding it is without consideration, though the party withholding it did not know of the ownership. Fink v. Smith, 170 Pa. St. 124. The court in this case said: "A promise made by the owner to obtain possession of his goods which at the time are wrongfully withheld from him, is without consideration. The learned judge below, however, assumes that there is no evidence that Fink knew the property to belong to Smith, and therefore the contract should be treated as a compromise of doubtful litigation, which is a good consideration to support a contract. But the error in this view is, that Fink's wrongful possession did not depend on what he knew, but on the fact, was it Smith's property? Had he demanded it from him who wrongfully detained it? If these were the facts, and they are not denied, then, there was no consideration for Smith's promise, for no benefit passed to Smith, and Fink sustained no loss by the contract; to hold that the abandonment of a wholly wrongful detention of another's property can form the basis of a compromise contract with the owner is direct encouragement to the commission of wrong for profit, and for this very reason the law holds the contract to be without consideration." An agreement by *cestui que trust* to pay the trustee commissions on the income received and paid out by him, by which no duties are imposed on the trustee other than such as he is bound to perform by virtue of his office, is without consideration. Wildey v. Robinson, 85 Hun, 362. A contract between the guardian of an insane husband and the wife that the latter shall care for the husband and receive a certain sum for her services, is without consideration and void. She owes the services independently of contract. Grant v. Green, 41 Iowa, 88. A parol contract by which a father agreed to convey to his infant son certain land if the son would remain with the father and assist him until the son's marriage, was not without consideration or obligation on the father because of the minority of the son. Lafollett v. Kyle, 51 Ind. 446. Where defendants had contracted to store and care for the property in controversy for one year and had agreed to deliver the same on demand to plaintiff, without claiming a lien thereon, a further agreement to so store and care for such property for a lien for such services is without consideration. Esterly Machine Co. v. Pringle, 41 Neb. 265. Where a party gave to a constable his written obligation to pay a sum of money, the mere consideration of which was the forbearance on the part of the officer from levying a writ of attachment on the property of a third person, and the evidence showed that there was no intention on the part of the officer to make the levy, the property being exempt from execution, it was held that the contract was void. Hennesey v. Hill, 52 Ill. 281. An agreement by a debtor not to go into bankruptcy and thereby be discharged from a certain debt, or at least imperil its collection, furnishes a sufficient consideration to support a contract by the creditor to take less for the debt than the full amount thereof. Dawson v. Beall, 68 Ga. 328.

Cases on this subject might be cited *ad infinitum*, but while they all evidence a wide diversity of facts, yet they all come within the principles announced in the cases already cited. If one has a right which he can legally enforce, his forbearance to enforce it is a valuable consideration to support a contract. There must of course be the agreement to forbear and the right of the promisor must be clear and free from doubt; but in every such case, whatever may be the statement of facts, the agreement to forbear will support a contract.

JETSAM AND FLOTSAM.

SEMI-ANNUAL BANKRUPTCY REPORT.

There is, perhaps, no better barometer of business conditions prevailing throughout the United States than disclosed in the reports of the practical operation of the bankruptcy law, made by the referees and clerks of the federal courts. The summary of the semi annual reports of this business for the period ending March 31, 1901, recently submitted to the attorney general by E. C. Brandenburg, the well-known author and expert, in charge of bankruptcy matters in the department of justice, discloses some interesting facts. It appears that during this period 9,516 voluntary petitions were filed, as against 8,000 for the preceding six months, 12,120 for the six months ending March 31, 1900, 10,124 for the six months ending September 30, 1899, and 9,052 for the six months ending March 31, 1899, thus showing no appreciable variation from the average number of petitions filed since the law went into operation, though it is over 2,600 less than for the corresponding period of last year. The report shows furthermore that a large percentage of those taking advantage of the voluntary feature of the law are old insolvents, who are seeking this means of resuscitating themselves in the business world, though it is practically impossible to definitely state the exact number. Mr. Brandenburg, by reason of his intimate relations with the subject has kept in close touch with the business interests, and states that it may be safely said that with one or two exceptions, for which congress will doubtless make provision at an early date, the law is meeting with almost universal approba-

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tion. As time passes its superiority over many of the State insolvency and assignment laws in reducing the expense of administration to a minimum, with the resultant of maximum dividends, together with the disappearance of preferences, either through legal proceedings or fraud, is redounding to the advantage of the business world. Nearly every feature of any consequence in the law has now been interpreted by the federal courts throughout the country, while the United States Supreme Court has passed upon several fundamental questions, thus placing congress in a position to act advisedly upon the question of amendments when suggested to that body at its coming session. The experience gained by the commercial interests under the present law has afforded a keener insight into its practical advantages than was expected or could have been anticipated, and while the existence of the present law is no guaranty against fraud, or that the dishonest debtor will not endeavor to use its machinery to his advantage, and to the detriment of the creditor whenever possible, yet the opportunities under the various State assignment and insolvency laws were so much greater and the frauds frequently so much more flagrant, that the federal law has come to be looked upon as one of the most beneficent and advantageous to the business world that has been placed upon our statute books for many years.

Mr. Brandenburg adds, that as a rule the number of petitions in bankruptcy vary with the States having the greatest population and amount of business. Thus the States owing the greatest number of voluntary petitions filed during the last six months are: Illinois 1,312, New York 1,263, Massachusetts 1,000, Iowa 460, Ohio 439, and Alabama 422; while the lowest number are shown in the State of Nevada where none were filed. Arizona and Hawaii 2 each, Delaware 5, New Mexico 8 and Idaho 10. Of the involuntary petitions the greatest number were filed in the following States: New York 230, Pennsylvania 132, Illinois 70, Massachusetts 52, Kentucky 50, and Georgia and Texas 48 each; while in the States of Kansas and Nevada no petitions were filed, and in Hawaii and New Mexico 1 each, and Delaware, Indian Territory, North Dakota and Oregon 2 each.

BOOK REVIEWS.

AMERICAN DIGEST.

Vol. 1900 B of the American Digest covering the period from April 1st to September 30, 1900, has just come to our attention. The change from one volume to two volumes a year of this publication was made in 1899 because of the extremely unwieldy size into which they were growing. The semi-annual volume, however, is fast approaching the same size of the annual volumes of a few years ago. This certainly speaks "volumes" for the marvelous increase of litigation in the United States, and furnishes a final argument against the oft repeated assertion that litigation is decreasing and the legal business generally in a decadent state. Nowhere in the world is the profession of the law more profitable than in the United States, and no better evidence of that prosperity can be found than in the fact that such a by the West Publishing Company in the preparation of this digest. The Century edition of the American Digest with its annual continuations are undoubtedly the most valuable tools of the American lawyer. Published by the West Publishing Company, St. Paul, Minn.

BOOKS RECEIVED.

The Tax Law of the State of New York, being L, 1896, ch. 908, entitled "An Act in Relation to Taxation, Constituting ch. 24, of the General Laws," with Amendments of 1897, 1898, 1899, 1900 and 1901. Annotated with all the decisions since the passage of such Act to and including Vol. 166 N. Y. 494, 59 App. Div. 288, and 34 Misc. 432. With forms for lawyers, assessors, collectors and other officers. By H. Noyes Greene, of the Troy Bar, with a chapter on the powers and duties of assessors, by J. Newton Fiero, Counsel for the State Board of Tax Commissioners; author of "Special Actions and Special Proceedings." Second Edition. Albany, N. Y. Matthew Bender, 1901. Sheep, pp. 349. Price, $3.00. Review will follow.

The American State Reports, containing the cases of general value and authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several States. Selected, reported, and annotated, by A. C. Freeman, and the associate editors of the "American Decisions." Vol. 78. San Francisco. Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1901.

The Civil Service Law of the State of New York. A treatise upon the law as to appointments to office, removals from office, and tenure in office, as embodied in the New York Civil Service Law and the "Veteran" Laws, with citations to all adjudicated cases in New York, and Copious References to Analogous Statutes and to Decisions by the Federal Courts, and Courts of other States, and containing the New York State Civil Service Rules and Classification. By William Miller Collier, President of the New York State Civil Service Commission; author of "Collier on Bankruptcy;" editor of "The American Bankruptcy Reports," etc. Albany, N. Y. Matthew Bender 1901. Buckram, pp. 440, price $4.50. Review will follow.

WEEKLY DIGEST.

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land for him, agreeing to pay them $200 for their services, but stipulating that they were to receive nothing unless they regained the land for him, and placed in their hands a refunding bond by which C was obligated to him for the loss of the land, the attorneys having procured C to purchase the land and convey it to M in discharge of his obligation, the contingency has happened upon which the attorneys were to be entitled to the stipulated fee.—MCINTOSH V. BACH, Ky., 62 S. W. Rep. 515.

3. BAIL—Amount of Bond.—A bail bond in the sum of $600 is not excessive in a prosecution for assault with intent to commit rape.—EX PARTE SCOTT, Tex., 62 S. W. Rep. 566.

4. BANKS AND BANKING — Insolvent National Bank—Stockholder's Liability.—Where, on an issue as to whether defendant was liable as a stockholder of an insolvent national bank, it appears from an agreed statement as to what the bank books and reports show that, at the time the four shares in question purported to have been transferred to him by the president, the latter's stock was all pledged, it must be held that defendant acquired no stock, and never in reality became a legal shareholder, and hence is not subject to a shareholder's liabilities.—BURT V. RICHMOND, U. S. D. C., D. (Vt.), 107 Fed. Rep. 387.

5. BENEFIT INSURANCE—Right of Action.—Where a beneficiary in a fraternal insurance organization is denied the remedy by appeal provided for by the association, he may maintain a suit at law.—ROSE V. SUPREME COURT, ORDER OF PATRICIANS, Mich., 85 N. W. Rep. 1078.

6. BILLS AND NOTES — Joint and Several Liability.—Where a note, worded in the singular, was signed by H, and by the firm of G & H, and by G, a suit on it against G only was not objectionable because H was not joined as a party, since the obligation was joint and several.—DOW LAW BANK V. GODFREY, Mich., 85 N. W. Rep. 1075.

7. BONDS—Power of Township to Issue.—Under Laws Kan. 1886, p. 128, relating to the organization of new counties, which provided that no bonds of any kind should be issued by any county organized thereunder, or by any subdivision thereof, within one year after such organization, and which was amended by Laws 1887, p. 196, so as to read that "no bonds shall be voted for and issued by any county or township within one year after the organization of such new county under the provisions of this act," a township had no power to vote upon the issuance of bonds within a year after the organization of the county, and railroad aid bonds issued pursuant to a vote at an election held within a year after the organization of the county are void, although not issued until after the expiration of such year, and, where the date of the election appears upon their face, all purchasers are chargeable with notice of their invalidity.—SAGE V. FARGO TP., U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 388.

8. BUILDING AND LOAN ASSOCIATIONS—Mortgages—Parol Testimony.—Where a landowner bought stock in a building and loan association, and pledged the same for a loan secured by a mortgage on real estate, which contained no provision for the release of the mortgagor on the sale of part of the property and assumption of the mortgage by the purchaser, evidence of prior negotiations between the mortgagor and an agent of the association that on such sale and assumption the mortgagor should be released from liability to the association, was inadmissible in an action to foreclose the mortgage on property so sold, in the absence of fraud or mistake, as tending to vary the terms of a written contract by parol.—PEOPLE'S BLDG., LOAN & SAV. ASSN. V. GHIO, Tex., 62 S. W. Rep. 560.

9. COMBINATIONS—Conspiracy.—An agreement between several independent concerns, each publishing a newspaper and furnishing thereby means for advertising, to compel a fourth person engaged in like business to reduce his rates for advertising or lose customers, indicates a malicious purpose to injure the business of the latter within the meaning of section 4466a, Rev. St. 1898.—STATE V. HURGIN, Wis., 85 N. W. Rep. 1046.

10. CONTRACTS — Breach — Measure of Damages.—Where a manufacturer of ice contracted to supply a local dealer at a certain price for the season, but failed to do so, and the dealer, after being supplied for some time by other parties, was finally compelled to abandon his business before the season closed, and the evidence showed the daily profit made while supplied by other parties, his profits were not so uncertain and remote as not to be recoverable in an action for breach of contract.—BORDER CITY ICE & COAL CO. V. ADAMS, Ark., 62 S. W. Rep. 591.

11. CONTRACTS—Convict Labor.—Where, under a contract between defendants and the warden of the State prison by which the warden was to furnish them with the labor of 300 convicts at a stated price per day, the plaintiff, while a convict, was required by the warden to work for defendants, and they paid the State the contract price for his labor, after plaintiff's discharge from prison he cannot recover the value of his work from defendants, even if his commitment to prison was void, since he had no contract relations, express or implied, with them.—THOMPSON V. BRONK, Mich., 85 N. W. Rep. 1084.

12. CONTRACT—Recovery for Partial Performance.—Where a contractor agreed to decorate the walls, ceiling, and woodwork of a room, and equip it with furniture, at the agreed price of $5,200, defects in the woodwork which afterwards develop, and which are shown to be completely remediable at a cost not to exceed $500, should not preclude a recovery of the contract price, less a deduction of that amount, as the defects do not reach the entire consideration; substantial performance of the contract in all other particulars being shown.—PHILIP HISS CO. V. PITCAIRN, U. S. C. C., W. D. (Pa.), 107 Fed. Rep. 425.

13. CONTRACTS — Rental of Personal Property.—Where defendant contracted to pay plaintiff three-quarters of a cent per pound per month for the use of chain belonging to a wrecking apparatus from the time the chain was taken until it was returned, and the contract further provided that all the apparatus should be returned by a certain date, defendant was liable for the stipulated rental until the property was returned, and not merely for rent to the time fixed for return, and damages for the failure to return at that time.—MCMORRAN V. HALL, Mich., 85 N. W. Rep. 1106.

14. CONTRACT—Tender of Performance.—An instruction that, inasmuch as a builder was prevented from going on with his contract, he was entitled to recover for what he had done, if his tender of performance by the correction of defects was made in good faith, was not incorrect because the tender may have been made on condition that sums claimed to be due should first be paid, and no reference was made thereto, as the condition was a circumstance to be considered by the jury with others in determining whether the tender was made in good faith.—CASS COUNTY V. GIBSON, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 363.

15. CONTRIBUTORY NEGLIGENCE—Evidence.—Plaintiff, driving on a load of hay, turned onto a street used by an electric railway company, and passed upon the track without looking, and was struck by a car coming up from behind, and was injured. Held, that he was guilty of contributory negligence if the car was in sight and could have been seen when he turned upon the track.—MCCLELLAN V. CHIPPEWA VAL. ELEC. RY. CO., Wis., 85 N. W. Rep. 1018.

16. CORPORATIONS — Assignment of Note to President.—The assignment by a corporation of a note to its president is valid, if made to reimburse the assignee for money advanced for the corporation, and if the corporation was solvent; and, there being testimony tending to establish each of these facts, the

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question was for the jury.—BLAKE v. RAY, Ky., 62 S. W. Rep. 521.

17. CORPORATIONS — Promoters — Secret Profits.—Promoters of a corporation, who become stockholders therein, assume a trust relation to the company and the other stockholders, which binds them to act openly and in good faith in all matters connected with its organization, and the acquiring of the property necessary for the transaction of the business for which it is organized, and they will not be permitted to make a secret profit on the sale of such property to the corporation, at least when by making themselves officers and directors in the initial organization they control the corporation, and assume to act in its behalf in making the purchase.—YEISER v. UNITED STATES BOARD & PAPER CO., U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 340.

18. CRIMINAL EVIDENCE — Acts of Co-Conspirators.—Under an indictment for grand larceny against several persons jointly, alleging that the offense was committed by stealing tobacco pursuant to a conspiracy, upon the trial of one of the defendants evidence as to sales of tobacco made by a co-defendant was not admissible in the absence of evidence tending to establish the alleged conspiracy.—STOVALL v. COMMONWEALTH, Ky., 62 S. W. Rep. 586.

19. CRIMINAL LAW—Burglary—Attempt.—Defendant knocked at the door of the house of prosecutrix, and asked to be let in, and told her that it would be better for her if she did so, but she refused, and opened a back door, and ran to a neighbor's, and on returning with the neighbor they found the defendant, who, having entered through such open door, was coming out of the house. Held not sufficient to warrant a conviction for attempted burglary under Pen. Code, art. 850, defining an attempt to commit burglary as an endeavor to accomplish the crime carried beyond mere preparation, but falling short of the ultimate design in any particular.—FONVILLE v. STATE, Tex., 62 S. W. Rep. 572.

20. CRIMINAL LAW—Homicide—Provoking Difficulty.—Where the only evidence as to the beginning of the difficulty in which defendant killed deceased was that, while deceased was standing at the bar in defendant's saloon, defendant entered with a gun in his hand, and passed by deceased to a door opposite, and remarked, "Boys, here is a gun S left with me for J. It is Sunday, and the doors ought to be closed," and deceased turned, saying, "There is the son of a ——," whereupon the shooting began, it was error to give instructions on "provoking the difficulty," since the attack, whether by deceased or by defendant, was without provocation.—WHITE v. STATE, Tex., 62 S. W. Rep. 575.

21. CRIMINAL LAW—Intoxicating Liquors—Local Option.—Where whisky consigned to defendant C. O. D. was in the express office, and he received money from certain witnesses with which he paid for the whisky, which he gave to such witnesses, it was not error for the court to instruct that, if defendant received the money with the understanding that the witnesses were to have the whisky, the transaction constituted a sale.—THREADAWAY v. STATE, Tex., 62 S. W. Rep. 574.

22. CRIMINAL LAW—Malicious Mischief—Indictment.—An indictment charging that defendant did, in a certain county and State, unlawfully and willfully injure that after she promised to marry him he began to ply his arts to seduce the prosecutrix; and that she gave birth to twins born out of wedlock,—was sufficient to sustain a conviction for seduction.—STATE v. FISHER, Mo., 62 S. W. Rep. 690.

24. DEED—Description of Property.—A deed describing the land conveyed as adjoining "the toll-gate property" cannot be construed as including the toll-gate property.—PATTERSON v. LEXINGTON, N. & D. TURNPIKE ROAD CO., Ky., 62 S. W. Rep. 529.

25. DEED—Patent—Mandamus.—A writ of *mandamus* will not be awarded to compel the commissioner of the general land office to issue a patent, where there is an adverse claimant to the land, who is not a party to the proceeding.—CHAPPELL v. ROGAN, Tex., 62 S. W. Rep. 589.

26. DEEDS—Undue Influence—Evidence.—A mother deeded certain land to a son by a second marriage, and 18 years thereafter a daughter by the first marriage sued to set aside the deed as procured by undue influence. It appeared that several years prior to the giving of the deed an estrangement had arisen between the mother and daughter, and there was evidence that the parties had never become reconciled, and that the mother had stated that notwithstanding the deed she had done more for the daughter than she could for the son, and there was no evidence to disprove such statement, nor was there any evidence showing undue influence on the part of the son. Held, that complainant's suit had no merit.—RIDLEY v. CHRISMAN, Tenn., 62 S. W. Rep. 661.

27. EVIDENCE—Burning of Property by Insured.—In an action on a policy, where defendant claimed that plaintiff had hired a person to burn the insured house, evidence that no one had been indicted for burning the house was not admissible.—LIVERPOOL & L. & G. INS. CO. v. JOY, Tex., 62 S. W. Rep. 546.

28. EVIDENCE—Certificate of Notary.—Section 2635, Comp. Laws, providing that the certificate of a notary public of official acts done by him shall not be evidence of non-payment or non-acceptance in any case in which a defendant shall annex to his plea an affidavit denying the facts of having received such notice, excludes the admission of such certificate as secondary evidence when the notary is dead.—SEXTON v. PERRIGO, Mich., 85 N. W. Rep. 1096.

29. EXECUTION—Rights of Mortgagee.—Comp. Laws, § 4889, provides that, when mortgaged personalty is levied on before the property is taken, the officer must pay or tender the amount of the mortgage debt, or deposit the amount with the county treasurer to the order of the mortgagee. An execution was levied on certain mortgaged property in possession of the mortgagee. The judgment creditor and the sheriff had full knowledge of the existence of the mortgage. No tender was made of the amount due, and no deposit was made with the county treasurer. Held, that the mortgagee was not estopped to claim such property, to the extent of his mortgage lien, by delivering to the sheriff a receipt for the property, conditioned that on default in redelivery he would pay the amount of the execution.—PLUNKETT v. HANSCHKA, S. Dak., 85 N. W. Rep. 1004.

30. EXECUTORS AND ADMINISTRATORS — Survival of Cause of Action.—Though a cause of action for the death of an intestate, which survives to his administrator

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wife, in payment of money which he had borrowed from her and promised to repay, and to secure a homestead for her, such conveyance was not fraudulent as to the holder of such note, and should not be set aside at the suit of such creditor.—COLE v. COLE, Mich., 85 N. W. Rep. 1098.

32. FRAUDULENT CONVEYANCES—Deed to Wife. — Defendant owned 160 acres of land, 40 of which was his homestead, another 40 was mortgaged for more than it was worth, and the remaining 80 he transferred to his wife without consideration. In a suit by defendant's mortgagee to set aside this transfer in order to collect a deficiency judgment, it appeared that an execution, issued against defendant shortly after the transfer, had been returned *nulla bona*, and, though defendant testified that at the time of the transfer he owned considerable personal property, he was unable to remember whether or not it was mortgaged. Held not to show the defendant was amply able to pay his debts, and had no creditors other than the plaintiff, so as to make the transfer to his wife valid.— GRUNER v. BROOKS, Mich., 85 N. W. Rep. 1085.

33. FRAUDULENT CONVEYANCES—Mortgages.—Where a mortgage includes both real estate and personalty, and the mortgagee permits the mortgagor to retain a portion of the personalty consumable in the use, to sell and exchange the same at will, and to retain some of it long after default, and the mortgage gives no power of sale, except of certain of the personalty, it will be declared void as against judgment creditors of the mortgagor.—MORRIS v. CLARK, Tenn., 62 S. W. Rep. 673.

34. GARNISHMENT—Equitable Contingent Contract.—Defendant and V entered into a contract to engage in the loan and real estate business for three years, defendant to draw a salary of $100 per month until the termination of the contract, when he was to receive a certain per cent. of the profits of the business, provided that there were any profits in excess of the salary already drawn, after collecting all claims. Held, that the fact that the defendant's interest in the contract could not be reached by trustee process or ordinary garnishment proceedings, prior to the termination of the contract, because defendant's interest was contingent, did not entitle plaintiffs to maintain an action of equitable garnishment, since the unascertained profits of a contingent contract cannot be reached by equitable garnishment.—STEVENSON v. MCFARLAND, Mo., 62 S. W. Rep. 694.

35. GUARANTORS—Extension of Time — Release of Guarantor.—A release of a guarantor of a railroad construction company's agreement to pay contractors for their work, resulting from an extension of time for its completion without the guarantor's assent, would not release the latter from liability for what had been done before the extension. — O'BRIEN v. CHAMPLAIN CONSTRUCTION CO., U. S. C. C., D. (Vt.), 107 Fed. Rep. 888.

36. GUARDIAN AND WARD—Compensation—Res Judicata.—Where certain compensation was allowed a guardian by the clerk of the county court, and was ratified and affirmed by the court, and subsequently such allowance was confirmed by the chancery court of another county on a petition by the guardian to remove the guardianship to the latter county, the guardian could not thereafter be charged with such allowance in a suit by the ward to remove the guardian, and charge him with the allowance, owing to breaches of duty.—TURNER v. TURNER, Tenn., 62 S. W. Rep. 607.

37. HOMESTEAD—Change of Residence.— Where the owner of a homestead moved with his family to a distant State, where he remained more than three years, the finding of the trial court, on his positive testimony, that the removal was temporary, and without intent to abandon his homestead, should not be reversed, though he registered and voted several times in such State, since the fact of voting is not conclusive on the question of residence.—MINNESOTA STONEWARE CO. v. MCCROSSEN, Wis., 85 N. W. Rep. 101.

38. HOMICIDE—Former Conviction—Second Indictment.—Under Const. art. 2, § 28, prohibiting a person from being twice placed in jeopardy for the same offense, but providing that a reversal of a judgment of conviction for error of law shall not prevent a new trial on a proper indictment, a prisoner convicted of murder in the second degree, under an indictment for first-degree murder, which judgment is reversed on appeal, may be retried under a second indictment, charging murder in the first degree. Such new trial for first-degree murder is not a violation of the fourteenth amendment of the United States constitution, requiring trial by due process of law, since the State has a right to impose conditions for the granting of new trials.—STATE v. GODDARD, Mo., 62 S. W. Rep. 697.

39. HUSBAND AND WIFE—Deed—Right of Survivorship.—Under Ky. St. § 2143, providing that "if real estate be conveyed or devised to husband and wife, unless a right of survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them, but they shall take as tenants in common, and the respective moieties shall be subject to the respective rights of the husband or wife as herein fixed, with all other incidents to such tenancy," a deed conveying land to husband and wife, "and upon their death" to others, or to them "during their natural lives," amounts to an express provision for the right of survivorship, within the exception of the statute, unless the presumption that such was the intention be rebutted by the terms of the deed.—MCALLISTER v. FOLDEN'S ASSIGNEE, Ky., 62 S. W. Rep. 588.

40. INFANTS—Stepchildren—Support.—Where defendant moved on his wife's farm, and used the products of it in the support of her children by a former marriage, and after the death of their mother the stepchildren sued defendant for railroad ties which he had sold off the land, it was error to refuse to allow defendant a counterclaim for the support and maintenance of the stepchildren, since he assumed to support them only with the aid of their means.—KEMPSON v. GOSS, Ark., 62 S. W. Rep. 582.

41. INSURANCE—Failure to Promptly Pay Loss—Constitutional Law. — Rev. Stat. Texas 1895, art. 3071, imposing on a "life or health insurance company" an additional liability for its failure to pay a loss within the time specified, consisting of 12 per cent. damages on its amount, and attorney's fees for its collection, is not repugnant to the provisions of the federal constitution against taking property without due process of law, and guaranteeing all persons the equal protection of the law. Such article, however, has no application to accident insurance companies, whether they were a part of the *res gestæ* or not, and no predicate was needed for such evidence after proof of the conversation by defendants.—FIDELITY & CASUALTY CO. OF NEW YORK v. DOROUGH, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 889.

42. INTERNAL REVENUE STAMPS—Chattel Mortgage—Validity.—Where plaintiff, on taking a chattel mortgage securing 12 notes, placed a United States revenue stamp on each note, but none on the chattel mortgage, without intent to defraud the revenue, but with the belief that the stamps on the notes were sufficient, the mortgage was valid and binding upon the parties in a State court.—PLUNCKETT v. HANSCHKA, S. Dak., 85 N. W. Rep. 1004.

43. INTERPLEADER—Bill by Tenant.—A bill of interpleader by a tenant against his landlord is, in effect, a dispute of his landlord's title, and hence should be dismissed.—WHITAKER v. WHITAKER, Tenn., 62 S. W. Rep. 664.

44. INTOXICATING LIQUORS—Sales without License—Retail.—Where, in a prosecution for retailing liquor

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without having paid the special tax, defendant claimed that he sold 18 quart bottles at a time, delivering it to the purchaser in less quantities as required by the purchaser, and receiving pay for the same, but there was no evidence that any specific 18 quarts of beer were set apart for the purchaser with the intent that the property therein should presently pass, defendant was guilty of retailing liquor, within Comp. Laws, § 5380, defining a retail dealer as one selling one dozen quart bottles or less at one time to any person or persons.—PEOPLE v. LUDERS, Mich., 85 N. W. Rep. 1081.

45. JUDGMENT—Execution—Bond of Indemnity.—A sheriff having an execution in his hands was notified by the attorney of the judgment debtors that the execution was void, and not to levy, and such debtors executed a bond to indemnify the sheriff against loss or damage for failing to levy. The validity of the execution depended on a new statute, which had not been construed by the court, and the sheriff was in honest doubt as to his right to levy. Held, that taking the bond was not against public policy, nor in contravention of any statute, and, the sheriff's bondsmen having been compelled to pay the amount of the execution, their assignee may recover on the bond of indemnity.—RAY v. MCDEVITT, Mich., 85 N. W. Rep. 1087.

46. JUDGMENT—Matters Concluded by Decree.—A petition in intervention was filed in a railroad foreclosure suit setting up a claim for rental of terminal property against the defendant accruing prior to the appointment of receivers in the suit, on account of which the intervenor claimed a statutory landlord's lien, and also that its claim constituted a preferential debt in equity entitled to priority over the debt of the mortgagee as a part of the necessary expenses of operating the road. Issue was joined on both of such claims, and on a hearing the petition was dismissed on the merits, and the decree of dismissal was affirmed on appeal. Subsequently the receiver having accumulated a fund in the registry of the court from the earnings of the road, the intervener filed an amended petition asserting its equitable right to preferential payment from such fund. Held, that the former decree was conclusive against its right to maintain such petition, the claim made, as well as the right in which it was asserted, in the two petitions being identical, and one which, had it been sustained in the first proceeding, would have been a charge upon the same fund when subsequently earned.—MANHATTAN TRUST CO. v. TRUST CO. OF NORTH AMERICA, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 828.

47. LANDLORD AND TENANT—Attornment—Action for Rent.—Plaintiff's tenant leased the premises from defendant, who claimed them under leases made to him by a city which had obtained them at a tax sale; defendant agreeing to save the tenant harmless from any loss or damage on account of plaintiff's claim for possession. The tenant assigned his claim for rent paid under such lease to plaintiff. Held, in an action by her for such rent, that it was error to direct a verdict in her favor on the ground that a tenant cannot make a valid attornment to a third person, since, as there was no stipulation in the lease as to taxes, they were payable by the landlord, and the tenant was entitled to show that his landlord's title has been extinguished by sale for such taxes.—SHERMAN v. SPALDING, Mich., 85 N. W. Rep. 1129.

48. LARCENY OF MONEY—Sufficiency of Indictment.—An indictment charging theft of $35 in money, of the value of $35, sufficiently describes the stolen property, though it does not state the denomination or character of the money stolen.—BELL v. STATE, Tex., 62 S. W. Rep. 567.

49. LIBEL—Relevant Allegation in Pleading—Privilege.—An allegation, though false, by the defendant in a cross complaint in a divorce proceeding, that her husband had been cohabiting with the plaintiff, was an absolutely privileged statement, for which libel will not lie, since it was made in the due course of legal proceedings in a court of competent jurisdiction, and relevant to the issues therein.—JONES v. BROWNLEE, Mo., 61 S. W. Rep. 795.

50. LIFE INSURANCE—Evidence.—The written declaration of the insured that the policy had not been delivered to him, that he had not paid the premium, and that he desired it to be canceled, was admissible on the defense that there never was a binding contract.—ATKINS v. NEW YORK LIFE INS. CO., Tex., 62 S. W. Rep. 563.

51. LIFE INSURANCE—Insurable Interest—Brother.—A life insurance policy may be taken out for the benefit of a brother of the insured, and it is immaterial what arrangements are made between them for the payment of premiums.—FIDELITY MUTUAL LIFE ASSN. v. JEFFORDS, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 402.

52. LIFE INSURANCE—Misstatements and Concealments—Effect of Good Faith.—Code, Ga. 1895, §2097, requires applications for life insurance to be made in the utmost good faith, and declares that representations are considered as covenanted to be true, and that a variation by which the nature, extent, or character of the risk is changed will void the policy. Section 2099 declares that the failure to state a material fact, if not done fraudulently, does not avoid the policy, but the wilful concealment thereof, enhancing the risk, will avoid it. Section 2101 avoids a policy for wilful misrepresentation as to any material inquiry made. Held, in view of this statute, that an untrue statement by insured that he did not have consumption, or his omission to name, when requested, all physicians who examined him within a specified time, would not avoid his policy, if his answers were made in good faith, and the misstatement or omission was not wilful, but due solely to his ignorance or failure to recollect, notwithstanding he distinctly certified that his answers were true, and agreed that, if any concealment or untrue statement or answer be made, the policy should be void.—FIDELITY MUT. LIFE ASSN. v. JEFFORDS, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 402.

53. LIFE INSURANCE — Provision that it Shall not Take Effect until Payment of Premium.—A policy of life insurance contained a provision that possession of it by the insured should not render it valid unless premium thereon had actually been paid in cash. Such policy was issued on an application made through an agent of the company who was allowed by custom to retain his commission from the first premium. The agent delivered the policy to the applicant, and himself remitted to the company the portion of the first premium in excess of his commission, taking a note from the applicant for an amount equal to about two-thirds of the entire premium. The company, in the belief that the premium had been fully paid in cash, credited the same to the policy holder, but on learning the facts after his death, and while the note was wholly unpaid, at once repudiated the transaction and refused payment of the policy. The evidence showed that it was understood between the agent and the applicant that the note of the latter covered all he should be required to pay on account of the first premium, but the agent had no authority from the company, either express or by virtue of his agency, to accept less than full payment in cash. Held, that aside from the question whether, under its terms, the policy would have become effective had the note been for the full amount of the premium, it did not attach in the absence of proof that the holder had either paid, or agreed to pay, in some manner, such premium in full.—MUTUAL RESERVE FUND LIFE ASSN. v. SIMMONS, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 418.

54. LIMITATIONS—Oral Contract.—Rev. Stat. Texas, arts. 3354, 3356, provide that there shall be commenced and prosecuted, within two years after the cause of action accrues, and not afterwards, all actions for

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debts not evidenced by contracts in writing and a longer time is fixed for debts founded on written contracts. Held, that the charter of a city railroad company, which authorized it to construct and operate its lines under such conditions and ordinances as the city might provide and impose, was not a contract in writing within such statute, on which a special assessment against the company for a street improvement, subsequently authorized by the legislature, was founded, as the contract mentioned by the statute is a contract between the parties, and the city was not a party to the company's charter, which was solely between the latter and the State, and hence the two-years limitations applied to actions for such assessments.—CITY OF GALVESTON v. GUARANTY TRUST CO. OF NEW YORK, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 325.

55. LIMITATION OF ACTIONS—New Promise—Husband and Wife.—Under Comp. Laws, §§ 9741, 9745, providing that no joint contractor shall lose the benefit of the bar of limitations by a subsequent promise or payment made by his joint contractor, a payment made by a husband, and indorsed without the consent of his wife, on a mortgage jointly executed by them, does not defeat the bar of limitations in favor of the wife.—CURTISS v. PERRY, Mich., 85 N. W. Rep. 1131.

56. LOGS AND LOGGING—Obstructions—Removal.—In an action brought under Comp. Laws, ch. 129, providing that where the owner of logs placed in a stream has not made adequate provisions for driving and keeping the stream unobstructed, any other person driving logs on the stream may cause such obstruction to be removed at the expense of the owner of such obstructing logs, the defendants under the general issue may show that there was a contract between the parties that each should drive certain portions of the logs of the other.—BELLOWS v. CRANE LUMBER CO., Mich., 85 N. W. Rep. 1103.

57. MASTER AND SERVANT — Assumption of Risk.—Where a servant went into the mouth of an elevator bin to cave cotton seed which had become lodged therein, he assumed the risk of digging in the bottom of the bin, whereby the seed slipped and crushed him.—BROWN v. MILLER, Tex., 62 S. W. Rep. 547.

58. MASTER AND SERVANT—Contract of Employment—Termination.—Where a servant employed for a term of years consents to a termination of his contract, on his discharge before the expiration of such term he cannot maintain an action against the master for wrongful discharge.—BELL v. GUND, Wis., 85 N. W. Rep. 1031.

59. MASTER AND SERVANT — Death — Assumption of Risk.—An instruction that a locomotive engineer assumes all risks ordinarily incident to the business, but he may presume that the company will furnish a reasonably safe track, and he does not assume risks brought about by the company's negligence, was not subject to the objection that he could only presume the company would use all ordinary diligence to furnish a safe track, and that he assumed the risk of a defective track, if, by the exercise of ordinary care, he might have known it.—TEXAS & P. RY. CO. v. MCCLANE, Tex., 62 S. W. Rep. 565.

60. MASTER AND SERVANT — Death of Servant—Assumption of Risk.—Plaintiff's decedent was directed by defendant to assist in stringing an electric wire, in the course of which were two electric light wires passing over the roof of a building. Decedent, holding the wire he was stretching in one hand, climbed on the roof of such building, and crawled under the electric wires, first touching them with his fingers to see if they were alive, knowing the danger if they were. After getting under them on the roof, which was wet and slippery, he attempted to walk along the roof, and slipped, and, either to save himself from falling or involuntarily, he took hold of the electric wire with his other hand, thereby making a complete circuit, and was killed. Held, in an action for his death, that it was proper to direct a verdict for defendant, since, as decedent knew of the danger by coming in contact with a live wire, and the slippery condition of the roof, and that, if he slipped, an involuntary movement might bring him in such contact, he assumed the risk.—DAVIS v. PORT HURON ENGINE & THRESHER CO., Mich., 85 N. W. Rep. 1125.

61. MASTER AND SERVANT — Fellow-Servants.—A brakeman, and a fireman in the discharge of his ordinary duty of receiving signals from the brakeman and repeating them to the engineer, are co-equal fellow-servants, and the master is not liable for an injury to the brakeman by either the ordinary or gross negligence of the fireman.—SOUTHERN RY. IN KENTUCKY v. CLIFFORD, Ky., 62 S. W. Rep. 514.

62. MASTER AND SERVANT—Negligence.—A factory caught fire, and a servant sustained injuries by jumping from a third story window. In a suit for the injuries, plaintiff contended that the fire was caused by the negligent maintenance by the master of a vat containing inflammable material in proximity to a trip hammer, and that the material was ignited by sparks from the hammer. It appeared that the hammer was situated 30 feet from the vat, and there was evidence that the sparks from the trip hammer would not contain sufficient heat to cause any substance to ignite for a distance greater than 20 feet; that the fire was first discovered on a rack beside the vat, the rack being used to drain articles that had been dipped in the vat; that the vat was covered at the time, but that in endeavoring to put out the fire the cover was knocked off, and fire thereupon appeared in the vat. The same conditions had existed many years without developing danger from sparks. Held, that the evidence was insufficient to support a verdict that defendant was negligent in locating the vat and rack the distance they were from the hammer.—DUNLAVEY v. RACINE MALLEABLE & WROUGHT IRON CO., Wis., 85 N. W. Rep. 1026.

63. MASTER AND SERVANT — Negligence of Servant.—Where a boy seats himself on the hounds of a wagon, the driver of which had been forbidden by his employer to allow children to ride thereon, and is injured by the horses starting, the employer is not liable, even if the driver invited the boy to ride.—SCHULWITZ v. DELTA LUMBER CO., Mich., 85 N. W. Rep. 1075.

64. MINES AND MINERALS—Royalties—Computation.—Where the lessee of a mineral right, required to pay a sum for each ton of phosphate taken from the land,—the same to be determined by the market price of the phosphate,—afterwards adopts a new method, by which the mineral is divided into two classes, selling at different prices, the royalty is to be computed by taking the combined values of the two products which the phosphate produces, though the phosphate has a market value before its separation. Where one class of phosphate so produced is crushed and put in bags, which was not required under the method in use when the lease was executed, the lessor is not required to have a portion of such additional expense deducted from her royalties.—HARLAN v. CENTRAL PHOSPHATE CO., Tenn., 62 S. W. Rep. 614.

65. MORTGAGE—Interest — Tender.—The mortgagor of a past due mortgage is not relieved from paying interest before he is ready and willing to pay both principal and interest, and is prevented from so doing by circumstances which would be the equivalent of a tender.—ADAMS v. GREIG, Mich., 85 N. W. Rep. 1078.

66. MUNICIPAL CORPORATIONS — Appropriations.—Under Ky. St. § 2982, part of charter of cities of first class, providing that "any unexpended balance of an appropriation in any current fiscal year shall be added by the comptroller to the amount appropriated for the same purpose out of the levy for the succeeding year," and that "unappropriated balances of revies in any current fiscal year shall be passed to the

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credit of the same funds for the succeeding year," the board of public safety has no power to use in any year, in addition to the amount appropriated by the general council for the police department, any balance in the treasury arising from a levy for the same purpose for previous years, until it has been appropriated by the council.—NEUMEYER v. KRAKEL, Ky., 62 S. W. Rep. 519.

67. MUNICIPAL CORPORATIONS — Parks — Appropriation.—No appropriation having been made by the city council of the city of Detroit, for the use of the park board, to pay for water for the operation of drinking fountains, hydrants, etc., the Detroit waterworks was not entitled to recover from the park board for water so furnished.—BOARD OF WATER COMRS. OF CITY OF DETROIT v. COMRS. OF PARKS AND BOULEVARDS, Mich., 85 N. W. Rep. 1133.

68. NEGLIGENCE — Collision on Highway—Proximate Cause.—Where plaintiff, riding his bicycle when it was quite dark, was run over by defendants, and the evidence was conflicting as to the speed at which the latter were driving, and there was some testimony that plaintiff was riding at a high speed, the court properly instructed the jury that if plaintiff was exercising due care, and defendants were racing their horses, plaintiff could recover against all of defendants, but, before he could recover against any of them, their negligence must have been the proximate cause of the injury.—MAHNKE v. FREER, Mich., 85 N. W. Rep. 1099.

69. NEGLIGENCE — Question for Jury.—Defendant tied his horse on a public street, with an ordinary strap three-fourths of an inch wide, which was fastened into the ring in the bit of the bridle; and while the horse was so standing a paper blew under his feet, whereupon he jumped, broke the bit, and ran into plaintiff's buggy, breaking it, and injuring plaintiff. The horse had previously broken a similar strap and run away, being frightened by the blowing of a paper, of which fact defendant knew, he afterwards taking the precaution to unhitch the horse from the buggy while at church. Held, that the question of defendant's negligence was properly left to the jury.—SINSABAUGH v. BROWN, Mich., 85 N. W. Rep. 1110.

70. PARTNERSHIP —Character—Corporation.—Where plaintiff dealt with an association of individuals as a corporation, such dealing fixed the *status* of the association as to that transaction by estoppel, and plaintiff was not entitled to subsequently claim a liability arising therefrom against the association as partners.—CLAUSEN v. HEAD, Wis., 85 N. W. Rep. 1028.

71. PLEADING AND PRACTICE — Conduct of Jury.—Where, on prosecution for violation of the local option law, it appeared that after the jury retired a juror stated that he had known the State's witness all his life, and that he was a truthful man, while another juror stated that a certain witness for defendant was under indictment for horse theft, none of which evidence was before the jury during trial, defendant was entitled to a new trial.—BLALOCK v. STATE, Tex., 62 S. W. Rep. 571.

72. PLEADING AND PRACTICE—Cross-Examination.—Though the cross-examination of a witness will ordinarily be left to the discretion of the trial judge, where

lands, a mortgage executed by the agent acting under such power is unauthorized and void.—MINNESOTA STONEWARE CO. v. MCCROSSEN, Wis., 85 N. W. Rep. 1019.

75. RAILROADS—Brakeman Riding on Pilot—Duty of Engineer.—A brakeman, while standing on the pilot of a switch engine, lost his footing, and was run over and killed. Held, that an instruction that if the engineer, by the exercise of ordinary care, could have seen that the brakeman had lost his footing, and he did in fact lose his footing, and the engineer, by the exercise of ordinary care, could have stopped the engine in time to have avoided inflicting fatal injuries on the brakeman, his failure to do so, if he did so fail, was negligence, was erroneous, in assuming as a matter of law, that it was the duty of the engineer to exercise ordinary care to see that the brakeman had not lost his footing, which was a question for the jury.—SAN ANTONIO & A. P. RY. CO. v. WALLER, Tex., 62 S. W. Rep. 555.

76. RAILROADS—Injury to Animals.—Where statute provides that whenever a railroad train approaches any crossing a bell shall be rung or a whistle blown, and that in case of neglect, the railroad shall be liable for damages sustained by any person by reason of such neglect. Held, that where a horse was injured by being run into by a train, and no statutory signals were given, there could be no recovery for the injury, in the absence of evidence that such failure was the cause of the injury.—MANKEY v. CHICAGO RY. CO., S. Dak., 85. N. W. Rep. 1018.

77. RAILROADS—Speed of Train.—In an action against a railroad company for killing a cow there was evidence that a rule of the company limited the speed of trains at the place where the cow was struck to not more than six miles an hour, and the court charged that if the train was running more than six miles an hour at the time to find defendant guilty of negligence. Held, that the charge was erroneous, since a violation of the rule would not constitute negligence, unless such violation was the proximate cause of the injury.—SAN ANTONIO & A. P. RY. CO. v. CLARK, Tex., 62 S. W. Rep. 546.

78. RAILROAD COLLISION — Injury to Fireman. — Plaintiff, a fireman on a north-bound train, was injured in jumping from his engine to avoid being involved in a collision with a south-bound train standing on the main track at a blind siding, where the trains had been ordered to meet. The night was dark, and the engine in front of him was without headlight or signal lamps, and the wind was blowing sand and snow across the track. The siding was without a telegraph station or a signal house by which it could be recognized, and it was a fair inference from the evidence that there was no signal light at the meeting point. Held, that the negligence causing the collision was attributable to the company, in ordering the trains to meet at such place, though it concurred with negligence on the part of plaintiff's fellow servants, the conductor and engineer of the south-bound train, in operating it without lights.—MEXICAN CENT. RY. CO. v. GLOVER, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 356.

79. REAL PROPERTY — Absolute Conveyance. — An agreement between husband and wife, by which the

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fraud or mistake, or that the vendors had warranted the quantity of land. The sale was not by the acre, though the deed called for a certain number of acres. A portion of the land was shown to be held by a superior title than that of plaintiff. Held, that there could be no recovery against the vendors for a deficit. —BARNES v. LIGHTFOOT, Tex., 62 S. W. Rep. 564.

81. RECEIVERS—Priority.—Where a receiver had in his hands money which he held as an assignee, and used a portion of such money to pay the expenses of the receivership, and afterwards repaid the estate of which he was assignee, he could not be allowed a preference therefor on a settlement; it appearing that certain creditors had also advanced money for defraying the expenses of the receivership, and the claim not being one of the estate, but of the receiver.—BUSTER v. MANN, Ark., 62 S. W. Rep. 586.

82. ROADS AND STREETS—Dedication.—Where, in a suit for the partition of land among devisees in 1868, the land was divided into lots, streets and alleys, as directed by testator's will, and a copy of the plat thereof was filed in the county clerk's office, and deeds were executed to the devisees referring to the plat and to B street, as shown thereon, and lots were sold and conveyed by the devisees by deeds referring to the plat and calling for the streets dedicated thereby, there was a dedication of B street, though the land was not then within the city limits, and though the plat was not recorded, as the law did not then require that to be done; and the subsequent extension of the city limits so as to include a part of B street, and the original construction of that street at the expense of abutting property owners, pursuant to a city ordinance, are sufficient evidence of acceptance by the city.—SOUTH COVINGTON & C. ST. RY. CO. v. NEWPORT L. & A. TURNPIKE CO., Ky., 62 S. W. Rep. 687.

83. SALES—Breach of Warranty — Rescission. — Defendant, in an action for the price of a threshing machine, pleaded a breach of warranty, and asked for a rescission. The machine was sold at its represented value, and the evidence showed that it was of no practical value. Held, that a decree ordering a rescission, and that the unpaid purchase-money notes be cancelled, and that the price paid be returned to the defendant, and ordering the latter to return the machine, would not be reversed *in toto* on the ground that pleading a breach of warranty was an affirmance of the contract, but that the relief canceling the notes and ordering the repayment of the purchase price was authorized.—GARR, SCOTT & CO. v. YOUNG, Tenn., 62 S. W. Rep. 631.

84. SALE—Fraud—Fiduciary Relations—Rescission.—Where the president of a bank, who had been in the habit of helping the bank to make loans, knowing that it relied on his advice, sold it a note, with knowledge that the maker was in straightened circumstances, if not insolvent, and that the indorsers were not financially strong, but representing to the bank that he believed both maker and indorsers to have the best of credit, the president's relation to the bank was such that it was entitled to a full disclosure of his information; and, for his failure to place it in possession of the facts, it was entitled to rescind its purchase of the note, and recover the consideration paid therefor.—HICKS v. STEBEL, Mich., 85 N. W. Rep. 1121.

85. STREET RAILROADS—Turnouts.—Under an ordinance authorizing a street railway company to construct and maintain a single-track railway along certain streets, with the right to construct, use, and operate all necessary and convenient tracks for turnouts, sidetracks, curves, and switches wherever the same may be necessary, the same to be constructed and in operation within one year from the date of the passage of the ordinance, held, that the relator was authorized to construct such turnouts, after the road was constructed, as should be made necessary by the increase of travel, without further legislative action on the part of the city.—DETROIT CITIZENS' ST. RY. CO. v. BOARD OF PUBLIC WORKS OF CITY OF DETROIT, Mich., 85 N. W. Rep. 1072.

86. STREET RAILWAYS—Ordinance—Sounding Gong.—The violation of an ordinance requiring the continuous ringing of a bell on a street car while in motion does not render the company guilty of negligence *per se* in a crossing accident, even though the ordinance is a condition in the grant of a franchise to the company, since the condition is unreasonable.—STAFFORD v. CHIPPEWA VAL. ELEC. R. CO., Wis., 85 N. W. Rep. 1036.

87. SURETIES — Discharge from Liability.—Under a sales agent's contract he was to pay cash on receipt of a bill of lading, and to keep strict account of all goods received by and returned by him, and his sureties bound themselves to pay or cause to be paid to his principal all sums which should become due on account of shipments to him or on his order during one year, during which all payments by him were to be made promptly in the ordinary course of business. Held, that failure of the agent to pay cash for any shipment on the receipt of the bill of lading was a breach of contract entitling his principal to proceed against him and his sureties to enforce collection of the debt then due, and hence his sureties were entitled to call on authorized agents of his principal for information as to the state of his accounts, and if, by their misrepresentations, the sureties changed their position to their detriment, they were discharged from liability.—ST. LOUIS BREWING ASSN. v. HAYES, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 896.

88. TAXATION—Tax Collector — Sureties—Limitation of Actions.—Where a tax collector issued receipts to his creditors for taxes which he did not collect, and the tax rolls were marked "Paid" in connection with each item where such receipts had been issued, and the collector did not report any stubs of receipts to the commissioner's court, but retained them in his office, where they might have been inspected, limitations run against the right of action against the sureties on his bond, since the commissioners would have discovered the wrong had they compared his report with the tax roll and receipt stubs, as required by Rev. St. art. 5168. The statute of limitations runs against counties, except when otherwise provided.—WARD v. MARION CO., Tex., 62 S. W. Rep. 557.

89. TAX SALE—Report of Sale.—Under Comp. Laws, § 8922, providing that where any record or paper, after sale for taxes, cannot be found in the proper office, it will be presumed, unless the contrary is shown, that the paper or record was duly made, the fact that after a sale there was no evidence that the county treasurer made to the auditor general the report required by the statute does not render the sale void.—CHURCH v. NESTER, Mich., 85 N. W. Rep. 1078.

90. TELEPHONES AND TELEGRAPHS — Breach of Contract for Use of Instrument.—Where plaintiff, who was engaged in a general messenger business, had a contract with defendant telephone company for the use of its telephone in his place of business for a period of three years, defendant had no right to refuse to deliver messages to plaintiff to notify persons wanted at another telephone exchange, and is therefore liable in damages to plaintiff for removing its instrument from his place of business after he had used it only four months, because he refused to pay therefor unless defendant would deliver such messages.—OWENSBORO HARRISON TEL. CO. v. WISDOM, Ky., 62 S. W. Rep. 529.

91. TRADE-MARKS—Infringement — Preliminary Injunction.—The registered trade mark "Yuses" having been applied, under various pronunciations incidental to its use, such as "Why use a," and "Yuse a," etc., to the manufacture and sale of an incandescent gas mantel, but commonly pronounced by the trade in general in referring to the mantle as though spelt "You see a," the owner is entitled to a preliminary in-

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junction against the use of the earlier conceived but subsequently registered trade-mark, "U-C-A," as applied to the manufacture and sale of a similar article; the intent with which the latter mark was used being immaterial, and its registration being only *prima facie* evidence of its validity.—WELSBACH LIGHT CO. V. ADAM, U. S. C. C., W. D. (N. Y.), 107 Fed. Rep. 464.

92. TRUSTS AND TRUSTEES—Superintendent of Mint—Loss of Public Moneys.—Whether the superintendent of a mint was at fault or not, he and his sureties are liable on his bond "for the faithful discharge of his duties" for the loss by fire of public moneys which the law required him to keep safely, and pay over when required.—SMYTHE V. UNITED STATES, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 377.

93. UNITED STATES GOVERNMENT — Postmasters — Money Order Funds.—Funds in other offices on which a postmaster could draw do not constitute money-order funds in his custody, within the meaning of the postal laws and regulations.—UNITED STATES V. NORTON, U. S. C. C of App., Fifth Circuit, 107 Fed. Rep. 412.

94. VENDOR AND VENDEE—Action for Price—Marketable Title.—Where, in a suit in equity, upon an executory contract for the sale of land, the purchaser not being in possession, wherein such purchaser alleged fraudulent representations on the part of the vendor as to mortgage upon the land, and pending the suit the vendor procured the mortgage to be canceled, and a decree was rendered providing that, upon the vendor filing with the clerk "a good and sufficient warranty deed in fee simple," execution should issue against the vendee for the purchase money, under the law, and the pleadings and evidence in the case in which the decree was rendered, the meaning of the words "a good and sufficient warranty deed in fee simple" was that the vendor must tender a good and sufficient marketable title before he could demand that the vendee accept the deed and pay the purchase money.—HORNE V. RODGERS, Ga., 88 S. E. Rep. 766.

95. WATERS AND WATER COURSES—Sewage—Polluting Stream.—In an action for injuries caused by allowing sewage to escape into a water course, the opinion of the court to the effect that plaintiff could recover for the time lost even for the sickness of his adult children is not prejudicial error where the charge restricted the jury to a recovery for the loss of time to that of plaintiff's wife by reason of her sickness.—CITY OF SAN ANTONIO V. DIAZ, Tex., 62 S. W. Rep. 549.

96. WATERS AND WATER COURSES—Surface Water.—Defendant built a dam to prevent surface water from crossing his land, thereby turning it on property of plaintiff, who sued for damages. Defendant claimed the water from time immemorial had flowed across H's land, and from thence across plaintiff's, and that its natural course had been diverted by a ditch cut by H through a natural elevation, which prevented it from flowing on defendant's property. There was evidence that the water had been diverted onto defendant's land by thy natural course of husbandry. Held, that an owner has not the right, even by ordinary husbandry, to divert the natural flowage of surface water so as to collect and precipitate it on his neighbor's property.—FINKBINDER V. ERNST, Mich., 85 N. W. Rep. 1227.

97. WATER COMPANY—Assignment of Contract with City.—Where a city for more than eight years acquiesced to the fullest extent in the assignment by a water company of its rights and privileges under a contract with the city, and allowed the new company during such time to perform the contract of its assignor, it is too late for the city to question the legality of the assignment for the purpose of avoiding performance of the contract on its part.—CITY OF AUSTIN V. BARTHOLOMEW, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 849.

98. WILLS—Claims for Services—Estoppel. A father in consideration of an adult son's services, deeded land to him worth $5,000, reserving possession and the right to sell, in which event the son was to receive a certain price per acre, or $5,000 at the father's death. Subsequently the father made a will giving $5,000 and some village lots to his son. By legacies to other children and his wife, he disposed of all his estate except a farm included in the land originally deeded to his son, which was to be equally divided among the children. He then assigned to his children his personal property on the same basis as in the will. The son knew of the assignment. On the father's death the son receipted for his legacy and share of the personal property, and then presented a claim for services covered by the deed first mentioned. Held, that the acceptance of the benefits under the will canceled the son's claim.—RUBERT V. RUBERT, Mich., 85 N. W. Rep. 1119.

99. WILLS — Construction — Trust Estates — Life Estates—Statutes—Estates in Fee.—Where a devise in fee was made in a will, but in a subsequent paragraph it provided that if the devisee should die without bodily heirs the property should be divided among certain others, the devisee, having survived the testator, took an estate in fee, since a devise over to third persons, dependent on the event of death without issue, referred to death in the lifetime of the testator.—STRATTON V. MCKINNIE, Tenn., 62 S. W. Rep. 626.

100. WILLS—Contest—Burden of Proof. — A charge that the burden of proof on the issue of the soundness of testator's mind at the time of the making of the will was on the contestants, and that they must establish by a preponderance of the evidence that testator was of unsound mind, and that if there was only a bare balance of evidence, or a mere doubt of the testator's sanity, the presumption was in favor of sanity, was erroneous, as inducing the jury to believe that the contestants must prove testator's insanity to the exclusion of all doubt.—BIMS V. COLLIER, Ark., 62 S. W. Rep. 593.

101. WILLS—Perpetuities.—N devised all his estate, real and personal, to M, as trustee, with power to sell all his real and personal estate; to invest and reinvest the proceeds thereof as he should deem fit; the trust fund to be used: (4) to pay annually one-half of the income to his son Charles during his life, and the other half of said income to his daughter during her life; (5) upon the death of his son Charles to pay one-half of the principal to the children of Charles, but, if no issue survive his son, then to pay one-half to the children of his daughter; (6) upon the death of his daughter to pay one-half of the principal to her children, but, if no issue survive her, then to pay the same to the children of his son Charles; (7) upon the death of either his son Charles or his daughter without issue, to pay the entire net income to the survivor of the two during his or her life; (8) if both of said children die without issue, then his entire estate shall be vested in the brother of the deceased, and his heirs, forever. Held: (1) that the devise was for more than two lives in being, and was therefore void; (2) that the statute against perpetuities applies to a case where the trustee is authorized to sell the real estate and other property of the deceased, but is required to immediately reinvest it; (3) the provision for the life estate devised to the sister is good.—NILES V. MASON, Mich., 85 N. W. Rep. 1100.

102. WILLS—Remainders — Death Without Issue.—Where a will bequeathed $1,000 to C for life, and on his death without issue to his brothers, the rule that where a provision of a will, standing alone, would pass to the devisee an absolute estate, and it is followed by another, directing that such estate shall pass to some other person on the death of the first-named legatee without issue, then such death must be held to mean death during the life of the testator, had no application.—COOK V. COLLIER, Tenn., 62 S. W. Rep. 656.

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Central Law Journal.

ST. LOUIS, MO., JULY 12, 1901.

The case of Atherton v. Atherton, decided by the Supreme Court of the United States, April 15, 1901, and reported in 52 Cent. L. J. 484, is awakening earnest inquiry, especially in the eastern States upon the probable encouragement such decision will give to the enactment of loose divorce laws in States whose public policy has not heretofore given evidence of much concern for the inviolability of the marriage relation. In our annotation to that case, however, we pointed out that from a legal standpoint, the position of New York and several other eastern States in refusing to recognize the decree of divorce of a sister State unless both husband and wife were domiciled therein had been justly rebuked by the supreme court in the decision just referred to. We showed also that while the motive which prompted these States in their refusal to recognize divorces granted in other States may have been commendable, its result was an absurdity in that it held people divorced in one State to be married in another, and *vice versa*, and was attended by all the serious consequences which such confusion of authority was bound to result in. But while this is true we desire to extend our sympathy and admiration especially to the States of New York and South Carolina which have so nobly and so unequivocably set themselves like a stone wall against the tide of easy divorce legislation, and whose policy has been to limit divorce and to check the wholesale separation of marital relations which like an epidemic has been spreading over the country, but whose earnest efforts in this direction have been counteracted in a large degree by the action of sister States whose laws have encouraged separation and made it easy of attainment. The result has been that there has arisen an absolute disregard of the sacredness of the marriage relation and a drifting away into paths of free love which permits the *status* of marriage to be changed at the will of the parties, and ends in the destruction of the home and its influences. We concur in the words of Pope, J., of South Carolina, in the case of McCreery v. Davis, when he said: "All admit that the true ideal in marriage is such a perfect union that leads to the indestructibility of the relation of man and wife; for, in its very inception, such is the declared purpose of the parties to it. Such is in exact accordance with the moral law: 'And they twain shall be one flesh.' England held this view for centuries, and while she held it, the thirteen colonies in America were planted, each adopting this view of the mother country. South Carolina was one of these, and, with the exception of the interval between the years 1872 and 1878, she has constantly retained this view. If others have drifted she cannot be so charged to have done."

A uniform federal divorce law is an absolute necessity. This is the sensible conclusion to which the recent agitation of this question is leading the people of this country. One prominent newspaper in the east says: "So widespread and insistent has become the demand for legislation by congress with reference to the regulation of divorce proceedings that action toward that end seems likely to be undertaken at the next session of the national law making body. Recent decisions of the supreme court have again brought the matter prominently into notice throughout the country." The *New York World*, showing the awful consequence of the wholesale granting of divorces, says editorially: "Many lawyers and judges have asked that federal legislation be inaugurated to put a stop to this state of affairs. From time to time the justices of the supreme court here and in other judicial departments have endeavored to prevent fraudulent and collusive divorces by stringent investigation, but the lawyers who advertise to procure divorces at forty dollars a head are ever ready to invent some method of carrying on the divorce-made-easy process." Jurists and practitioners eminent in their profession are emphatic in their declarations that federal action is necessary. One is quoted to have given his opinion as follows: "I consider the present state of divorce legislation in this country most deplorable. It cannot be remedied except by federal legislation. Why should marriage, which is universal, be treated by every State in the Union in a different manner? The law on this subject should be universal. Then we

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should hear no more of Dakota or New Jersey decrees being invalid."

Marriage is not a contract between the parties to be dissolved by their mutual consent, but is on the contrary, a *status* into which they have entered binding them for life in a relation which is the most sacred and the most vital to the perpetuity of society of all the relations of life. In Aryan civilization, at least, the home has always been most jealously guarded as the fountain spring out of which comes all that is good or bad in the social and political life of the people. In undermining the marriage relation we destroy the home and in destroying the home, we destroy the most powerful influence and restraint upon the actions of men only excepting that of the spirit of God himself. It is earnestly to be hoped that the discussion of this important question now being awakened throughout the country will serve to arouse the people to first principles on this subject, and lead them to secure the purity and indistructibility of the home by providing for a uniform law of divorce which might stipulate, probably, not more than three grounds, suggested by Mr. Bishop as the only proper and reasonable grounds for divorce, adultery, desertion and sævitia.

NOTES OF IMPORTANT DECISIONS

MUTUAL MISTAKE OF LAW.—An interesting point of law is discussed by the Court of Chancery Appeals of Tennessee in the case of Harlan v. Central Phosphate Company, 62 S. W. Rep. 614. In that case a half interest in common in a lot descended to A, who supposed, under a mistake as to the law of descent, which was also shared by B, that the lot descended in severalty to the latter, who, in fact, inherited no interest therein. A owned other land adjoining this lot, and together with B executed a joint mineral lease to the several tracts owned by them, which included the lot in question. The lease was executed as a joint lease merely for convenience, and all the parties, including the lessee, supposed that A had in law no interest in the lot in question, though they all knew the facts. It was held by the court that the lease did not convey the interest of A in such lot, since it was executed under a mutual mistake of law as to the ownership thereof. The court said: "The inquiry as to when equity will relieve from mistakes of law is an exceedingly difficult one. The general rule is simple enough. The difficulty arises upon a consideration of its qualifications and exceptions. Judge Story has considered this question at length in his work of Equity Jurisprudence, and we have recourse to that authority for enlightenment upon this matter. In that work it is said that agreements entered into in good faith, but under a mistake of law, are generally held valid and obligatory upon the parties." After considering a great number of authorities, which are apparently against the position taken by the court, the learned judge who writes the opinion collates authorities showing a well defined exception to this general rule which he states as follows: "Where the mistake is of so fundamental a character that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by a mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed *in statu quo*, equity will interfere, in its discretion, in order to prevent intolerable injustice. This we believe to be the clearly defined and well-established rule upon the subject in courts of equity both in England and America."

HOMESTEAD—CHANGE OF RESIDENCE.—In the recent case of Minnesota Stoneware Co. v. McCrossen, 85 N. W. Rep. 1019, the Supreme Court of Wisconsin decided an interesting question in the law of homestead. It was held in this case that where the owner of a homestead moved with his family to a distant State, where he remained more than three years, the finding of the trial court, on his positive testimony, that the removal was temporary and without intent to abandon his homestead, should not be reversed, though he registered and voted several times in such State, since the fact of voting is not conclusive on the question of residence. We quote from the opinion:

"There is left the question of fact, upon which the case mainly turned, as to whether the removal of Mr. McCrossen from the homestead was for temporary purposes, with intent not to abandon it as a homestead but to reoccupy it as such, as found by the court. We shall not discuss at length the evidence upon which such finding was made. In this case there is the very significant circumstance that Mr. McCrossen exercised the elective franchise in the State of Washington three times while residing there. We must presume that the essentials of citizenship are the same in that State as here, and that McCrossen's assertion of the right of citizenship, as indicated, was inconsistent with his possessing a homestead in the State of Wisconsin. But we cannot say that such circumstance is conclusive. He violated the law in voting, or he committed perjury in testifying that his residence in the State of Washington was for mere temporary purposes and that his intention at all times was to return to the Wisconsin homestead. The trial court concluded from all the circumstances that he tes-

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tified to the truth. It seems, looking at the record alone, that there is room for a different conclusion. But there are many cases in the books where it has been held that the mere act of voting at a particular place is not conclusive on the question of residence. Many well-considered cases of that kind are cited to our attention in the brief of counsel for respondents. Robinson v. Charleton, 104 Iowa, 296, 73 N. W. Rep. 616; Dennis v. Bank, 19 Neb. 675, 28 N. W. Rep. 512; Mallard v. Bank, 40 Neb. 784, 59 N. W. Rep. 511; Corey v. Schuster, 44 Neb. 269, 62 N. W. Rep. 470; Campbell v. Potter (Ky.), 29 S. W. Rep. 139. In the last case cited the Kentucky court said: 'This court has held that the homestead right is never forfeited when there has been an occupancy and then a temporary removal with the intent to return and make the premises a home. Appellants endeavored to show that the appellee abandoned all purpose to return to the property and that his residence had been permanently located elsewhere by proving that he registered and voted in wards in Bowling Green other than the one in which his home was situated. The proof shows that he did this. This act is not conclusive of the question, but is merely a fact, in connection with the other facts proven, to aid the court in determining whether the removal of the appellee from the premises was permanent or temporary.'"

MUNICIPAL ORDINANCE — MUST BE REASONABLE.—Municipalities are not supreme in legislative power, and to that rule the city of Eau Claire, Wisconsin, is indebted for wiping off an ordinance requiring the continuous ringing of a bell on street cars while in motion, and rendering them guilty of negligence *per se* in failing to do so. It is difficult to understand how a municipal assembly even of school boys, could have been guilty of the lack of common sense which the passage of such an ordinance would seem to signify. To demand that the motorman of an electric car shall keep his gong going continually while his car is in motion is not only ludicrous and impossible, but absolutely unnecessary. In the case of Stafford v. Chippewa Valley Electric Railway Company, 85 N. W. Rep. 1036, the Supreme Court of Wisconsin held that the violation of such an ordinance would not render a street railway company guilty of negligence *per se* in a crossing accident, even though the ordinance is a condition in the grant of a franchise to the company, since the condition is unreasonable. The court's opinion is clear on this point:

"It is elementary that the power of the city council to enact ordinances is not unlimited. It may go, within the field delegated to it by the State legislature, to the boundaries of reason. Within such field its discretionary power is supreme, but it cannot legitimately go beyond. If it does, in so far its enactments are void. Whether, in any given case where the facts are undisputed, a city council has exceeded its power by the enactment of an unreasonable ordinance, is purely a judicial question, to be considered substantially the same as that of whether the legislature has exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal power. Clason v. City of Milwaukee, 30 Wis. 316; Barling v. West, 29 Wis. 307; Hayes v. City of Appleton, 24 Wis. 542; 17 Am. & Eng. Enc. Law (1st Ed.), p. 246, and cases cited; 1 Beach, Pub. Corp. §§ 319, 320, 327; Elliott, Roads & St. § 187. Many cases will be found within the field covered by the above citations which in principle condemn an ordinance requiring a bell on a street car to be continuously sounded while the car is in motion upon a street. In North Chicago City Ry. Co. v. Town of Lake View, 105 Ill. 207, an ordinance prohibiting the use of a steam motor on street cars was held void. In Van Vorst v. Mayor, etc., 27 N. J. Law, 497, an ordinance prohibiting a railroad train from obstructing a street more than two minutes at a time was so held. In Delaware, L. & W. R. Co. v. Township of East Orange, 41 N. J. Law, 127, an ordinance compelling the maintenance of flagmen at grade crossings was likewise held void. In Hayes v. City of Appleton, this court, speaking by Dixon, C. J., said: 'The power of a common council therefore extends only to the making of regulations for the good of the State. They must be such as only prudence and reason require, not unreasonably prejudicial to private rights and interests.' Who can say that prudence and reason require that a bell shall be continuously sounded on a street car while it is in motion upon the street? No one, we venture to say, who applies ordinary reason to matters of common knowledge. Common sense suggests that instead of operating to protect persons traveling upon the street it would have the opposite effect. It would tend to alarm horses not familiar with it; and persons would naturally become so familiarized with the sound that it would cease to attract attention. Without continuing the discussion, we venture to say that no good reason can be assigned for such a regulation in the operation of street railroads. The ground of the doctrine that the violation of an ordinance designed to promote the safety of individuals is negligence *per se*, is that it is a reasonable regulation to that end. Smith v. Traders' Exchange, 91 Wis. 360, 64 N. W. Rep. 1041, 30 L. R. A. 504. Hence it goes almost without saying that whether the violation of a regulation which is part of a granted franchise constitutes actionable negligence must turn on the same principle."

LIFE INSURANCE—MISSTATEMENTS AND CONCEALMENTS IN THE APPLICATION. — Statutes in many of the States require applications for life insurance to be made in the utmost good faith and declare that representations are considered as covenanted to be true, and that a variation by which the nature, extent or character of the risk is changed will void the policy. The United States Circuit Court of Appeals has just

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passed upon facts arising under such a statute in the case of Fidelity Mutual Life Association v. Jeffords, 107 Fed. Rep. 402. Under such a statute, containing a further provision that failure to state a material fact, if not done fraudulently, does not avoid this policy, it was held that an untrue statement by the insured that he did not have consumption, or his omission to name, when requested, all physicians who examined him within a specified time, would not avoid his policy, if his answers were made in good faith, and the misstatement or omission was not willful, but due solely to his ignorance or failure to recollect, notwithstanding, he distinctly certified that his answers were true, and agreed that, if any concealment or untrue statement or answer be made, the policy should be void. The court said:

"It may be stated as a general rule that answers to questions propounded to insured in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties to be strictly and literally complied with, are to be construed as representations and not as warranties. Insurance Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. Rep. 500, 30 L. Ed. 644. One of the statements that the insured was required to make to obtain the insurance was that he was 'free from any and all disease,' except as stated. Placing the construction upon the application which the plaintiff in error contends for, the policy would be made void if the insured had a disease material to the risk, although he was entirely ignorant of the fact. It might be a disease so undeveloped that it could not be discovered by an expert physician, and yet if it afterwards developed, and it could be shown that the germs of the disease were active in the insured at the date of his application, the policy would be made void. We cannot believe that this contract is fairly susceptible to such construction. Such a construction ought to be avoided unless clearly demanded by legal rules. In the absence of explicit and unequivocal words requiring such interpretation, the court should not conclude that the insured took a life policy with the distinct understanding that it should be void, and all premiums paid forfeited, if at the time of his application he had a disease of which he was entirely unconscious. Moulor v. Insurance Co., 111 U. S. 335, 4 Sup. Ct. Rep. 466, 28 L. Ed. 447. We do not think that it was the purpose of the insurers to exact from the insured, as a condition precedent to a valid contract of insurance, a guaranty against the existence of diseases of which he had no knowledge, and which even a skillful specialist, on careful examination, would be unable to detect. We are not unmindful of the fact that the insured distinctly certifies that the statements in his application are true, and that he agrees that, if any concealment or untrue statement or answer be made, the policy of insurance shall be void. Referring to the Georgia statute, and probably without the statute, concealment means 'willful concealment.' Construing a life policy, Mr. Justice Harlan asked what was meant by true and untrue answers, and he answered the question, saying: 'In one sense, that only is true which is confirmable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But, in another and broader sense, the word "true" is often used as a synonym of "honest," "sincere," "not fraudulent." Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made "fair and true answers." Moulor v. Insurance Co., 111 U. S. 335, 345, 4 Sup. Ct. Rep. 466, 28 L. Ed. 447."

WILLS—RENTS AND PROFITS ACCRUING AFTER TESTATOR'S DEATH.—In the Case of Cole v. Edwards, 62 S. W. Rep. 642, the Supreme Court of Tennessee decided an interesting point of law relating to the rights of the residuary devisees to the rents and profits accruing after the testator's death and before the vesting of the estate in them. In that case it was held that where a will directed that the residue of testator's property remaining after payment of stipulated amounts should be divided into equal shares, and each share conveyed in trust for testator's children, who should receive the rents and profits for life, the rents and profits accruing after testator's death, and before the conveyance to trustees, should not be added to the *corpus*, but such life tenants were entitled to receive such rents and profits, except those for the first year. We quote the following from the opinion:

"The next assignments in logical order are the third and fourth assignments, filed by Mrs. Edwards and Mrs. Benson. These present the contention that the net rents, profits, and interest arising upon that portion of the funds and assets of the estate which are the subject of the several life estates, and accruing between the death of the testator, and the conveyance to the trustees provided in item 17 of the will, do not go into the corpus of the several trusts, but belong to the life tenants. The question is one that arises between the life tenants and the remaindermen. The rule is that the life tenant is entitled to all the interest, rents, and profits arising on the property which is the subject of the life estate. Pritchitt v. Trust Co., 96 Tenn. 472, 477, 36 S. W. Rep. 1064, 33 L. R. A. 856; *In re* Turner, 101 Tenn. 701, 50 S. W. Rep. 757; For-

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sey v. Luton, 2 Head, 184; Hunt v. Watkins, 1 Humph. 498, 506. In a well-considered case the court of errors and appeals of New Jersey, said: 'There is another class of cases which are apparently exceptions to this general rule [that legacies do not bear interest until the expiration of one year from the testator's death]; but these cases stand upon peculiar and special grounds, and are regarded as a class by themselves. On a bequest of the residue of the testator's estate, or of some aliquot part or proportion thereof, in trust to pay the interest or income to a legatee for life, with a gift of the principal over at his death, the interest or income payable to the life tenant will be computed from the testator's death. Green v. Green, 30 N. J. Eq. 456; Same v. Blackwell, 32 N. J. Eq. 768; Van Blarcom v. Dager, 31 N. J. Eq. 783; 2 Spence, Eq. Jur. 562-569; Howe v. Earl of Dartmouth, 7 Ves. 137, and the notes to that case in 2 White & T. Lead. Cas. Eq. 486. Cases of this class are distinguished from legacies of a definite sum with remainder over, with respect to the computation of interest to the life tenant. 2 Williams, Ex'rs. 1301; Fearns v. Young, 9 Ves. 549, per Lord Eldon; Baker v. Baker, 6 H. L. Cas. 623, per Lord Chelmsford; Van Blarcom v. Dager, 31 N. J. Eq. 783, per Dood, J. In the case last cited the computation from the testator's death of interest or income to the life tenant, where the gift is of the residue, is placed on a special equity as between the parties who are to participate in the gift, arising from the injustice that would be done to the life tenant by the addition of the entire interest to the capital. 2 Rop. Leg. 1320.' Welsh v. Brown, 43 N. J. Law, 37, 41. See, also, Rodman v. Fincke, 68 N. Y. 239; Marsh v. Taylor (N. J. Ch.), 10 Atl. Rep. 486; Green v. Green, 30 N. J. Eq. 456; Same v. Blackwell, 32 N. J. Eq. 778. In Williamson v. Williamson, 6 Paige, 298, 304, 305. After a full examination of the authorities, Chancellor Walworth, said: 'The result of the English cases appears to be—and I have not been able to find any in this country establishing a different principle—that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator. All the cases which appear to conflict with this rule, except the two decided by Sir John Leach, which are no longer to be considered as authority, will be found to be cases in which the testator had directed one species of property to be converted into another, or the residuary fund to be invested in a particular manner, and had then given a life estate in the fund as thus converted or invested. In such cases it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place and the investment is made,—either within the year or at the expiration of that time. But, as a year is considered a reasonable time for the executor to comply with the testator's directions as to the conversion or investment, the legatee for life cannot be kept out of the interest or income beyond that period.' "

PLEDGES AND PROCEDURE TO FORECLOSE BY ACTION.

Pledges were in constant use under the civil law. They seem to have been in use in England from the time of Glanville, but no judge of the common law courts appears to have given a correct definition of the term until Chief Justice Holt, in deciding Coggs v. Bernard, reviewed nearly the whole law relating to bailments, and in speaking of a pledge, said: "When goods and chattels are delivered to another to be security to him for money borrowed of him by the bailor," the thing deposited is a pledge.[1] In a case somewhat later[2] Gibbs, C. J., says: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But where goods are deposited by way of security to indemnify a party against a loss of money, it is more than a pledge. The lender's rights are more extensive than those that occur under an ordinary lien in the way of trade. These goods were deposited to secure a loan. Therefore, the contract was this, 'If I, the borrower, repay the money, you must return the goods, but if I fail to repay it you may use the security I have left with you to repay yourself.' "[3] In a case in the exchequer court[4] where a party had borrowed a large sum of money giving his own note therefor secured by certain shares of stock and afterwards became bankrupt when the payee sold a sufficient amount of the stock to pay the note, in an action against him by the assignee in bankruptcy it was held that no recovery could be had. It is said, p. 392: "There are three kinds of security; the first, a simple lien; the second, a mortgage passing the property out and out; and the third, a security intermediate between a lien and a mortgage, viz., a pledge whereby a contract, a deposit of goods is

[1] 2 Ld. Raym. 909.
[2] Pothonier v. Dawson, 1 Holt, 385.
[3] Halliday v. Holgate, 3 Exch. 299.
[4] Halliday v. Holgate, 3 Exch. 299.

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made, a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt." And the assignment of an insurance policy on mortgaged premises as further security for the debt is a pledge.[5] But an agreement of a debtor to permit the creditor to take and sell certain property in the possession of a third party and apply the proceeds to the debtor's claim and return the surplus, if any, to the debtor, is merely an executory pledge with power to sell, and where the creditor fails to take possession of the property the agreement has no effect against a subsequent attaching creditor.[6] And as against creditors a pledge of corporate stock must include delivery, and momentary possession of the stock and return of the same to the pledgor are insufficient.[7] And where a debtor authorized his creditor in case of the death of the debtor to take certain policies of insurance from among his papers and hold the same as collateral security for the debt, but nothing to effect such transfer was done during the life of the debtor, it was held that the articles named were not taken in pledge,[8] that the death of the debtor revoked the authority of the creditor to obtain possession of the securities, and as possession of them had not been obtained during the debtor's lifetime, the creditor could not hold them as a pledge.[9] But where a debtor ordered his agent to set apart certain packages containing oil as security for payment of claims of his creditor, it was held that an acceptance in writing of the agent of the creditor transferred the possession of the oil and operated as a pledge for the debt.[10] So where the owner of certain horses agreed with the creditor that he might retain one of the horses as security for the claim for feeding all of them, it was held that the transaction constituted a pledge.[11] But the mere intent to pledge property does not constitute a pledge. There must be a delivery to the pledgee. Therefore, where bonds were held by the president of a railroad company where they never passed from his control there was no pledge of the same to a syndicate of which he was a member, although he may have intended to pledge the same for loans made to the company by the syndicate.[12] It is said: "He still held them as president of the company, and they remained under his control. Whatever his intention in regard to a pledge of the bonds it was never effectuated by any action of the owner of them or by delivering them to Marcus, the trustee of the syndicate."[13] While possession of the property is essential to the execution of a pledge, yet the possession may be according to the nature of the thing pledged.[14] And where property is not capable of manual delivery and possession as where certain shares of the stock of a corporation can be transferred only on the books of the institution, a pledge may be created by a written transfer thereof.[15] In the last case cited the contract was as follows: "$2,000. I promise to pay to Jacob Little or order two thousand dollars for value received with interest at the rate of seven per cent. per annum, having deposited with them as collateral security with authority to sell the same at the broker's board or at public auction or at private sale at option on the non-performance of this promise without notice on" the pledgor. The court held that although there was a waiver of notice there was no waiver of demand, and that such demand was necessary. It was also held that although the transfer was absolute in form, yet it did not appear from the whole proof that the object was to secure a loan, and, therefore, the pledgor had a right to redeem.

Sale Under the Trust.—A trustee under a first mortgage afterwards made a second loan to the debtor taking security in certain second mortgage bonds. It was held that the right of the creditor to sell the trust property according to the terms of the pledge was not affected by the commencement of a suit to foreclose the first mortgage.[16] So where a pledgor of stock in a corporation consented to a sale of a part of it to a person named at

[5] Savings Bank v. Middlekauff, 45 Pac. Rep. 840.
[6] Rowell v. Claggett, 41 Atl. Rep. 173.
[7] McFall v. Buckeye, etc. Assn., 55 Pac. Rep. 253;

[12] Hook v. Ayres, 26 C. C. A. 287.

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a price proposed by the purchaser, the seller will not be permitted to assert that his consent extended only to such sales as he had a joint interest in with the person named.[17] And an action for an accounting will not lie where the pledgor authorizes a sale of the stock at private sale where a short time previously the pledgor had consented to a sale of such stock at the price received.[18] It is said, p. 561: "The complainant, Smith, in the notes evidencing the debts for which the stock was pledged as security, had agreed that the holders of the notes might sell the stock at public or private sale without advertising the same, or without demanding payment or giving notice to Smith, and the validity of such contract is recognized in Illinois."[19] But if the contract had not been carried out in good faith, the debtor, no doubt, could maintain a suit for an accounting. Delivery to the pledgee of things pledged is essential to create the relation of pledgor and pledgee.[20] Some of the reasons are stated in the fourth point of the syllabus of the case cited." The requirement of possession in the pledgee is an inexorable rule of law adopted to prevent fraud and deception. There must be an actual delivery of the chattels as distinguished from a mere promise, and the change of possession must be continuing, not formal, but substantial.[21] The pledgee must take and retain possession of the property as long as he claims the property as pledgee.[22] There must be a delivery either actual or symbolical, as the nature of the goods may require. A mere intent to pledge is not sufficient.[23] Thus, an agreement for the sale of steam boilers then in use in a factory which provided that they shall be taken out and delivered by a time stated in the future is not an executed contract, and does not deliver the title to the proposed vendee.[24] But where the owner actually delivered property to an agent of certain bondsmen of the owner with authority to sell the property and apply the proceeds upon the liability of such owner, it was held that the agent thereby becomes a pledgee and acquires a superior right to such property against all persons except those who have valid prior liens.[25] The reasons assigned for requiring the pledgee to receive and retain possession of a pledge are that he has a mere special property in the thing pledged, and does not possess the legal title. His claim, therefore, is stronger, but somewhat analogous to a common law lien which is lost by a surrender of the thing to which the lien attached. At common law a mortgage of chattels is a sale upon condition, and becomes an absolute interest at law if not redeemed at the time fixed for the satisfaction of the claim, and possession is not indispensable to its validity. The general tendency of the courts at the present time is to treat a chattel mortgage as a mere lien, and the property must be sold either upon statutory notice or under a decree to bar the mortgagor's right to redeem. It will thus be seen that the principal difference between a pledge and a chattel mortgage at the present time is, that the mortgagor may be permitted to retain possession of the property until the time of default or sale of the property. There is another ground of difference, viz., if no time is fixed for the redemption of the pledge, and the pledgee makes no demand on the pledgor to redeem, the latter has his whole life in which to redeem.[26] A tender of the amount for which the pledgor is liable on the day the debt becomes due, whether it is accepted or not, discharges the lien of the pledge, and revests the title in the pledgor free from the claim of the pledgee.[27] In the Minnesota case, which is well considered, it is said: "It is a general principle that tender of payment of a debt to secure which personal property has been pledged, discharges the lien, terminating the special property rights of the pledgee. Coggs v.

[17] Smith v. Lee, 84 Fed. Rep. 557.
[18] Smith v. Lee, 84 Fed. Rep. 557.

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Mitchell v. Roberts, 17 Fed. Rep. 776; Loughborough v. McNevin, 14 Pac. Rep. 773; Ratcliffe v. Vance, 2 Const. (S. Car.) 239; Kortright v. Cady, 21 N. Y. 343; Cass v. Hizenbotam, 100 N. Y. 248, 3 N. E. Rep. 189; Moynahan v. Moore, 9 Mich. 9; Stewart v. Brown, 48 Mich. 383, 12 N. W. Rep. 499. The appellants concede that while the general rule that tender of the amount due at the time it becomes due, discharges the lien of collateral securities, yet contend that such is not the effect of a tender after that time. Such a distinction has been recognized in respect to mortgages, based upon the fact that the legal title has become vested in the mortgagee. No such distinction can be made in the case of bailments of personal property as security." And it was held that a tender at any time after the debt became due discharged the lien. In Tompkins v. Batie[28] it was held that where the tender was after the debt became due, the tender must be kept good. In a later case in the same court it was held that where the obligation is admitted in a suit pending in court, in order to avoid the payment of interest the money must be paid into court.[29] The tender must be without qualifications, that is, there must not be anything which implies that the debtor intends thereby to bar a claim for any amount beyond the sum tendered.[30] It is said: "It is not of the nature of a tender to make conditions, terms, or qualifications, but simply to pay the sum tendered as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender."[31] In Wood v. Hitchcock,[32] Judge Cowen says: "The books are sufficiently nice as to the manner of a tender. The person making the tender may avoid all implication against the idea of a qualification or other circumstance destroying the tender," etc. The more liberal procedure of the courts at the present time would seem to justify, if not require a departure from the strict rules of the common law in that re-

law of tender. And already the courts hold that the creditor is entitled to a reasonable time in which to examine his accounts, and accept or refuse the tender.[33] The tender must be made at or after the day the debt is due, and is of no avail if made before.[34] But where the law made days of grace a part of the contract, and a tender was made by the debtor on the day preceding the first day of grace, and the creditor treated the debt as due, but refused to accept the tender on the ground that he was entitled to hold the collateral to secure another claim of the debtor to the creditor, the court held that both parties in respect to the tender treated the debt as due when the tender was made, and the refusal to accept it was put by the defendants solely upon the ground that they were entitled to hold the bonds as security in another transaction, and that the creditor had waived the objection that the tender was prematurely made.[35] The tender must be in money which is a legal tender;[36] but a tender in bank notes on solvent banks when such notes are in general circulation is a valid tender unless objection is made to the medium of payment offered.[37] In Jennings v. Mendenhall,[38] Brinkerhoff, J., says: "It has long been settled both in England and in this country by cases too numerous and familiar to need to be cited, that a tender of payment in current bank notes where bank notes constitute the common currency of the country is good unless objected to on account of the medium of payment offered." On the same principle a bank check drawn against funds in a solvent bank has been held a good tender unless objections were made by the creditor. If no objection is made on that ground or if objections are made on other grounds—as that the amount tendered

[33] Moore v. Norman, 43 Minn. 428, 45 N. W. Rep. 857; Rost v. Bradley, 49 Mich. 27, 12 N. W. Rep. 896.
[34] Moore v. Kime, 43 Neb. 517, 61 N. W. Rep. 736.
[35] Wychoff v. Anthony, 90 N. Y. 443, Andrews, C.

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is insufficient it will be a waiver of the medium of payment offered.[39]

The right of the pledgor to redeem the pledge inheres in every case, because from its nature a deposit of goods as security redeemable on certain terms, and either with or without a definite time for redemption does not pass the title to the pledgee. Therefore, in order to bar the right of the pledgor he must be given an opportunity to redeem. Under the civil law a pledge could not be sold except under the judgment of the court unless there was a special provision in the contract to dispense with such decree.[40] Under the pressure of modern times for prompt payment the courts of England and this country for more than 100 years have held that reasonable previous notice to the debtor to redeem, and a failure to do so would authorize the pledgee to sell the pledge at public auction to the highest bidder.[41] There are many cases, however, where it is sought to redeem stocks, bonds, plate or other securities of considerable value pledged for the payment of a debt in which a bill in equity is necessary and has been sustained.[42] Where commercial paper is pledged the remedy of the pledgee seems to be to collect the same as it becomes due and not to sell it,[43] but under special circumstances the court may decree a sale. To entitle a court of equity to take jurisdiction the petition should state some equitable ground for relief. Thus, suppose the action is brought by the pledgor to redeem. In an ordinary action there would probably be three main propositions set forth in the petition. 1. A description of the securities pledged and the debts secured thereby. 2. That payment has been made by collections from the securities pledged for said loan by the makers thereof in an amount unknown to plaintiff. 3. That the plaintiff on the ——— day of ——— requested of the defendant an accounting and offered to pay the amount remaining due and unpaid on said loan, but the defendant refused to render an account, etc., with an appropriate prayer for relief." The petition by the creditor will in most cases contain three main propositions, and should show that the debt is due and the pledgor has neglected to pay the same, and should pray for an account and sale of the pledges. In the absence of an agreement to that effect the pledgee cannot retain the goods for any other debt than that for which they were pledged.[44] The assignee of equitable securities pledged may bring an action thereon when due in his own name, accounting to the pledgor for any surplus which he may receive.[45] Where a third party claims an interest in the subject of the action he may intervene to assert or protect his rights.[46] If there are conflicting claims to the property pledged so that the pledgee is in doubt to whom it belongs he may bring an action in the nature of a bill of interpleader making the claimants parties thereto, and in that form of action, it can be determined who is the true owner of the property.[47] Where an action is brought for loss of the pledge or for injury to the same the leading points are the delivery of the pledge [describing it] to the pledgee, his promise to take due and proper care of the same, and his failure to do so, and damages thereby sustained.

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[39] Mitchell v. Vermont M. Co., 67 N. Y. 280, it is said: "There was no objection to the tender at the time it was made, either as to form or amount, and all objections which might have been taken on either ground was therefore waived." Becker v. Boon, 61 N. Y. 317; Jennings v. Mendenhall, 7 Ohio St. 257; Le Pol v. Shutt, 78 N. W. Rep. 288; 2 Greenleaf, Ev. (Lewis Ed.), sec. 601.

[40] Hart v. Ten Eyck, 2 Johns. Ch. 100, and cases cited.

[41] *Id.* Tucker v. Wilson, 1 P. Wms. 161; Lockwood v. Ewen, 2 Atk. 303.

[42] Kemp v. Westbrook, 1 Ves. 278; Wanderzer v. Willis, 3 Brown. 21; Hart v. Ten Eyck. 2 Johns. Ch. 100.

[43] Wheeler v. Newbold, 16 N. Y. 392. A different rule applies to goods and chattels pledged as collateral. *Id.*; the pledgee may foreclose negotiable securities, however, and sell them under the decree of the court.

[44] *Id.*

[45] Citizens' Nat. Bank v. G. W. Elevator Co., 82 N. W. Rep. 186; Seeley v. Wickstrom, 68 *Id.* 1017.

[46] O. S. Ry. Co. v. Benson, 36 Neb. 361. But a mere creditor, although he may have an interest in the subject of the suit will not be permitted to intervene therein. K. C. P. R. Co. v. Fitzgerald, 33 Neb. 137.

[47] Cass v. Hizenbotam, 100 N. Y. 255.

LIBEL AND SLANDER—PUBLICATION.

GAMBRILL v. SCHOOLEY.

Court of Appeals of Maryland, February 21, 1901.

1. The dictation of defamatory matter to a confidential stenographer constitutes a publication.

2. Where one dictates a letter containing defamatory matter to a stenographer, the stenographer's

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notes, typewritten copy, and letter press copy constitute the publication of a libel.

3. In libel, the words charged were actionable *per se*, and defendant requested that the jury be instructed that if the defendant honestly and in good faith believed the statements contained in the letters to be true, and had ground for such belief sufficient to satisfy an ordinarily prudent and cautious man that such statements were true, then the jury might take into consideration all the circumstances of the case, and award the plaintiff nominal damages merely. Held that, the conclusion of the instruction being the converse of a proposition contained in an instruction properly given at the request of plaintiff, it was error to reject defendant's instruction, since thereby the jury were practically told that they must give exemplary damages, and, where there is evidence sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury.

PEARCE, J.: This is an action of libel, in which the appellee recovered a judgment for $500 against the appellant in the superior court of Baltimore city. The plaintiff offered 5 prayers, all of which were granted; and the defendant offered 15 prayers, of which the 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, and 14th were granted and his 1st, 2d, 3d, 9th, and 15th were rejected. A single exception was taken by the defendant to this ruling on the prayers, and the three following questions arise upon the exception: (1) Whether the dictation of alleged libelous letters to defendant's private and confidential stenographer, their reduction by her to stenographic characters, and subsequent reduction to the characters of the alphabet by means of a typewriter, their signing by the defendant, and their transmission by his direction to the plaintiff, are in law a publication of such letters, where there is no communication of any of said letters in any manner to any other person; (2) whether in such case the proper action is for libel or slander; (3) whether, under the testimony in this case, the jury was properly instructed as to the allowance of exemplary or vindictive damages.

There were three counts in the declaration, upon three separate letters, and the case was tried on the general issue plea; there being no plea of justification, alleging the truth of any of the charges contained in any of the letters, either in whole or in part. Of the libelous character of each of these letters there can be no question, but the letter in the 3d count was shown by the uncontradicted testimony to be wholly in the handwriting of defendant, and never to have been read or exhibited to any one but the plaintiff; and the jury was properly instructed by the defendant's 4th prayer that there could be no recovery on the 3d count.

It was very earnestly and ably argued by the appellant's counsel that, as the two letters in the 1st and 2d counts were not otherwise published than as above stated, there was no actionable publication of either letter, so as to make either one a libel, and consequently that the court erred in granting the plaintiff's 3 1-2 and 4 1-2 prayers, and in rejecting the defendant's 1st, 2d, and 3d prayers, which, respectively, raised the contentions of the parties on this point. This is certainly an important question, and one which has never before been raised in this court. Indeed, the appellant's counsel states in his brief that it has never been expressly ruled upon in America, though he has referred us to a case in the appellate division of the Supreme Court of New York (Owen v. Publishing Co., 32 App. Div. 465, 53 N. Y. Supp. 1033), which he contends supports his position. The appellee's counsel has submitted a very full brief, but has referred us to no American case upon this point. If such authorities existed, we may safely assume they would not have escaped the well known diligence of counsel, and we have found none such in our own examination; but the principles and considerations upon which this question should be decided are not, in our opinion, difficult to determine, and the instructive English cases which have been cited are in accord with these principles and considerations.

Before considering the argument of the appellant, it will be well to recall the definition of "publication," given by competent authority, as necessary to constitute slander a libel. Mr. Odgers, in his work on Libel and Slander (page 150), defines "publication" as applicable either to slander or libel, as "the communication of the defamatory words to some third person;" and on page 1 he says, "False defamatory words, if written and published, constitute a libel; if spoken, a slander." It is obvious, however, that publication is essential to either, and that the words "if published," though not repeated in the latter clause, must be understood as if repeated. For to shout aloud defamatory words on a desert moor, where no one hears them, is not a publication of the slander; nor is the utterance of such words in a foreign language a publication, if no one present understands their meaning. *Id.* 151. For the same reason, very clearly, if one should write a defamatory letter, and hand it to a third person, to be read, who does not understand and cannot read that language, there would be no publication of the libel. In Pullman v. Walter Hill & Co. (1891), 1 Q. B. 529, Lopes, L. J., defines "publication of a libel" in the exact words cited from Mr. Odgers; and in the same case Lord Esher, master of the rolls, defines it, more fully, and perhaps with more technical accuracy, as "the making known the defamatory matter, after it has been written, to some person other than the person to whom it is written." Appellant's counsel, in his brief, says, with equal clearness and accuracy, "Publication, in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person other than the parties to the suit."

Bearing in mind these definitions and simple illustrations of what is and what is not publica-

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tion, it will be seen that the argument that there has been no actionable publication in this case divides itself into two branches. The theory of the first branch is that, while there was in fact a physical or mechanical reception by the stenographer of the thoughts expressed by the appellant, such reception was instantaneous only, and merely sufficient for their reduction to written characters, but that there was no comprehension and no lodgment of their meaning in the brain of the recipient, who acted as a mere phonograph, and whose function in that regard was not a mental, but purely a mechanical, process, so that there was no such perception as is requisite to constitute publication. This theory is both ingenious and subtle, but we cannot be persuaded it is sound. We cannot doubt that the dictation to Miss Willis, though taken down in stenographic characters, produced in her mind as full and complete perception of the thoughts of the appellant as a slower dictation, for the purpose of reduction to ordinary characters, would have produced in the mind of one not a stenographer. If this were not so, there could be no assurance that there would be an accurate reproduction of the matter dictated, such as common knowledge gives assurance of from any skillful stenographer. A communication, therefore, to a stenographer, must be regarded precisely as a communication to an ordinary amanuensis, and as establishing all that is ordinarily necessary to constitute publication. The second branch of the argument is that in view of the fact that Miss Willis was the private and confidential stenographer of the defendant, and in view of the almost universal employment in this country of such stenographers, and the necessity for such employment consequent upon the demands of business, a communication to such a stenographer should be made an exception to the general rule, and be held not to be an actionable publication. But we cannot adopt this view. Apart from any precedent or authority, we can perceive no good reason why such an exception should be made to the rule. Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the stenographer is under contractual or moral obligation to regard all his employer's communications as confidential alter the reason of the matter. This defense was made in Williamson v. Freer, L. R. 9 C. P. 393, where it was held that the necessary transmission by a postoffice telegram of libelous matter which would have been privileged if sent in a sealed letter avoids the privilege; Lord Coleridge, C. J., saying, "Although the clerks are prohibited, under severe penalties, from disclosing the contents of telegrams passing through their hands, still there is a disclosure to them." In Pullman v. Walter Hill & Co., already cited, the exact question here presented was decided. There the letter containing the defamatory matter was dictated by the managing director of a corporation to a clerk, who took down the words in shorthand, and then wrote them out fully by means of a typewriting machine, and the letter thus written was copied by an office boy in a letterpress book. When it reached its destination it was, in the ordinary course of business, opened by a clerk of the plaintiff; and it was held that the letter must be taken to have been published both to the typewriter and to the copypress boy, as well as to the plaintiff's clerk. Lord Esher, M. R., in the course of his opinion, said: "I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself." Lopes, L. J., said: "It is said business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter, he must write it himself and copy it himself, or he must take the consequences." Kay, L. J., said: "The consequence of such an alteration in the law of libel would be this: That any merchant or solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent." We were referred to Boxsius v. Goblet Freres [1894] Q. B. Div. 843, as evincing a disposition to qualify the rule in Pullman v. Walter Hill & Co.; but we cannot discover such disposition, and if we could we should not be inclined to follow it. There the libelous letter was dictated by a solicitor, acting in behalf of and at the direction of his client, and copies were made as in the case mentioned. The court distinguished the case very clearly from Pullman v. Walter Hill & Co., holding, through two of the same judges, that the solicitor owed to his client the duty to act on his instructions, and that if the solicitor had communicated directly with the plaintiff the communication would have been privileged, and that he could discharge that duty, as he did other business of the office, in the ordinary way, without losing the privilege. But there was no question of privilege in Pullman v. Walter Hill & Co., and there is none here, as the appellant owed no duty in the matter to any one. The typewriter had no conceivable interest in hearing or seeing the letters, and there could be, therefore, no privilege between her and the appellant. In Owen v. Publishing Co., 32 App. Div. 465, 53 N. Y. Supp. 1033, the alleged libelous letter, relating to the business of a corpora-

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tion, was dictated by its manager to its stenographer, who wrote it out in shorthand, copied it upon a typewriter, and mailed it. The manager and stenographer were held to be servants of a common master, and to be engaged in the performance of duties which their respectivie employments required, and that under such circumstances the stenographer should not be regarded as a third person, in the sense that either the dictation or the subsequent reading should be regarded as a publication by the corporation. The English cases mentioned were not referred to, but the court nevertheless said: "It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged." Upon the exact question here involved the above extract from the opinion in that case seems to afford slender support to the appellant's contention, and what it does decide is not in accord with the views expressed by this court in Carter v. Machine Co., 51 Md. 294, in which Judge Alvey said that it would seem to be now clear, whatever may have been the former state of judicial opinion upon the subject, that corporations are liable for all acts, whether willful or malicious, of their agents or servants, done in the course of their employment, and that actions for such injuries, including libel, could be sustained against corporations in any case where under similar circumstances such actions could be sustained against individuals for the acts of their servants. It is true that that case was not an action for libel, but it sufficiently indicates that this court would not be astute to find reasons for relieving corporations from liability in libel cases for want of technical publication. We think, for the reasons given above, that the defendant's 1st prayer was properly rejected.

Apart from the question of publication, the defendant's 2d and 3d prayers raise the additional question whether, under the pleadings in this case, the action must not have been for slander, instead of libel, but we have no difficulty on this point. We have no doubt that the dictation of these letters to the stenographer was the publication of a slander, for which, if nothing further had been done by either, an action of slander could have been maintained, but we have no more doubt that the stenographic notes, the typewritten copy, and the letterpress copy constituted the publication of a libel, and that either slander or libel could be maintained as ers were properly rejected, not only for the reasons now given, but for those applicable to defendant's 1st prayer, and that the plaintiff's 3 1-2 and 4 1-2 prayers were for the same reasons properly granted."

NOTE.—*What Constitutes Sufficient Publication in Cases of Slander and Libel.*—Exaggeration and misrepresentation of the character and faults of others, if not the greatest, is undoubtedly the most common failing of human nature. The Bible, the oldest and highest authority for this statement gives the following awful commentary on human nature in this regard: "There is none that doeth good, their throat is an open sepulchre, the poison of asps is under their lips, their mouth is full of cursing and bitterness." Again: "Thy tongue imagineth wickedness and with lies thou cuttest like a sharp razor. Thou hast loved to speak all words which may do hurt; Oh thou false tongue, therefore shall God destroy thee forever." And still further: "Let the lying lips be put to silence which cruelly, disdainfully and despitefully speak against the righteous." The world has never found fault with this severe condemnation of its own inherent weakness. Indeed, it has fully shared the sentiment therein expressed, and no law is more stringently enforced than that which condemns the man who "cruelly, disdainfully and despitefully" speaks against his neighbor.

The gist of the action of libel or slander being the injury to one's reputation or the estimate put upon him by his fellowmen, it is absolutely necessary, that before defamatory words become actionable they must be published, that is, communicated to some third person. Therefore defamatory words spoken in an uninhabited wilderness or in the presence of the person of whom they are spoken cannot be the ground for an action of either libel or slander. They must be brought to the attention of a third person and in a language which he can understand. What will constitute a sufficient publication, however, can be more accurately determined by a glance at the authorities. If a person compose a libel and send it to his agent to be read by him, and it reaches its destination and is read by such agent, this is a sufficient publication to support an action. And this rule applies to a publication by a corporation to its agent of the cause of the discharge of an employee. Bacon v. Railroad, 55 Mich. 224. Where defendant sent through the mail a letter addressed to the prosecuting witness, in an envelope with the words "Bad Debt Collecting Agency" printed thereon, he was held guilty of criminal libel. State v. Armstrong, 106 Mo. 395. As this form of libel has arisen quite frequently in late years, being used by certain collection agencies as a means of coercing the payment of bad debts, it will not be unprofitable to quote from the opinion of the case just cited: "Was the sending of this envelope the publishing of a libel? We are clearly of the opinion that it was. The words 'Bad Debt Collecting Agency' were printed in large, bold

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prosecutrix. The envelope on its face was designed to attract the attention of the public, and when the prosecutrix received these letters in these envelopes the fact was thereby published that this association was in correspondence with her for the purpose of collecting a bad debt. • • • The evident purpose and design of the defendant and the association he employed and for whose acts he is responsible in this matter, was to publish the prosecutrix as a bad debtor, a dishonest person, who would not pay her honest debts, and to degrade her in the eyes of the public and her employers, and as such was clearly libelous. Muetze v. Tuteur, 77 Wis. 236; Dennis v. Johnson, 42 Minn. 301; Johnson v. Commonwealth (Pa. 1888), 14 Atl. Rep. 425. The law will not countenance nor tolerate this method of collecting a debt. The fact that the debt was originally only $3.45, that it was barred by the statute of limitations, that defendant persisted in his endeavor to extort the money from the prosecutrix after her protest, and the avowed intention of his agents to publish her to the world, amply sustain the charge that this was maliciously done. To permit a defenseless woman, in this day of enlightenment, to be thus persecuted would be a reproach to our laws."

Publication of defamatory matter through business channels makes the publication none the less actionable nor offers any excuse therefor. For instance, the writing of defamatory matter and delivering it for transmission to a telegraph company is a publication and makes the writer liable. Monson v. Lathrop, 96 Wis. 336. The transmission of a message containing defamatory matter by a telegraph company is a publication by the latter. Peterson v. Western Union Telegraph Company, 72 Minn. 41. The dictation of defamatory matter to a private stenographer is a publication. Pullman v. Hill (1891), 1 Q. B. 5246. This case is explained fully by the court in the principal case and amply sustains its position. The only case of similar character that has arisen in this country is the case of Owen v. Ogilvie Publishing Co., 32 N. Y. App. Div. 465. The court in that case held that where the manager of a corporation dictated a letter containing defamatory words, in relation to the business of the corporation, to his private stenographer, as both persons were employed by a common master and were engaged in the performance of the duties which their respective employments required, the stenographer could not be regarded as a third person in the sense that the dictation to her, or the subsequent reading of the letter by her, could be regarded as a publication by the corporation. We believe the error in this decision lies in the fact that the court overlooked, or at least, failed to give proper respect to the maxim *qui facit per alium facit per se*. The general manager was undoubtedly the agent of the corporation in the writing of this letter and his dictation of the defamatory was a sufficient publication to make the corporation liable therefor. It is the height of absurdity to say that a stenographer in the employ of a corporation is not a are led to believe that no other rule can reasonably be applied to the printing of defamatory matter upon postal cards for delivery through the mail. To make the postal card an exception to the general rule offers an opportunity for scandal mongers and unscrupulous agencies that is not demanded by the necessities of the case. If a man is overcome with a desire to express himself to a certain person in a manner that would be defamatory if addressed to a third person he must take every precaution that his statements, either spoken or written, are not brought to the attention of anyone else in the world than the one of whom they are made.

A. H. ROBBINS.

JETSAM AND FLOTSAM.

LITERATURE AND THE BAR.

Address by George B. Rose, delivered before the Arkansas State Bar Association, May 23, 1901.

It is the proud boast of the law that it is the one profession that embraces every human interest. No matter how exquisite the art, no matter how recondite the science, those who practice it must look to the law for the protection of their rights and the redress of their wrongs. The law is as broad as humanity. Nothing is so high as to be beyond its reach, naught too lowly to feel its fostering care. All classes of men must appear before its tribunals, every kind of act must be submitted to its scrutiny. A lawyer, therefore, ought to know everything, but that is impossible. Ordinarily he must trust to informing himself by special study and investigation when retained in a case involving the application of scientific principles. The science of jurisprudence alone has grown far beyond the capacity of any man to master. Lord Coke said: "Ask me a question about the common law, and I should be ashamed not to answer without looking at the books: but if you ask me a question about the statute I should be ashamed to answer without looking at the books." Lord Coke was the last and perhaps the only one who could say so much about the common law. Certainly many generations have passed since any man has lived who could truthfully assert that he knew one-tenth of its immense and ever-shifting mass. A man could devote a life longer than that of Methuselah to its study and yet feel that he was still upon the confines. Therefore, the greater part of every lawyer's time must be devoted to the study of the law. He must be a mental athlete; and if he neglects his training even for a short period, he loses his strength and suppleness, and falls backward in the race.

Yet he who confines his studies to the law alone makes as great a mistake as he who is always training for the battle. Athletes know that it is as dangerous to be over trained as it is to be deficient in training. Nerves and muscles that are over-trained lose their freshness and elasticity. To attain the highest vigor of mind or body alternations of repose and exertion,

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plined his mind as the sagacious athlete disciplines his body, who has developed his faculties to the utmost and has not overtaxed his strength, is he that is truly blest, and who will prove the swiftest runner in life's crowded race course.

It has been well said that the law is a jealous mistress, and that he who neglects her overmuch will lose her favor. But like many another lady, she comes to us with a sweeter smile because we coquet with others. Women are apt to undervalue the man whom no other woman desires; and the law reserves her richest charms for him whose mind has been broadened and embellished by varied studies.

It were bootless for the busy lawyer to undertake to master any science. He lacks the time. Nor does science afford him the relaxation he requires. There is no repose to be found in scientific pursuits. They demand a strenuous exertion of the mind. The weary lawyer can no more find relaxation in science than the man who is worn out with splitting rails can find it in breaking rocks. He but doubles his labor, stretching the o'er wrought nerves to the point where they must snap. There is occasionally a wonderful phenomenon like the late Justice Bradley of the Supreme Court of the United States, who could amuse his leisure in the calculation of eclipses, but such instances are so rare that they only prove the rule.

But far different is it in the fair field of literature. There the lawyer finds refreshment and repose and gathers many a rare flower to adorn his severer studies. It is the lawyer's natural play ground. Words are the counters with which the lawyer plays his game, where the stake is the life, liberty or fortune of his fellow-men; of words aptly used does literature consist. Without words the lawyer could never practice his profession. The lawyer who uses words most skillfully is he who succeeds the best. St. John says that in the beginning was the word—a dark sentence that has puzzled the brain of many a theologian; but certain it is that words are the beginning and the end of the law. Without words human law could never exist; without words it could pronounce no judgment. The thought is its soul, but words are its body. Without words it would be only a disembodied spirit with no capacity of self-manifestation. Buffon says that style makes the man. In this there is something of exaggeration; but no one who considers the controlling influence that the great writers and speakers have had in the moulding of human destinies can deny its essential truth. One man will express a great thought in obscure or commonplace language and it will pass unheeded. Another will utter the same thought in such terms that it will rouse the nations like a trumpet's peal or lull them to peace like the harping of David in the palaces of Saul.

Therefore, the lawyer who would aspire to eminence in his profession should be a student of literature. Erskine declared that the speeches in Milton's Paradise Lost were the school in which he acquired his magnificent oratory; and Lord Brougham says that to prepare himself for his wonderful defense of Queen Caroline he read with diligence the works of the great tragedians of Greece. There are extraordinary geniuses who by force of natural eloquence have moved assemblies; but their fame was built upon the sand. They have died and left no sign. The great orators whose memory will endure were diligent students of literature, whose style had been disciplined and adorned in the noblest schools. All of them, Demosthenes, Cicero, Lord Chatham, Mirabeau, Webster and the like, were deeply versed in the classics. Not that the study of literature will alone suffice to make an orator. The orator, like the poet, is born, in spite of Horace. But if he would attain to greatness, his talents must be cultivated by the most persistent reading of the masterpieces.

A wide reading is not essential to the formation of style. He who knows the Bible and Shakespeare by heart would have a better style than he who had read aimlessly ten thousand books; and if he has added Homer and Dante, Milton and Byron, Demosthenes and Cicero, Gibbon and Macauley, Burke and Webster, and applied himself constantly to their study till they have become parts of his very soul, he will perhaps attain the highest type of diction. The wading through countless books is a weariness to the flesh, a dispersion of precious energies which must be concentrated to become effective. Half-knowledge that one cannot use is but worthless lumber that encumbers the brain. As the small but disciplined armies of Greece and Rome put to flight the countless hordes of Asia, so the man whose knowledge covers only the narrow field of the noblest writers is the master of a far more effective utterance than he who has read all the books in the congressional library. In search of relaxation the lawyer may well be a discursive reader; but for effectiveness he requires concentration on the best.

And while the great novelists do so much to divert the mind from the cares of life, they teach the lawyer to perform one of his most important duties—to tell the story of his client's case. There are few gifts so important to the lawyer as the capacity for lucid statement, for the artistic development of a story. How often when an attorney has stated his case do we wonder what it is all about! How often are we prepared to decide against him on his own narrative! How often when the adversary has made his reply are we prejudiced against the first speaker for his want of accuracy and candor! The lawyer who can state his case fully, candidly, intelligibly and yet in such a way as to place in the strongest light the merits of his cause has won it half way. I have often heard a distinguished jurist declare that he would rather have a statement of the case from Chief Justice Watkin when at the bar than an elaborate argument from another; that he stated everything with perfect fairness and yet in such a manner that you could not fail to see the facts from the standpoint of his client.

Nor is it alone in his capacity as an orator that the study of literature conduces to the lawyer's success. In every step that he takes its effect is apparent. The most learned of briefs, if its style be diffuse, obscure and dull, will remain unread; or, if it be read, it will carry no weight, and the court will see the cause as through a mist, darkly. On the other hand, if the English be clear, crisp and vigorous, the court will read it with pleasure and will grasp its meaning. In the preparation of briefs the first requisite is clearness. No brief is well made until it is reduced to such simplicity that it looks as if any fool could do it. But that simplicity is the highest art, and one that is only acquired by long study of the masters of expression. And as the carpenter gains time by stopping to sharpen his tools before he goes to work, so the lawyer saves time by the hours that he devotes to literature. How often do we see the lawyer whose English education has been neglected, toiling for days in the preparation of a paper which a scholar could dictate in a few moments! And when it is done, what a monstrosity it is, long, tedious, involved, and tautological—everything that a legal document should not be. Since men usually take up the law as the occupa-

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tion of a life time, they should so equip themselves that its labors may be as light as possible; they are sure to be heavy enough at best. Half the occupation of the lawyer being to write, a facility in composition lightens his toil immensely. To the acquisition of that facility he should therefore earnestly direct his mind, and only by the study of the best literature can it be acquired.

The easiest way of displaying one's culture is to interlard one's discourse with quotations and foreign words. For the first of these a dictionary of familiar quotations suffices; for the second, a smattering of a foreign language. The first marks a man as a pedant, the last as worse. He who has really mastered a foreign language has learned enough of his own in the process to express in it all his thoughts. Nor is it the chief function of literature to supply quotations. It should be absorbed until it becomes a part of our innermost selves, so that while every word we utter is our own, it may bear the impress of antecedent culture. And occasionally, at rare intervals, an apt quotation may be used with telling force.

To the acquisition of a good style a collegiate education is a great assistance, but it is by no means indispensable. If it were, we should have lost the supreme ornament of our literature. Shakespeare, the greatest of all masters of English, in whose hands it is strong as steel and ductile as gold, probably never passed a day at Oxford or Cambridge, certainly was never a student at either university. His only instructor was the village schoolmaster, and the historical and geographical mistakes that abound in his works prove that the good old teacher was oversparing of the rod. And many another who has shed lustre upon our literature has either had no collegiate advantages or has neglected those he had.

In fact, while every man who can afford it should give his children the benefits of a college education, there is a general tendency to overrate its importance. He who has gone through college is apt to think that his education is finished, while he who has not been so fortunate is apt to attribute all of his deficiencies, most of which he could remedy himself if he would, to the want of such instruction. But art is very long and life is very short, and education, beginning at birth, should end only at the grave. The few years of collegiate study cannot make a cultivated man. That is the labor of a lifetime. A college education is an excellent foundation, but it is nothing more. Many of the most accomplished men that the world has ever seen, many of the most splendid ornaments of our own profession, have been entirely self-educated. The man who educates himself labors under considerable disadvantages, but the habits of self discipline and of independent investigation that he thus attains are a priceless acquisition. So far as the enjoyment of literature and the acquirement of style in composition are concerned, he who in his youth has merely learned to read and write is master of the situation. The arts and sciences require instruction, but literature is self absorbed. Some aid may be derived from others, but in that field each man must chiefly work out his own salvation. And as his style, to be effective, must be thoroughly individual, and must clothe his thoughts as with a perfectly fitting garment, it is probable that as many pupils have been injured as benefited by the natural disposition of every teacher to make his scholars conform to his own methods of composition. Of course there are masters of rhetoric whose teaching is beyond price; but they are the exception; and the man who has not worked out his own literary style in the travail of the spirit is apt to be deficient in vigor and individuality. The instructor can teach his pupils to avoid errors; but he cannot show him how to deal sledge hammer blows or to catch those sweet verbal harmonies that haunt the chambers of the memory and exercise so compelling a power over the souls of men.

But perhaps the greatest blessing of literature to the lawyer is the relaxation that it brings. The life of the busy lawyer is a strenuous life. Outside of a war or of a fierce political campaign there are few things more exhausting than a judicial trial. The tension on the nerves is great. The bow is often bent till every fibre quivers, and unless it is relaxed there is danger lest it snap in twain. The lawyer who would last long and work well until the end must have intervals of relaxation. I have known a good many lawyers to break down, but they were generally men who thought of nothing but the law. The bow, kept too long upon a strain, first lost its elasticity and finally broke in two.

If we would keep the mind clear and strong and ready for vigorous exercise we must give it not merely rest, but agreeable diversion. We must at intervals get away from the law, or, jaded by the monotony of the labor, it will make but a poor response to our appeal. There are many diversions that will serve the purpose; but I am persuaded that there is none which in that regard is the equal of literature. Art and nature demand long journeys for their enjoyment; but the masterpieces of literature can be had at every fireside and at a nominal cost. The friends which a man makes among his books are ever faithful and never obtrusive. Unlike living friends, they do not force themselves upon you when you are weary, and they come at your beck when their presence is desired. If you would be merry, you can find among them friends who laugh; if you are sad, you can find consoling companionship in your grief; if you are consumed with the thirst for knowledge, they hasten to throw open to you all the storehouse of learning. Of all associates, they are the most satisfactory. In them are garnered up all the treasures of the human mind. The man who has acquired the taste for reading is in large measure lifted above the vicissitudes of life. Within the four walls of his narrow room he can behold as in a microcosmic glass all that passes in the world and can watch the ever whirring loom of time as it weaves its varied web. He who can go from the toil and strain of the bar to his quiet library and become absorbed in the reading of a book, which like a magic robe will transport him far away to the land where *ultra vires* and contingent remainders are unknown, will find a refreshment of spirit that he would seek in vain elsewhere. Take an illustration from the cognate domain of politics. Do you suppose that Disraeli and Gladstone could have preserved the freshness and vigor of their minds during their long years of fierce political conflict had they not found relaxation and repose in literature? It was that that kept them fresh and ever young.

And literature saves the lawyer from so much ruinous dissipation. When he issues from the court-room, his nerves quivering with the long strain, he has two alternatives, he can brace them with stimulants or he can quiet them by diverting his thoughts. The former resource is quickest and most tempting, but the seeds that it sows are bitter. The last is nature's remedy, and its fruits are health and longevity. Sometimes the lawyer who loves books is also dissipated, but that rarely happens; more rarely than it seems, for the flashy, nervous temperaments that

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so often seek exhilaration in the wine cup frequently make much display with little reading.

And a study of literature becomes more essential to the lawyer every day. Throughout the history of our nation the bar have been the leaders of the people. This is because their superior culture and attainments have entitled them to lead. In the old days when the minds of men were absorbed in the material problem of subjugating our immense continent it was not difficult for the bar to maintain its preeminence. But now all that is changed. Our enormous accumulations of wealth afford to large numbers the leisure for study; and the great universities, rivaling those of Oxford and Cambridge, of Goettingen and Berlin, that have grown out of our humble colleges afford every facility for instruction. If the bar would maintain in the future the proud position that it has occupied in the past, it must recognize the changed conditions and take on a broader, deeper culture.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ANIMALS—Leaving Horse Untied. — A refusal to charge a request in such a case, that "it is not negligence for the driver of a quiet, gentle horse to leave him untied, and otherwise unattended, on the side of a public highway, while the driver is upon the sidewalk loading goods in the wagon," is error.—BELLES v. KELLNER, N. J., 48 Atl. Rep. 1010.

2. ASSIGNMENT — Benefit of Creditors — Rights of Creditor.—M sold land to Z, and agreed to loan him $56,000 to enable him to erect buildings thereon. Z gave a mortgage for the purchase money and the $56,000. Defendant entered into a contract by which it guaranteed M against loss from non-completion of the buildings, and undertook to have the $56,000 applied to the work of construction. When Z made an assignment for the benefit of creditors to plaintiff the buildings were uncompleted, and defendant still had $10,000 of $56,000 under its control. Plaintiff called on defendant to complete the buildings under contract of indemnity. It did so, and, having expended more than the $10,000, refused plaintiff possession of buildings completed, and rented them. Held, that it could not retain the rents to reimburse itself for its expenditures, but must seek repayment on the same basis as other creditors.—LINDSEY v. UNION SURETY & GUARANTY CO., Pa., 48 Atl. Rep. 1081.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS — Death of Assignee—Enforcement.—Where the assignee in a deed for benefit of creditors is dead, or it is charged that in the conduct of the assignment the assignee has perpetrated a fraud, any creditor whose claim has been proved and admitted may bring suit to enforce the assignment for the benefit of himself and of the other proving creditors. Non-proving creditors have no *status* to be admitted as parties complainant in such a suit, nor can it be extended to enforce claims against the decedent assignor's estate acquired after the assignment.—LOUCHEIM v. CASPERSON, N. J., 48 Atl. Rep. 1107.

4. ASSOCIATIONS — Disposition of Funds — Vested Rights.—Where an appropriation of money by a voluntary association was made by the unanimous vote of all the members present, and the committee authorized to make the expenditures for which it was appropriated had incurred liabilities, the rights of the committee to the funds had become vested, and could not be devested by the subsequent dissent of a member of the society.—CARTER v. STRATFORD SAV. BANK, N. H., 48 Atl. Rep. 1083.

5. ATTORNEY—Liability to Client.—An attorney, who is merely asked to draw a contract of sale and for certain advice, is not, in the absence of anything wrong with the papers drawn or the advice, liable to his client for failure of the other party to make payments as agreed.—HARKNESS v. CAVEN, Pa., 48 Atl. Rep. 1090.

6. BANKRUPTCY — Partnership — Discharge of Partners as Individuals.—Where a petition in involuntary bankruptcy was filed against persons named as partners, constituting a firm, alleging as acts of bankruptcy a transfer of property and a general assignment made by the firm, but no act of bankruptcy on the part of the individual partners, and the entire proceedings, aside from clerical errors in the record of the court, show that the adjudication and proceedings related solely to the partnership as a legal entity, the court cannot grant a discharge to the partners as individuals.—IN RE HALB, U. S. D. C., E. D. (N. Car.), 107 Fed. Rep. 482.

7. BANKRUPTCY—Reopening of Estate.—To authorize the court to reopen the estate of a bankrupt, under Bankr. Act 1898, § 2, subd. 8, it should "appear" by some satisfactory evidence that there are assets unadministered, although no formal or technical procedure is required. An unverified petition filed by a creditor, stating on information and belief that the wife of the bankrupt has "money or property" belonging to him, without stating its character or amount, and which is unsupported by affidavits or other evidence, is insufficient to warrant any action by the court.—IN RE NEWTON, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 429.

8. BENEFICIAL ASSOCIATIONS — Sick Benefits—Total Disability.—Where a benefit certificate provided that plaintiff should receive sick benefits if he were sick so as to be "totally disabled, and absolutely, necessarily, and continuously confined to his house," he was entitled to such benefits where he was totally disabled by sickness, but remained in the open air much of the time, under direction of his physician, since defendant's liability depended on the disability of the insured, and not on his confinement to the house, which was merely an evidentiary fact, and not a condition precedent.—SCALES v. MASONIC PROTECTIVE ASSN., N. H., 48 Atl. Rep. 1084.

9. BENEFIT SOCIETIES—Action on Certificate. — In a suit on a benefit certificate issued by an incorporated fraternal order, the plaintiff's declaration averred generally, the performance of all conditions precedent to recovery, and the defendant's pleading specified compliance with a law of the order, alleged to have been enacted after the issuing of the certificate as a condition precedent, the performance of which it intended to contest. Held: (1) That the burden of proving the enactment of such a law was on the defendant; (2) that such enactment could not be proved

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by the testimony of a member of the order that a printed book produced by him, in which such law was included, contained the laws of the order in force at a date stated.—HERMAN v. SUPREME LODGE K. P. OF THE WORLD, N. J., 48 Atl. Rep. 1000.

10. BUILDING AND LOAN ASSOCIATION — Payment on Loan or Stock.—The obligation given by a member of a building association, covering 10 shares of stock, for a loan, provided for the payment of the principal in equal monthly installments, of $10 each, during the time the principal remained unpaid, "according to the act of assembly and the terms and provisions of the constitution and by laws of said association." The by-laws required a transfer of the member's stock as collateral security for the loan, and a monthly payment on each share of $1 till the stock was of a certain value. The member paid, in addition to interest, only $10 per month, which in the association's account with him and in his pass book was entered under the head of "Dues." Held, that such payments were not on the debt, but on the stock. — FREEMANSBURG BUILDING & LOAN ASSN. v. WATTS, Pa., 48 Atl. Rep. 1075.

11. CONSTITUTIONAL LAW—Delegation of Legislative Power.—A delegation of power by the legislature to the circuit court to designate a route for a telephone line through a municipality, in case the municipal authorities do not upon application make the designation within 50 days, is improper and void.—STATE v. MAYOR, ETC., OF BOROUGH OF BOUND BROOK, N. J., 48 Atl. Rep. 1092.

12. CONSTITUTIONAL LAW—Special Act. — The act of March 22, 1901 (P. L. p. 884), providing that the power to license inns and taverns be taken from the governing bodies of certain cities of the third and fourth class and vested in the court of common pleas, is a local and special law, and is unconstitutional and void.—BLACK v. MAYOR, ETC., OF GLOUCESTER CITY, N. J., 48 Atl. Rep. 1112.

13. CONSTITUTIONAL LAW—Special Act. — A law is special, in a constitutional sense, when by force of an inherent limitation it arbitrarily separates some persons, places, or things from others, upon which, but for such limitation, it would operate.—STATE v. HANCOCK, N. J., 48 Atl. Rep. 1028.

14. CONTRACTS—Action on Bond—Fraud as a Bar.—In a suit upon a sealed instrument, the defense of fraud in the consideration is not a bar to the action, where the contract has been executed by both parties, and remains unrescinded, and where the consideration has not entirely failed. Under such conditions, the defendant can only take advantage of the fraud by proving it at the trial, for the purpose of reducing the amount of the plaintiff's recovery. — ROGERS v. BAKER, N. J., 48 Atl. Rep. 1003.

15. CONTRACTS — Action for Services — Architect.—Where an architect was employed to draw plans for a building not to exceed more than $4,500, and the plans made as estimated by him were for a building to exceed $8,000, he cannot recover for services.—EMERSON v. KNEBZELL, Tex., 62 S. W. Rep. 551.

16. CONTRACT—Consideration.—When a deed is made conveying a lot of land for $14,000, and coincidently, for the same consideration, a separate agreement is made by the grantors in the deed to convey to the grantee an adjoining piece under certain circumstances, the deed and the agreement will be considered in this court as one contract, one consideration operating as the purchase money of both.—MYERS v. METZGER, N. J., 48 Atl. Rep. 1118.

same ship, testified that the articles were misread by the consul's secretary, before being signed, as including the return voyage. The master of the ship, the consul general, and his secretary testified that the contract was read by the secretary precisely as written. Held, that the evidence was insufficient to show fraud in the execution of the articles, and hence libelants were not entitled to recover for the refusal of the master to reship libelants for the return voyage on their refusal to sign new articles.—RAMIREZ v. MEXICAN S. S. CO., U. S. D. C., N. D. (Cal.), 107 Fed. Rep. 580.

18. CORPORATION—Contract of Directors.—A special committee of the board of directors of a private corporation, being empowered by the board to contract for the sale of the shares of stock in another company owned by the corporation, stipulated in the contract which they made that the members of the committee should personally have an option to deliver their own shares in the same company to the same vendee at the same price. Other stockholders of the corporation also owned shares in the same company, but no such option was secured for them. Held, that the court would not decree specific performance against the objection of the corporation and its stockholders. —KELSEY v. NEW ENGLAND ST. RY. CO., N. J., 48 Atl. Rep. 1001.

19. EMINENT DOMAIN—Railroad.—Where, in proceedings under Rev. St. 1881, §§ 3906, 3907, providing that, where a railroad company is unable to agree with the landowner as to compensation to be paid for its right of way, appraisers may be appointed to fix the amount, and on exceptions by either party the amount may be determined by jury, when there is abundant evidence justifying a verdict fixing such amount the verdict should not be set aside as contrary to the evidence or excessive, though the evidence is conflicting.—CHICAGO, I. & E. RY. CO. v. LOBB, Ind., 60 N. E. Rep. 819.

20. EXECUTORS AND ADMINISTRATORS — Funds—Taxation.—Code, art. 81, § 9, requires the register of wills to return to the county commissioners a summary account of all property that shall appear by the records of the orphans' courts to be in the hands of each executor and administrator. Held, that where the register of wills returned property for taxation as in the hands of an administrator, after it had in fact been distributed, equity had jurisdiction of a bill to restrain the collection of the taxes, since the levy was not merely irregular, but illegal.—NICODEMUS v. HULL, Md., 48 Atl. Rep. 1049.

21. EXECUTORS AND ADMINISTRATORS—Liability for Interest.—Where an executor's final accounting was delayed by litigation, and he derived no benefit from the retention of money held for the payment of a legacy subsequently declared invalid, meanwhile making all requested advances to exceptant, he is not chargeable with interest for failure to invest such money pending final settlement.—IN RE CORLE, N. J., 48 Atl. Rep. 1027.

22. FIXTURES — Electric Light Fixtures.—Where a hotel which contained electric light fixtures was sold under foreclosure, the mortgagor cannot maintain trover for such fixtures as chattels, since they constituted a part of the realty.—CANNING v. OWEN, R. I., 48 Atl. Rep. 1033.

23. FIXTURES — Sale of Freehold.—Where fixtures have been constructively severed from the freehold, but their physical annexation is permitted, by the purchaser of the realty and of the fixtures, to remain

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defective condition of a highway, and was shown that he knew of such defects, and could have avoided them by going through a field, but the road was not impassable or so out of repair that accident must necessarily result from an attempt to use it, he was entitled to recover if he used due care, and his opportunity for avoiding the danger by leaving the road ought not to be considered by the jury.—COMBS. OF CHARLES CO. v. MANDANYOHL, Md., 48 Atl. Rep. 1058.

25. HUSBAND AND WIFE—Joint Bank Deposit—Estate by Entireties.—J had a deposit in the K bank in his own name changed to the joint account of his wife, E J, so that either could draw it on indorsing the certificates. Subsequently, during J's life, his wife indorsed the certificates to the F bank for collection, and took a certificate of deposit reading, "Received of J and E J $1,981, which sum will be paid to them or their order." Held, that the certificate created an estate by the entirety, and hence the wife was entitled to the deposit on the death of the husband, by right of survivorship.—BREWER v. BOWERSOX, Md., 48 Atl. Rep. 1060.

26. INTERNAL REVENUE — Wholesale Liquor Dealer—Branch House.—Defendant, a wholesale liquor dealer in San Francisco, maintained a branch house in Portland, bearing his sign, and where presumably samples of his trade were kept, and where the public were invited to purchase. The manager thereof was a "salesman" who was required to sell judiciously, the right to cancel his contracts being reserved to his principal, who filled all orders, and, without prepaying the freight, delivered the goods to a carrier at San Francisco, consigned to purchasers in various parts of the agent's territory. Held, that the sales were made wholly at San Francisco, notwithstanding the agent may have been authorized to make binding contracts and collected the purchase money, and defendant was not subject, under Rev. St. § 3244, subd. 4, to the internal revenue tax, as an Oregon liquor dealer, though his method of transacting business may have been devised purposely to evade such tax.—UNITED STATES v. CHEVALLIER, U. S. C. C. of App., Ninth Circuit, 107 Fed. Rep. 484.

27. LANDLORD AND TENANT—Distress for Rent—Death of Tenant.—If a distress for rent be made after the tenant has died intestate, and before administration has been granted, the administrator subsequently appointed, whose title runs back by relation to the death of the intestate, cannot treat as a tort a distraint which would have been lawful if he had then actually been administrator.—BROWN v. HOWELL, N. J., 48 Atl. Rep. 1021.

28. LANDLORD AND TENANT—Lease of Farm.—H entered into an agreement with R, by which he demised to the latter a certain farm for a specified term, giving him the exclusive occupation thereof, and reserving as rent one-half of the crops grown thereon. By the provisions of the agreement, R was prohibited from underletting the premises or assigning "the lease," and was required to keep the premises in repair during the continuance of the term, and surrender possession thereof to H at its expiration. Held, that such an agreement was not a mere contract to work the farm upon shares, constituting the owner and the occupant tenants in common of the crops produced, but was a lease of the farm, creating the relationship of landlord and tenant. Held, further, that by virtue of such agreement the title to the crops produced vested in R as tenant, and that H had no claim upon them until a division was made.—REEVES v. HANNAN, N. J., 48 Atl. Rep. 1019.

29. LIMITATIONS — Suspension — Presentation of Claim.—When a claim is submitted to the jurisdiction of a court for determination, the common statute of limitations and the analogous bars and presumptions in equity and at law are regarded, for all purposes of the pending litigation, as having ceased to operate against the claim, so that, if it be not then barred, the subsequent lapse of time will not defeat it.—FORMAN v. BREWER'S EXRS., N. J., 48 Atl. Rep. 1012.

30. MANDAMUS—Mayor.—When, by statute, it is made a condition precedent to the right of the purchaser at a tax sale under the Martin act to reimbursement for expenses incurred for an abstract of title made to ascertain the owner or mortgagee, or both, of the property purchased, that such fees shall be approved by the mayor, upon his neglect or refusal to act thereon a *mandamus* will issue, directing that he proceed to the performance of the duty thus imposed.—BIERMAN v. SEYMOUR, N. J., 48 Atl. Rep. 1005.

31. MARINE INSURANCE—Construction of Policies—American Clause.—A shipper of wool by rail and water contracted with the steamship company to cover the shipment by marine insurance for an additional rate of freight stated in the bill of lading, which was in accordance with the company's custom. It carried several policies issued about six months before, covering such cargo as it was required by contract to insure, and also its own risk as a carrier. Such policies were all applicable to the cargo in which the wool was shipped. The consignees of the wool, having paid a draft against the shipment attached to the bill of lading, and not knowing whether the goods were insured, reported them for insurance under an open policy carried by them for several years, under which they had covered "wool not previously insured." This was before the goods had actually been received upon the ship, but while they were in course of shipment by rail. All the policies contained the American clause against double insurance, providing that "if the said assured shall have made any other assurance prior in day of date to this policy, then the said assurers shall be answerable only for so much as the amount of such prior assurance shall be deficient," etc. Held, that such clause had no application as between the two sets of policies to affect the validity of either, not being applicable by its terms to insurance under an open policy, and neither the assured, the interests insured, nor the risks insured against being the same in the two cases.—GROSS v. NEW YORK & T. S. S. CO., U. S. D. C., S. D. (N. Y.), 107 Fed. Rep. 516.

32. MARRIAGE AND DIVORCE — Complaint — Cruel Treatment.—In an action by a husband for divorce, the complaint alleged that defendant was frequently cross, and would scold and upbraid him without cause; that at times she would refuse to speak to him for a whole week; that she would get angry and break up dishes and household utensils, and would frequently leave home for a week or more without his consent, when he would be compelled to do the household work in addition to his own work; that she squandered the crops of the farm without his knowledge or consent, and dissipated his property, and drove him to poverty and financial ruin. Held, that the complaint stated a cause of action for divorce for cruel and inhuman treatment, though some of the charges should have been made more specific, had a motion for that purpose been filed.—SPITZMESSER v. SPITZMESSER, Ind., 60 N. E. Rep. 515.

33. MASTER AND SERVANT—Injury to Employee—Fellow-Servant.—Where a shop laborer is killed by a trolley, used for the transportation of iron plates, running off a traveler, the accident being caused by the failure of the foreman, whose duty it was to clean and oil it, the master is not liable, as the foreman, in performing such a duty, was a fellow-servant, and not a vice-principal.—QUIGLEY v. LEVERING, N. Y., 60 N. E. Rep. 276.

34. MISTAKE—Indorsement.—Where plaintiff, who was entitled to a deposit in the joint names of herself and her husband by right of survivorship, indorsed the certificate to the husband's administrator on his representation that it belonged to the estate, and in ignorance of her rights, and there was no evidence that she intended to transfer it to the administrator, the indorsement did not preclude her from maintain-

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ing an action for the deposit.—BREWER v. BOWERSON, Md., 48 Atl. Rep. 1060.

35. MORTGAGES — Foreclosure Sale—Confirmation.—Complainant resists the confirmation of a sale of mortgaged premises by the sheriff under decree of foreclosure, on the ground that he had given instructions to his solicitor, who attended the sale for him, which instructions, if followed, would have resulted in the purchase of the premises for complainant, and benefited him. Held, that if instructions were given, and not followed, a purchaser at the sale will not be deprived of the benefit of his purchase, unless he knew of the instructions, and of their violation, or had information putting him on inquiry, and the price at which he purchased was grossly below the fair market value.—ZIMMERMAN v. PLACE, N. J., 48 Atl. Rep. 994.

36. MORTGAGE—Reformation.—After a corporation has been adjudged insolvent, and a receiver appointed to wind up its affairs, a mortgage given by the corporation, while insolvent, to prefer some of its existing general creditors, which, through a mistake of the draftsman, conveyed only a life estate in its real property, ought not to be reformed by a court of equity so as to embrace the fee, when it appears that the mortgagees did not act to their detriment on the supposition that the mortgage conveyed the fee.—MILLER v. SAVAGE, N. J., 48 Atl. Rep. 1004.

37. MUNICIPAL CORPORATIONS — Defective Street—Failure to File Claim.—Where plaintiff fell and was injured on the sidewalk of defendant city, and the evidence was conflicting as to whether the accident was caused by a hole in the walk or by ice thereon, and there was doubt as to whether the place of injury was a culvert or a bridge, sufficiently important questions were involved, so that on a showing by plaintiff that she was unavoidably prevented from filing her claim within 10 days, as required by Pub. St. ch. 76, § 7, she was entitled to leave to file a claim under Pub. St. ch. 76, § 9, providing that, if any person receiving injuries from defects in a highway is unavoidably prevented from filing a claim within the statutory time, the supreme court may allow such claim to be filed, if manifest injustice would otherwise be done.—WELSH v. CITY OF FRANKLIN, N. H., 48 Atl. Rep. 1102.

38. NEGLIGENCE—Construction of Subway—Accumulation of Gas.—The existence of a duty on the part of a telephone company, when constructing a subway, to anticipate and provide against the accumulation of illuminating gas therein, depends upon whether or not the escape of such gas from the mains and service pipes of the gas company can be prevented by the latter by the use of reasonable care.—CHALMERS v. PATTERSON, P. & S. TEL. CO., N. J., 48 Atl. Rep. 993.

39. PARTNERSHIP — Accounting — Res Judicata.—A finding, in suit for partnership accounting, that, as between the parties, the firm is composed of plaintiff and defendant S, and not of defendants H and S, does not establish the partnership as against creditors of H; so that there should be no decree for payment of balance due to plaintiff till determination of attachment pending against S as garnishee of H, on the ground that H and S compose the firm.—LYONS v. LYONS, Pa., 48 Atl. Rep. 1079.

40. PLEADING AND PRACTICE — Summons — Place of Service.—Where a person has several residences, which he permanently maintains, occupying one at one period of the year and another at another period, a summons must be served on him at the dwelling house in which he is living at the time of the service. —CAMDEN SAFE DEPOSIT & TRUST CO. v. BARBOUR, N. J., 48 Atl. Rep. [illegible]

from the engine and the blowing of the whistle.—SIMMONS v. PENNSYLVANIA R. CO., Pa., 48 Atl. Rep. 1070.

42. RAILROADS—Earnings—Net Receipts.—The phrase "ten per cent. on their expenditures," in Laws 1844, ch. 128, § 11, providing that when the net receipts of railroad corporations shall exceed 10 per cent. on their expenditures the balance shall be paid to the State, refers to the sum actually contributed by the stockholders, and not to the entire amount expended in the construction of the road; and hence the State is entitled to recover the amount by which the net receipts exceed 10 per cent. of the actual investments of the stockholders, though such receipts may not exceed 10 per cent. of the whole cost of the road.—STATE v. MANCHESTER & L. R. R., N. H., 48 Atl. Rep. 1103.

43. RECEIVERS AND RECEIVERSHIPS—Franchise Tax—Preferences.—A franchise tax levied by the State during the receivership of an insolvent corporation is entitled to payment in preference to the liabilities incurred by the receiver in carrying on the business of the insolvent corporation, but not to payment in preference to the receiver's allowance and the expenses of winding up the corporation.—CHESAPEAKE & O. RY. CO. v. ATLANTIC TRANSP. CO., N. J., 48 Atl. Rep. 997.

44. SALE — Implied Warranty — Inspector. — Where canned peas are sold by importers by a description known to the trade to refer to the highest grade packed by them, no warranty as to their quality is implied, where it is ascertainable by inspection of one or more cans in every hundred, which inspection is the usual custom of the trade.—WARBBER v. TALBOT, N. Y., 60 N. E. Rep. 268.

45. SHIPS AND SHIPPING—Collision—Mutual Fault.—A brig which had gone ashore in the Narrows was suddenly floated by the action of the wind, her sails having been trimmed with that object, and going astern with the rising tide without any means of control, came in collision with a scow which was passing in tow of a tug, about 50 feet distant. The captain of the brig was the only person on deck at the time, no precaution had been taken to control her when she should come off, and no signal of danger was given to the approaching tug, nor was any attempt made to control her until too late to avert the collison. On the other hand, a proper lookout on the tug could have seen the brig, and understood her situation, and the tug could easily have passed at a safe distance. Held, that both vessels were in fault for the collision, and liable for the injury to the scow.—THE F. W. VOS BURGH, U. S. D. C., E. D. (N. Y.), 107 Fed. Rep. 589.

46. SHIPS AND SHIPPING — Collision—Steam Vessels Meeting in Channel.—A transfer tug passing down East river with a car float on either side held in fault for a collision with a schooner coming up in tow, which occurred as she was rounding Horn's Hook between the shore and the center of the channel, on the ground that, being in a position where careful navigation was required, owing to the number of vessels passing and the flood tide, after having agreed to allow the tug and schooner to pass ahead of her, she also assented to the signal of another tug coming up nearby, abreast of the schooner, with a tow on each side, to permit the latter to pass across her stern, and thereby placed herself in a situation where she was unable to avoid collison with one of the two passing vessels.—THE WILLIAM J. SEWELL, U. S. C. C. of App., Second Circuit, 107 Fed. Rep. 583.

47. SHIPS AND SHIPPING—Collision in Fog.—A steamboat and a ferryboat collided in a harbor in a fog so dense that neither vessel could see the other at a greater distance than 20 or 25 feet. Both vessels were moving at a very moderate speed, and fog signals

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the practice is to equally divide the damage.—THE HANSON H. KEYS, U. S. D. C., D. (Md.), 107 Fed. Rep. 587.

48. SHIPS AND SHIPPING—Suit for Demurrage.—A provision of a charter allowing the charterer a certain number of lay days for loading and discharging, and requiring the payment of demurrage for any additional time taken, is an absolute and unconditional engagement on the part of the charterer, who cannot be relieved therefrom except on the ground that the delay was due to the fault or negligence of the owner, or those for whom he is responsible; and such fault or negligence is an affirmative defense in a suit to recover the stipulated demurrage, the burden of pleading and proving which rests upon the charterer.—HAGAR V. ELMSLIE, U. S. C. C. of App., Third Circuit, 107 Fed. Rep. 511.

49. STATUTE OF FRAUDS—Indemnity.—A promise by one person to indemnify another for becoming surety upon the bond of a third is not within the statute of frauds, and will support an action, although not in writing.—HARTLEY V. SANDFORD, N. J., 48 Atl. Rep. 1009.

50. STREET RAILROAD—Location—Determination of Commissioners.—Const. art. 3, § 18, and Laws 1899, ch. 656, § 94, providing that on application for leave to construct a street railroad, the determination of commissioners, confirmed by the court, may be taken in lieu of the consent of the property owners, the determination thus referred to means one only that is in favor of the road; and there is therefore no express authority for the action of the appellate division when the report is unfavorable.—IN RE NASSAU ELECTRIC R. CO., N. Y., 60 N. E. Rep. 279.

51. STREET RAILWAYS—Contributory Negligence.—One who thinking he can drive across the street in front of an electric car, which he sees approaching, attempts to do so with the result that there is a collision when the front wheels of the wagon are on the track, is guilty of contributory negligence.—TYSON V. UNION TRACTION CO., Pa., 48 Atl. Rep. 1078.

52. STREET RAILWAYS—Control of Streets.—A trolley railway track, laid in accordance with the direction of the special ordinance, will not be enjoined from operation because its location works incopvenience and injury to the abutting owners.—BUDD V. CAMDEN HORSE R. CO., N. J., 48 Atl. Rep. 1028.

53. STREET RAILWAYS — Negligence — Pleading. — A complaint alleging that a street car was stopped to allow a passenger to alight, and that while she was in the act of getting off, and before she had a reasonable time to do so, it was started, with a sudden quick jerk causing her to be thrown, "all of which was without any negligence on her part contributing thereto," sufficiently negatives contributory negligence.—CITIZENS' ST. RY. CO. V. HUFFER, Ind. 60 N. E. Rep. 816.

54. TELEPHONES AND TELEGRAPHS — Failure to Deliver Message. — Burns' Rev. Stat. 1894, §§ 5511, 5512 (Horner's Rev. Stat. 1897, §§ 4176, 4176a), making a telegraph company liable for penalty of $100 for a failure to deliver a telegraph message to the sendee, does not render a telegraph company liable for such penalty for the failure to deliver a message received within the State for transmission to a point outside the State.—WESTERN UNION TEL. CO. V. CARTER, Ind., 60 N. E. Rep. 805.

55. TENANCY AT WILL — Notice to Terminate. — A three-months notice is sufficient to terminate a tenancy at will or at sufferance, or from year to year, under section 109 of the District Court Act of 1898, and to justify a judgment for dispossession, when proven to the satisfaction of the judge.—STATE V. GUVERNATOR, N. J., 48 Atl. Rep. 1028.

56. TORTS—Personal Injuries — Written Release.—A libelant's claim for personal injuries against a schooner was settled by the agent of a casualty company, which had insured the vessel against liability for such injuries, the libelant signing a written release, and accepting a specified sum therefor. He averred that he was tricked into signing it by the way the paper was read to him, though admitting that he was able to read the same. Held, that to be relieved from the effect of his carelessness in not insisting on the right to read it himself, he must clearly show that he was defrauded; and there being nothing to corroborate his own testimony, which was positively contradicted by the company's agent, the libel should be dismissed.—THE ANNIE L. MULFORD, U. S. D. C., E. D. (Pa.), 107 Fed. Rep. 525.

57. TRADE LABELS—Infringement—Preliminary Injunction.—To authorize the granting of a preliminary injunction against unfair competition by imitation of packages, the right should be clear; and where it was not shown in support of the motion that any purchaser had ever in fact been deceived, and the question whether the similarity complained of was such as was likely to deceive ordinary purchasers could not be determined with certainty on the evidence adduced, the discretion of the trial court, exercised in denying the motion, will not be interfered with by the appellate court.—PFEIFFER V. WILDE, U. S. C. C. of App., Third Circuit, 107 Fed. Rep. 456.

58. TREATIES—Construction of Treaty with Russia.—Article 9 of the treaty of 1832 between the empire of Russia and the United States, which authorizes consular officers of either country to apply to the competent tribunals of the other for the arrest, detention and surrender of deserters from "ships of war and merchant vessels of their country," and provides that such deserters shall be surrendered "on proof, by the exhibition of registers of vessels, the rolls of the crew, or by other official documents, that such individuals formed part of the crews," cannot be extended beyond its terms, so as to apply to deserters generally; and it does not authorize the arrest and detention by the authorities of the United States, on application of a Russian consul, of a member of the Russian navy who, with others, had been sent to this country in charge of an officer, to form part of the crew of a cruiser being built here for the Russian government, but which had not been completed or accepted, or its crew organized, at the time such person deserted.—MOTHERWELL V. UNITED STATES, U. S. C. C. of App., Third Circuit, 107 Fed. Rep. 437.

59. TRIAL—Directing Verdict.—Though, even where the evidence is sufficient to sustain it, a verdict may be properly set aside, and a new trial granted, yet the court in such a case cannot, whenever it sees fit, direct a verdict, if the evidence presents an actual issue of fact.—MCDONALD V. METROPOLITAN ST. RY. CO., N. Y., 60 N. E. Rep. 268.

60. WILLS—Perpetuties.—A testator gave to his executor in trust $1,000, the interest thereof, less the taxes, to be applied to keeping his burial plot in C graveyard in good order, and any surplus remaining to be used to repair fences around the graveyard. Hold void, as an attempt to create a perpetuity, being neither a charitable bequest nor a gift to a cemetery association, within 1 Gen. Stat. p. 851, § 14, empowering incorporated domestic companies or associations to take and hold property given in trust, and to apply the income thereof for the improvement, repair, and embellishment of such cemetery.—IN RE CORLE, N. J., 48 Atl. Rep. 1027.

61. WILLS—Presumption against Partial Intestacy.—A will purporting to dispose of all of testator's property created a trust in a portion of his property for the benefit of B for the life of the latter, with directions that on his death $500 should be paid to testator's wife, and the remainder to his son. The wife died before the termination of the life estate. Held, that the estate of the wife became entitled to the $500 on the termination of the life estate, since the son was only entitled to the remainder after excluding such bequest, and the law does not favor partial intestacy. — DAUGHTERS V. LYNCH, Md., 48 Atl. Rep. 1055.

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A recent New Jersey case raises a question of matrimonial law which is in the nature of a *quære*, a decision of the point not being vital to the determination of the action. The case is Hires v. Hires, decided by the Court of Chancery of New Jersey, and the question propounded is whether mere abstention by a husband from the exercise of his marital rights is willful, continued and obstinate desertion, within the meaning of the New Jersey statute, where he continues to live in the same house with the wife, though occupying a separate sleeping room, and pays, though in parsimonious fashion, for the support of the wife. Mr. Bishop, in section 1678 of his treatise on Marriage, Divorce and Separation seems to state the correct doctrine on this question as follows: "A man may lawfully obligate himself to support a woman not his wife, or to support her children, or to retain her in his house as long as they both live, and to be kind to her. She may bind herself in a corresponding way to him. Indeed, there is but the one thing which is special to marriage, and is lawful in no other relation. All else pertaining thereto a man and woman may mutually contract for, and do, without taking the first step toward marriage. The unavoidable conclusion from which reason is that the married party who permanently and irrevocably withdraws from all that is peculiar to marriage, whatever incidentals he may adhere to, commits matrimonial desertion."

A most interesting decision was rendered by the Court of Appeals of Kentucky, in the recent case of Lynn v. Moss, 62 S. W. Rep. 712, where it was held that though champerty is the only form of maintenance forbidden by the statutes of Kentucky, the ancient rule of the common law against simple maintenance is yet in force in that State; and that therefore an agreement by one who was not a lawyer to assist infant heirs, to whom he was not related, in the contest of a will, by rendering personal services as their agent, in consideration of "a sum equal to" a certain part of what might be recovered, was void where the litigation was the result of the agent's interference and intermeddling. This decision is certainly against the custom and decisions of other states of the Union where it is generally conceded that "owing to their long disuse and the great change of conditions since the time when it was found necessary to apply the harsh doctrines of the common law on this subject, the acts then denounced are no longer illegal." However, in many jurisdictions, the question has never definitely come up for decision whether the offense of maintenance at common law is still in force independent of statutory enactment. But considering the prevailing practice among a certain class of lawyers to employ "runners" to work up damage suits for them, and other similar arrangements, it is strange that the question has not been more often litigated. In the case we are considering the question arose, not in a criminal, but in a civil proceeding between the attorney and the "agent" who employed him for a division of the fee. It was held on this point that though the contract was made in the name of an attorney whose employment the agent procured under an agreement that the agent was to share the fee, which had been collected by the attorney, the agent could not require the attorney to divide with him, the contract being illegal.

The mortgage tax amendment adopted by the people of Missouri at its last general election, has just been declared by the supreme court of that State to be in violation of the fourteenth amendment of the constitution of the United States. This amendment was borrowed from the constitution of the State of California, where it was adopted in 1879, and where it is still the law. The effect of the adoption of this amendment in California was exhaustively treated in 51 Cent. L. J. 443, where the result of our investigation showed it to have been a collosal failure. We also discovered that the real intent and purpose of the amendment was to prevent double taxation by considering the mortgage as an interest in the real estate by which it is secured, thereby requiring the mortgagee to make no return on the mortgage as personal property, as formerly the case, but to have it assessed against him

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as part of the real estate, and requiring the mortgagor to pay taxes only on his interest or equity, in the same property. That part, however, of the amendment, which the Missouri court holds to be in violation of the fourteenth amendment is embodied in the first clause, as follows: "A mortgage, deed of trust, etc., shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, *except as to railroad and other quasi-public corporations.*" The italics represent the fatal words, which in the opinion of the Supreme Court of Missouri unjustly discriminates against those persons holding mortgages not coming within the exception, and who are thereby denied the equal protection of the law. Four judges dissent. The principal ground of objection to the decision of the court in this case is the fact that a legislature has the power to select the subjects of taxation, and may place one kind of property in a class by itself and tax it differently from other property. That is the general rule, but in answer to this objection the court quoted with approval the words of Caldwell, J. in Railroad Co. v. Walker, 47 Fed. Rep. 681: "But conceding that railroads may be classed by themselves for purposes of taxation, and taxed by a method applicable to them alone, still that classification and method of taxation must be restricted to what is railroad property. It cannot be extended to lands which have no relation to the railroad, or its use or operation. It is not competent for the legislature, under the fourteenth amendment, to classify lands for purposes of taxation, into lands owned by railroad companies, and lands owned by all other persons. and declare that the former should not and the latter should be taxed."

NOTES OF IMPORTANT DECISIONS

BANKRUPTCY — DISCHARGE OF INDIVIDUAL PARTNERS IN PARTNERSHIP PROCEEDINGS.—The District Court of the United States for the Eastern District of North Carolina, in the case of *In re* Hale, 107 Fed. Rep. 432, has decided that where a petition in involuntary bankruptcy was filed against persons named as partners, constituting a firm, alleging as acts of bankruptcy a transfer of property and a general assignment made by the firm, but no act of bankruptcy on the part of the individual partners, and the entire proceedings show that the adjudication related solely to the partnership as a legal entity, the court cannot grant a discharge to the parties as individuals.

CORPORATIONS—MAJORITY STOCKHOLDERS AS TRUSTEES.—A most important point of law of especial interest to minority stockholders was recently decided by the New York Court of Appeals, in the case of Saranac Railroad Co. v. Arnold (not yet reported). The point decided was that officers of a corporation who own substantially all the stock do not own the corporation itself. It is not their chattel, but is a distinct legal entity, with the right to own property; and they cannot appropriate its property to their own use any more than any other agent or trustee can appropriate the property of his principal. The court is not ambiguous in the statement of its position:

"While the defendants owned substantially all the stock, they did not own the corporation itself. It was not their chattel, but was a distinct legal entity with the right to own property, and they could not appropriate its property to their own use any more than any other agent or trustee can appropriate the property of his principal. Buffalo Loan, etc. Co. v. Medina Gas, etc. Co., 162 N. Y. 67, 76. Through their voting power they could manage and control its affairs, but only as trustees, and they were bound to observe the rule of *meum et tuum*, and to be as true to the corporation as if they had sustained the same relation to an individual. Hence, if they took any of the plaintiff's money or property for themselves they are liable the same as if, under similar circumstances, they had taken the money or property of an individual."

LIFE TABLES AS EVIDENCE.—Are life tables conclusive evidence of the duration of human life? That question was decided recently by the Supreme Court of Iowa, in the case of Trott v. Chicago, R. I. & Pacific Railway Co., 86 N. W. Rep. 33, where it was held in a suit by a servant for personal injuries, that an instruction, "if you find for plaintiff, you will consider the age he would probably have reached if he had remained in good health, as ascertained by the tables of the expectancy of human life introduced in evidence is erroneous, as making the life tables conclusive as to the age he would probably have reached," whereas such tables are only evidence thereof. Defendant asked for an instruction to the effect that the expectancy of life does not necessarily apply to persons engaged in hazardous employment, but is based upon the observed expectancy among persons in ordinary pursuits. This instruction was refused. The court said:

"The instruction given makes the life tables conclusive as to the age he would probably have reached. This certainly is not the rule. They are not conclusive upon the duration of life, but are competent to be weighed with other evidence. The physical condition of the injured person at the time next preceding the injury, his

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general health, his avocation in life with respect to danger, his habits, and probably other facts, enter into the question of the probable duration of life. Railway Co. v. Chambliss (Ala.), 11 South. Rep. 897; Railroad Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. Rep. 1, 30 L. Ed. 257; Scheffler v. Railway Co. (Minn.), 21 N. W. Rep. 711."

CORPORATIONS — LIMITATION OF ACTIONS AGAINST STOCKHOLDERS.—There are statutes in many States providing for the enforcement of the debts of a corporation against the stockholders generally by suit in equity, or by an action of debt on the judgment against the corporation. In passing upon the question of when the statute of limitations begins to run on the right of action thus given, the Supreme Court of Rhode Island, in the case of Kilton v. Providence Tool Co., 48 Atl. Rep. 1039, held that since the right of action on the debt did not accrue as against the stockholder until the creditor had exhausted his remedy against the corporation, the statute did not begin to run in favor of the stockholder until that time, although the liability on the debt attaches to the stockholder when the debt is incurred. The court said: "It is argued by some of the defendants that the liability of the stockholder, at least under section 1, is primary and absolute from the time of contracting the debt, and that, therefore, the statute of limitations begins to run in his favor immediately. Such would doubtless be the case if an action against him were given immediately, as in some of the cases cited by counsel. In Stilphen v. Ware, 45 Cal. 110, the statute in force (Stat. 1850, ch. 127, § 30) provided: 'The preceding sections of this act shall not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created.' It is further provided (Stat. 1850, ch. 128, § 32): 'Each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities proportioned to the amount of stock owned by him.' The case held that in a suit upon a debt due from a corporation the liability of the stockholder 'was created' when the debt became due. Hardman v. Sage, 124 N. Y. 25, 26 N. E. Rep. 354, holds that, where the statute made stockholders liable only for such corporation debts as were payable within one year from the time they were contracted, the extension of time of payment beyond a year released the stockholders from liability. The liability attaches to the stockholder when the debt is incurred, but no statute of limitation begins to run in his favor until a right of action against him is acquired by the creditor. Bank v. Dallam, 4 Dana, 574; Hawkins v. Furnace Co., 40 Ohio St. 507; Bronson v. Schneider, 47 Ohio St. 438, 33 N. E. Rep. 233; Handy v. Draper, 89 N. Y. 334; Powell v. Railway Co., 38 Fed. Rep. 187; Longley v. Little, 26 Me. 162; 2 Mor. Priv. Corp. § 22, note 3; 1 Cook, Stock, Stockh. & Corp. Law, §§ 195, 225f. The statutes of limitation likewise affect remedies, not obligations. The creditor, under our statute, cannot bring debt on judgment until he has obtained the judgment, and when his right of action accrues the statute of limitations begins to run against him."

WILLS—LIFE TENANT—PAYMENT OF MORTGAGE—SUBROGATION AGAINST REMAINDER-MAN.—Several interesting questions arising out of the relation of a life tenant under a will to the remainder-men when the former has been given the right to sell property and reinvest the proceeds, are decided in the case of Dougherty v. Connolly (N. J.), 48 Atl. Rep. 777. In this case the testator's will gave his wife a life estate in his property with power to sell and invest the proceeds; the income to be hers for life. She was also made the executrix under the will. Part of the realty had been incumbered by the testator, which incumbrance the executrix paid off out of the personal estate and then conveyed her life estate therein to C. C claimed as against the remainder-men to be entitled to be subrogated to the benefit of the mortgage on the property which had been paid off by the tenant for life. The court said:

"Mrs. Dougherty, considered merely as the life tenant of the real estate, subject to an incumbrance created by the testator himself, and devised to her for life, was undoubtedly entitled to redeem the mortgage, and upon the payment of the mortgage to hold it uncanceled, if she chose, and to be subrogated to the rights of the mortgagee. As against the personal representative of the testator, this right of subrogation extends to the immediate payment of the mortgage debt, inasmuch as the personal estate is the primary fund for the payment of mortgage debts created by the testator himself. McLenahan v. McLenahan, 18 N. J. Eq. 101; Campbell v. Campbell, 30 N. J. Eq. 415; Coudert v. Coudert, 43 N. J. Eq. 407, 409. And if there is no personal estate, and the lands incumbered have been sold, and all the estates in the land are represented by funds in court, then the life tenant redeeming is entitled, as against the remainder-men, to immediate payment of the principal of the mortgage out of the funds in court, and will not be barred by her cancellation of the mortgage through inadvertence or ignorance. Kocher v. Kocher (N. J. Ch.), 39 Atl. Rep. 535. * * * As to the second question, the right to require immediate payment by the remainder-men of the principal sum, the authorities as to the rights of a life tenant to redeem, so far as I have examined them, seem to establish that the life tenant's right of redemption is prior to that of the remainder-men, but that, inasmuch as his right of redemption is based on the rights in the lands given by the

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will, his redemption is allowed for the primary purpose of carrying out the trusts of the will for all parties, the remainder-men as well as the life tenant, and therefore the life tenant's title held under the mortgage, or by the mortgagee's reconveyance, if one is made, is a title upon the trusts of the will, and the reconveyance will be directed to be made upon these trusts. The remainder-men therefore cannot be called upon to redeem the principal before the termination of the life estate, and in the meantime the life tenant holds a charge on the lands for the principal paid, which upon his death is enforceable by his personal representative, or other assignees of the claim. Wicks v. Scrivens, 1 Johns. & H. 215; Pearce v. Morris, L. R. 5 Ch. App. 227, 230; Jones, Mortg. (5th Ed.) par. 1065.

FEDERAL COMMON LAW.—In answer to the question whether the federal courts are bound by common law, Justice Brewer, in the case of Western Union Telegraph Co. v. Call Publishing Co., 21 Sup. Ct. Rep. 561, gives the following interesting explanation:

"In Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, it was said by Mr. Justice Matthews, speaking for the court: 'There is no common law of the United States, in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law and subject to such alteration as may be provided by its own statutes. Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State. P. 478, L. Ed. 512, Inters. Com. Rep. 808, Sup. Ct. Rep. 569.'

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of congress.

"What is the common law? According to Kent: 'The common law includes those principles, usages and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature.' 1 Kent, Com. 471. As Blackstone says: 'Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom. This unwritten, or common law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification.' 1 Bl. Com. 67. In Black's Law Dictionary, page 232, it is thus defined: 'As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.'

"Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule, except that to be found in the statutes of congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."

THE CONSTITUTIONAL PROTECTION OF THE OBLIGATION OF CONTRACTS.

1. *Generally.*—The constitution of the United States binds the States, not the United States, by the provision that "no State shall * * * pass any * * * law impairing the obligation of contracts."[1] It may be said that the obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence

[1] U. S. Const. art. 1, § 10.

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when it is made; they are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other.[2] Contracts between any parties capable of binding themselves are within this provision of the constitution,[3] as between two individuals,[4] between corporations or a corporation and an individual,[5] between two States,[6] between a State and an individual or a corporation.[7] This provision applies to implied as well as express contracts. The constitution makes no distinction between the one class of contracts and the other.[8] But this provision has no application to a law in respect to contracts made after its passage. It is only those in existence when the hostile law is passed that are protected from its effect.[9] The invalidity of the State law, as impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract. Any deviation from the terms of the contract, by postponing or accelerating its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation.[10] It is immaterial whether the law impairing the obligation of the contract is an ordinary act of legislation or is embodied in the organic law of the State, it being well settled in reference to this clause of the constitution that a State constitution is a law within the meaning thereof.[11] When parties have entered into a contract valid at the time by the laws of the State, it is not competent for the legislature or courts of the State to impair the obligation of that contract.[12] And statutes which change the rules relating to the discharge of contracts, the medium of payment, or the measure of damages, are unconstitutional if applied to contracts made prior to their passage.[13] In other words, no act of the legislature can alter the nature and legal effect of an existing contract to the prejudice of either party.[14] But there is nothing in the constitution which forbids congress from passing laws which impair the obligation of contracts.[15] The determination of the existence or non-existence of the contract set up, as well as the question of its impairment by State statute, is within the paramount authority of the Supreme Court of the United States, when reviewing the final judgment of a State court respecting an enactment alleged to violate the contract clause of the constitution.[16] The rule that the federal courts will not accept as conclusive the construction which a State court has put upon the constitution and its laws in determining the existence of a contract or its violation, when considering whether a State law impairs the obligation of a contract, has no application where a prior judgment of the State court in a suit between the same parties is pleaded in a suit in the federal court as *res judicata* between the parties.[17]

2. *The Parties and the Contract.*— This provision of the constitution has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It is believed that the word "contracts," in this provision, is employed in its broadest sense, for example, as including even statutes and judgments.[18] And the reason is, that there is no

[2] McCracken v. Hayward, 2 How. (U. S.) 608; Curran v. State of Arkansas, 15 How. (U. S.) 304.

[3] Green v. Biddle, 8 Wheat. 1.

[4] Hills v. Carlton, 74 Me. 156; Holt v. Patterson, 74 N. C. 650.

[5] Gilfillan v. Union Canal, 109 U. S. 401; Louisiana v. St. Martin's Parish, 111 U. S. 716; Hovelman v. Kansas City Horse Railroad, 79 Mo. 632.

[6] Green v. Biddle, 8 Wheat. 1; Spooner v. McConnell, 1 McLean, 337.

[7] Fletcher v. Peck, 6 Cranch. 87; Terrett v. Taylor, 9 Cranch. 43; Pawlet v. Clark, 9 Cranch. 292; Hart v. Lamphire, 3 Pet. 280.

[8] Story on the Const. § 1377.

[9] Lehigh Water Co. v. Easton, 121 U. S. 388; Denny v. Bennett, 128 U. S. 489; Powell v. Madison, 107 Ind. 106; People's Sav. Bank v. Tripp, 18 R. I. 621.

[10] Green v. Biddle, 8 Wheat. (U. S.) 1.

[11] White v. Hart, 13 Wall. (U. S.) 646; Railroad Co. v. McClure, 10 Wall. (U. S.) 511; Gunn v. Barry, 15 Wall. (U. S.) 610; Dodge v. Woolsey, 18 How. (U. S.) 331; Williams v Bruffy, 96 U. S. 176; Lehigh Valley R. Co. v. McFarlan, 31 N. J. Eq. 706.

[12] Robinson v. Megee, 9 Cal. 81; Chicago v. Sheldon, 9 Wall. (U. S.) 50.

[13] Dundas v. Bowler, 3 McLean, 397; Abercrombie v. Baxter, 44 Ga. 36.

[14] King v. Dedham Bank, 15 Mass. 447.

[15] Evans v. Eaton, 1 Pet. (U. S.) 322; Metropolita Bank v. Van Dyck, 27 N. Y. 400; Mitchell v. Clar 110 U. S. 663.

[16] Douglas v. Kentucky, 168 U. S. 488; Citizens' S Bank v. Owensboro, 173 U. S. 636.

[17] Bank of Kentucky v. Stone, 88 Fed. Rep. 38

[18] Gunn v. Barry, 15 Wall. 610; Moser v. Wh Mich. 59; O'Brien v. Young, 95 N. Y. 428.

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principle to justify interpretation in distinguishing classes with regard thereto. In the statute of frauds and other like statutes, the word "contract" is employed to denote an undertaking voluntarily entered into between the parties, not drawing into contemplation any creation of the law. It may be said that this is because only actual contracts are within the dangers which those statutes were enacted to avoid, and it would do violence to the legislative purpose and work a partial defeat of the law itself, to extend them to created contracts. But there is no ground of reason for making a like distinction under the constitutional provision now under discussion, so that, in just principle on a question little illumined by decisions, though constitutions are interpreted like statutes, this provision should be held to protect as well the bargains which the law makes for men as those which they make for themselves.[19] The contracts of the United States with its citizens, if made in accordance with law and without fraud, are no more subject to recission by the government than ordinary engagements between man and man without the consent of both parties, the United States being as much bound by their contracts as individuals.[20] In other words, when the government enters into a contract it lays down its constitutional authority, and has only the same rights and is subject to the same obligations as an individual.[21] And the United States cannot legislate back to themselves, without making compensation, the lands they have given to railroad corporations to aid in the construction of railroads.[22] The prohibition of the constitution applies to contracts of the State, and to those of its agents acting under its authority, as well as to contracts of individuals.[23] And a State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. On general questions of policy, one legislature cannot bind those which shall succeed it, but it is equally true that a legislature may make a contract which shall bind those that shall come after it.[24] And this provision extends to contracts between two States.[25] There is no difference in reason or in law, to distinguish between contracts made by a State with individuals, and contracts made between States, as each ought to be equally inviolable.[26] When a State becomes a party to a contract the same rules of law are applicable to her as to individuals under similar circumstances.[27] So long as there is no national bankrupt law, each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided they do not impair the obligations of existing contracts.[28] Such laws are void, as impairing the obligation of contracts, when they assume to discharge a debtor from the obligations which he had entered into before their passage,[29] but are valid as to contracts made after their passage, because, being made after the law, the parties are presumed to have had reference to the law, and impliedly to have made it part of their contract.[30] But such insolvent laws have no operation whatsoever on contracts made with the United States, for such contracts are in no manner subject to State jurisdiction.[31] Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of interest as it does to the payment of the principal, and a law changing the legal rate of interest cannot affect contracts entered into prior to its passage, although they may become due and payable after the passage of the law.[32] To attempt to restrict the holder of the obligation to anything below the rate of interest agreed upon is to release the obligor from a material part of his obligation.[33] And a law increasing the rate of interest is equally objec-

[19] See Story on the Const. § 1377.

[24] Woodruff v. Trapnell, 10 How. (U. S.) 190.
[25] Green v. Biddle, 8 Wheat. (U. S.) 1.
[26] See Story on the Const. § 1390.
[27] Davis v. Gray, 16 Wall. (U. S.) 203.
[28] Brown v. Smart, 145 U. S. 454.
[29] Sturges v. Crowninshield, 4 Wheat. 122.
[30] Ogden v. Saunders, 12 Wheat. 213. See, Pratt v. Chase, 44 N. Y. 597; Blanchard v. Russell, 13 Mass. 1; Hemstead v. Reed, 6 Conn. 480.
[31] See Story on the Const. § 1390.

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tionable as imposing new burdens upon the obligor [34] All authorities recognize the implied obligation of every judgment debtor to pay the judgment, and for the purpose of actions upon them judgments are treated as contracts.[35] In other words, a judgment is an obligation of record, and interest thereon is given as damages for delay in performing the obligation.[36]

When a law is in the nature of a contract, and when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.[37] Rights acquired by deed, will, or marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards as they were before, in all respects as if the statutes were still in force.[38] And rights under an antenuptial contract which become vested by the marriage, cannot be impaired by subsequent legislation.[39] But the right of dower to which a married woman is entitled in her husband's real estate before his death, is not a vested right, and may be changed at any time before the death of the husband.[40]

3. *Subsequent Laws Impairing or Not the Obligation.*—Viewing a contract as consisting, both of the words of the parties and mingled therewith, of all relevant provisions of the law under which it was made, if now we find any obligation which the mingled contract imposes on either party attempted to be augmented, diminished, or otherwise changed by a later statute to the detriment of either, the enactment will be ineffectual for that purpose.[41] For a law to be obnoxious to this provision of the constitution it must be made subsequently to the contract; since the prior laws are interpreted into the contract, and thereby rendered parts thereof.[42] But the prior laws covered by this proposition can be those only under which the contract came into existence; and neither prior nor subsequent laws of another State, where the enforcement of the contract may be sought, can be effectual, whatever their terms, to impair an obligation which the law of the contract, at the time of its making, imposed. The method of procedure for the enforcement of an obligation forms no part of the obligation itself. Consequently it has become the well settled doctrine that the legislative power may, at pleasure, change the remedy by the enactment of any laws which do not impair the right.[43] The Supreme Court of the United States has declared the rule to be that, "in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."[44] A contract may be virtually impaired by a law which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor, under the legal remedies existing when the contract was made, are substantially defeated.[45] If the legislature see fit to change the law as to the manner of pleading either at law or in equity or in any summary or analogous proceeding, and the law takes effect before the defense is made, the party must conform to the new rule, and he cannot complain of having been deprived of a vested right.[46] The right of a creditor to any particular remedy is not a vested right in the continuance of any special mode of procedure, or the perpetuation of any remedy or remedial process which can be modified or abolished without impairing or taking away the right itself.[47] A particular remedy existing at the time of the execution of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate

[34] Goggans v. Turnipseed, 1 S. C. (N. S.) 80.
[35] Johnson v. Butler, 2 Iowa, 535; Gutta Percha, etc., Co. v. Mayor, etc., of Houston, 108 N. Y. 276.
[36] O'Brien v. Young, 95 N. Y. 428.

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remedy for the enforcement of that obligation remains, or is substituted for the one taken away.[48] In altering a remedy a State cannot, by law, impair its efficiency in the least degree, because the right to impair means a license to destroy. If the substituted remedy as compared with that existing when the contract was made, has a tendency to diminish the value of the debt in the least degree, it is unconstitutional.[49] But the legislature may give a more efficient remedy for the enforcement of the obligation of a contract after breach, and such legislation is not repugnant to the constitution.[50]

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Evansville, Ind.

[48] Conn., etc. Ins. Co. v. Cushman, 108 U. S. 51; McGahey v. Virginia, 135 U. S. 693; New Orleans, etc. Co. v. State, 157 U. S. 219.

[49] Long v. Walker, 105 N. Car. 90.

[50] Webb v. Moore, 25 Ind. 4; Newark Sav. Inst. v. Forman, 32 N. J. Eq. 436; Tennessee v. Sneed, 96 U. S. 69.

POLICE POWER—BURIAL IN CITY LIMITS.

WYGANT v. MCLAUCHLAN.

Supreme Court of Oregon, May 4, 1901.

1. Under a charter authorizing a city to protect the health of the city and remove nuisances, and declare what shall constitute the same, the city council was not authorized to declare generally that the burial of a dead body in any portion of the city would constitute a nuisance, when such interment might be made in certain sections thereof without giving offense to any human sense or endangering the health of the community.

2. Under a city charter authorizing a city to provide for the health, cleanliness, peace, and good order of the city, and to prevent and remove nuisances, an ordinance prohibiting burials in certain territory of the city, distant more than half a mile from any inhabitants or public thoroughfare, being unreasonable, as applied to sparsely-inhabited portions of the city, and general in its operation, is invalid as to the whole, and fails in its entirety.

The plaintiff was convicted in the municipal court of the city of Portland of a violation of City Ordinance No. 9,188, and sentenced to pay a fine of $35, in default of the payment of which he was committed to jail under a commitment issued, directed, and delivered to the defendant, McLauchlan, who is the chief of police. The complaint upon which the conviction was had charged the plaintiff with a violation of the ordinance by willfully and unlawfully interring and causing to be deposited a certain dead body within prohibited territory in the city of Portland, "thereby creating a nuisance," contrary to the ordinance, etc. The ordinance under which the complaint was drawn provides, by section 1, that it shall be unlawful, and it is declared a nuisance and misdemeanor, for any person or persons, at any time after the 1st day of April, 1895, to dig, or cause to be dug or opened, any grave, or to enter or deposit, or cause to be deposited, in such grave, any dead body, within the city of Portland, except within certain specified districts; and, by section 2, that no person or persons shall, after the day named, dig, or cause to be dug or opened, any grave, or cause to be deposited or interred in such grave any dead body, except in those portions of the city designated in section 1. Section 6 prescribes a penalty for a violation of the ordinance. The charter empowers the city to prevent the introduction of contagious diseases, etc., and "to provide for the health, cleanliness, ornament, peace, and good order of the city," and, by a subsequent clause, "to prevent and remove nuisances, and to declare what shall constitute the same." Section 32, subds. 6, 9. The plaintiff, being imprisoned, sued out a writ of *habeas corpus*, alleging that he is unlawfully restrained of his liberty by the defendant, to which the latter made return that he is lawfully detaining the plaintiff under and by virtue of the commitment to him issued and directed. The judgment being favorable to the plaintiff, the defendant appeals.

WOLVERTON, J. (after stating the facts): The plaintiff bases his argument in support of the judgment of the circuit court upon the ground that Ordinance 9,188 is invalid, for the reason that the charter does not authorize the city of Portand to declare the burial of the dead within the city limits, outside of the excepted districts, to be a nuisance, or to punish persons for doing the acts thereby declared to be offenses against the city. It may be premised that a cemetery is not a nuisance, except conditions be present which corrupt or foul the atmosphere by unwholesome or noxious stenches, or impregnate the water of wells or springs in the vicinity by percolation through the soil, thereby endangering the public health; hence the authorities agree that it is not nor can it be regarded a nuisance *per se*. Wood, Nuis. § 6; 1 Dill. Mun. Corp. (4th Ed.) 373; 5 Am. & Eng. Enc. Law (2d Ed.), 791; Kingsbury v. Flowers, 65 Ala. 479; Henry v. Trustees, 48 Ohio St. 674, 30 N. E. Rep. 1122; Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191. And whether the act of depositing a dead body in its place of sepulture is the commission of a nuisance depends entirely upon its proximity to the habitations of the living and the manner in which it is accomplished. In so far as the language of the charter conferring power upon the city to declare what shall constitute a nuisance is involved by the contention, the case of Grossman v. City of Oakland, 30 Oreg. 478, 41 Pac. Rep. 5, 36 L. R. A. 593, is precisely in point. Within the scope of the doctrine there announced and settled, the city is not thereby authorized to declare that to be a nuisance which

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is neither such *per se* nor under the common law, nor made so by statutory enactment. It would seem to follow, therefore, that the city council was not authorized to declare generally that to deposit a dead body in any portion on the inhibited district shall constitute a nuisance, when it is conceded, as here, that such an interment may be made in the usual way in some sections thereof, without giving offense to the senses of any human inhabitant, or endangering in the least measure the health of the community.

Defendant's counsel insist, however, that the authority requisite for excluding burials from within the city limits may be referable to the general police power incident to all municipal corporations, and, beyond this, it is urged that the words of the charter, "to provide for the health, cleanliness, ornament, peace, and good order of the city," are commensurate for the purpose. The power thus conferred is no doubt ample to authorize the city to adopt reasonable measures prescribing rules and regulations, as it respects the place and manner of burials within the city limits; but the city cannot arbitrarily prohibit them, unless such prohibition be a reasonable exercise of the power. The legislature, in its wisdom, may, by express delegation of authority, empower the city to adopt measures of a specified and defined character, and the exercise of such authority cannot be questioned on the ground of its unreasonableness. People v. Pratt, 129 N. Y. 68, 29 N. E. Rep. 7; Cronin v. People, 82 N. Y. 318; Coates v. Mayor, etc., 7 Cow. 585,—are illustrative of the principle. In the first, the authority delegated was "to make, modify, and repeal ordinances and by-laws to regulate the burial of the dead;" and it was held that the power to regulate was tantamount to the power to prohibit, the court referring to Cronin v. People, which involved the authority to prohibit the operation of slaughter houses in certain portions of the city of Albany as conclusive of the point. So, in the last case cited, the authority extended to making by-laws "for regulating * * * or preventing the interment of the dead" within the city, which language is so express and explicit as to leave no doubt touching the power to prohibit. But where the authority to adopt specific measures is referable merely to the general power, or where the authority to legislate with respect to a given subject is conferred and the mode of its exercise is not prescribed, there goes with it the condition that the exercise thereof, to be valid and efficacious, must be reasonable and not oppressive. 1 Dill. Mun. Corp. (4th Ed.) § 328; Trenton Horse R. Co. v. Inhabitants of City of Trenton (N. J. Sup.), 20 Atl. Rep. 1076; Haynes v. Cape May, 50 N. J. Law, whether or not an ordinance is reasonable. 17 Am. & Eng. Enc. Law, 248. The prevailing presumption, however, is in favor of its reasonableness, which must be overcome by legal and competent proof to the contrary before its invalidity can be declared. Trenton Horse R. Co. v. Inhabitants of City of Trenton, *supra;* Com. v. Patch, 97 Mass. 221; Van Hook v. City of Selma, 70 Ala. 361.

We are thus brought to the question whether the ordinance involved evinces a reasonable exercise of the general police power vested in the city, or of such as is attendant upon the power accorded to provide for the health, cleanliness, and good order thereof. The court may take judicial knowledge of the acts of incorporations and charters of municipal corporations, and as a logical consequence of the territorial limits of such municipalities, especially where they are fixed and defined by the acts giving them life, or acts amendatory thereof. 17 Am. & Eng. Enc. Law (2d Ed.), 936, 938; Fauntleroy v. Hannibal, 1 Dill. 118, Fed. Cas. No. 4,691; Binkert v. Jansen, 94 Ill. 283; Hornberger v. State, 47 Neb. 40, 66 N. W. Rep. 23; De Baker v. Railway Co., 106 Cal. 257, 39 Pac. Rep. 610; City of Kansas City v. Smart, 128 Mo. 272, 30 S. W. Rep. 773.

Now, it is an admitted fact that there are considerable tracts of land, comprised within the limits of the city, which are sparsely inhabited. As was said by the court below, "there are within the corporate limits of the city of Portland several large tracts of lands, which are used solely for farming purposes, some of them containing several hundred acres, and on some of them interments could be made which would be distant a half mile or more from any human inhabitant or public thoroughfare." Under these conditions, it is assuredly not a reasonable regulation, as a police provision, or for the conservation of the health or good order of the community, to exclude burials from the whole territory, save the districts enumerated by the ordinance. If, however, as before indicated, the legislature had granted special and express power to exclude burials from within the city limits, the adoption of such an ordinance would be a legitimate exercise thereof, and no one could question its validity; yet, when the nature of the power delegated enjoins upon the city the duty of adopting such measures only as are reasonable, that becomes the measure and limit of the power, and any act in excess thereof is without legal efficacy. The ordinance being unreasonable as applied to those sparsely inhabited portions of the city, and general in its territorial scope and operation, it is invalid as to the whole, and must fall in its entirety. As sustaining the conclusions here

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etc. of City of Jersey City, 47 N. J. Law. 286; State v. Sheppard, 64 Minn. 287, 67 N. W. Rep. 62, 36 L. R. A. 305; and other cases cited by counsel. One of the primary essentials of a valid ordinance is that it must be general in its operation; that is, it must affect all persons alike, under like circumstances and conditions. 1 Dill. Mun. Corp. (4th Ed.) § 322. It may, and often does, become a question whether certain persons or corporations, acting in peculiar capacities or special emergencies, come within the legitimate purview or spirit of the ordinance, and such was the question presented and determined by the above cases. The ordinance in each case was general in its scope, affecting all persons alike, but in the first the business of the railroad concentrated in a small compass, but had grown to such proportions that the ordinance became unreasonably embarrassing and burdensome, and it was held, therefore, that it should not be enforced against the company as to the particular *locus in quo*. So, in the latter case, the ordinance prohibited the driving of animals in the street at a rate of speed exceeding six miles an hour, and it was held that a fireman, acting in the discharge of his duties in hastening to the scene of a conflagration, did not come within the inhibition. The doctrine is operative in the establishment of an exception rather than that of a general rule, and can have no application in the case at bar.

Reliance is had upon the case of City of Portland v. Terwilliger, 16 Oreg. 465, 19 Pac. Rep. 90, as being an adjudication sustaining the power of the city to exclude burials from within the city limits. The court there had under consideration the effect of an ordinance prohibiting the burial of the dead within the city, and consequently upon an estate conceded, for the purpose of the case, to have been vested in the municipality upon a condition subsequent as to the continued use and occupation thereof by it for cemetery purposes. The power to adopt the ordinance in that case seems to have been taken for granted, or, at least, it was not a matter of controversy in the course of the hearing. In announcing the opinion, Mr. Justice Strahan incidentally says: "That power was delegated by the State to the city of Portland under the general description of police power," referring, we presume, to the power of prohibiting burials within the city limits. The learned justice then proceeded to an elaboration of the idea that every citizen holds his property subject to the proper exercise of the power, but the question whether the charter did or did not confer the power to adopt the ordinance was not mooted so far as we are informed by the record, much less can it be said to have been decided. The idea of declaring the act of burial a nuisance, and the power commensurate to that particular purpose, does not seem to have been suggested at any time during the proceeding. The case is therefore not controlling as a precedent. If, however, it ever had any vitality in the direction claimed for it. it must be considered as overruled in its general scope by the subsequent case of Grossman v. City of Oakland. There will be an affirmance of the judgment.

NOTE.—*Power of Municipality to Prohibit or Restrict the Establishment of Cemeteries or Right of Burial within Certain Limits.*—What is termed in law the "police power" of a State has never been satisfactorily defined, and the Supreme Court, the tribunal most competent of any other to define it, has absolutely confessed its inability to do so, and therefore refuses to try it. It would hardly be acting with becoming modesty on our part, in the face of this confession, to make any attempt at definition, but we will content ourself with the suggestion offered by Scott, J., in the case of Lake View v. Cemetery Co., 70 Ill. 191, where, after suggesting several other attempts at definition, the learned judge says: "It [the police power] may be said to be that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

The question whether a cemetery is a nuisance *per se*, while sufficiently settled by authority, has been opened for academic discussion. Tiedeman, for instance, in his late work on State and Federal Control of Persons and Property, says: "It is held by *some* that a cemetery is not a nuisance *per se*, and consequently the interment of the dead cannot be prohibited altogether. Of late, the advocates of cremation of dead bodies have been urging the unwholesomeness of burial as a reason why cremation should be adopted in its stead, as a means of disposing of corpses. If the burial of the dead does not cause or threaten injury to the public health, burial could not lawfully be prohibited; but if it is proven to be a fact that the interment of dead bodies does injure the public health, and is a fruitful source of the transmission of disease, as it is claimed to be by many scientists, it cannot be doubted that the State may prohibit burial and compel the remains of the dead to be cremated, or disposed of in some other harmless way." While not disposed to share completely with Mr. Tiedeman the sentiments thus expressed, any discussion of the question would be useless, as it has been determined, not by "some," but by all authorities which have come to our observation that a cemetery is not a nuisance *per se*. Lake View v. Cemetery Co., 70 Ill. 191; People v. Pratt, 129 N. Y. 68; Dunn v. Austin, 77 Tex. 139; Pfleger v. Groth, 108 Wis. 104; Kingsbury v. Flowers, 65 Ala. 479; Humphrey v. M. E. Church, 109 N. Car. 132; Monk v. Packard, 71 Me. 359. Not being a nuisance, *per se*, the interment of bodies cannot be declared such except upon proof showing that in the particular case it has become such. For instance, in Monk v. Packard, 71 Me. 309, it was held that a cemetery which does not affect the physical health of the occupants of a dwelling house near it, nor their olfactories by any effluvia from the graves, is not in law a nuisance. To become a nuisance the effect must be such as to interfere with ordinary physical existence, and the injury must be something more than fancy, delicacy or fastidiousness. If it is established, however, by sufficient proof that the place of burial has become so situated as to injure the health and comfort of the people living in its neighborhood, equity will interfere and grant relief by injunction abating the nuisance. Jung v. Neraz, 71 Tex. 306.

In regard to State and municipal regulations it is now definitely settled by a long line of decisions that the legislature has the right, under the police power, to

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regulate the burial of the dead and may restrict it within definite limits or even prohibit it altogether, as, for instance, in large cities. Brick Presbyterian Church v. Mayor, 5 Con. (N. Y.) 428; Concordia Cemetery Assn. v. Railroad Co., 121 Ill. 199; Woodlawn Cemetery v. Everett, 118 Mass. 354; Pfleger v. Groth, 103 Wis. 104; Kincaid's Appeal, 66 Pa. St. 423; People v. Pratt, 129 N. Y. 68. In Town of Lake View v. Rose Hill Cemetery Company, 70 Ill. 191, the court seems to take an opposite view. In this case the charter of a cemetery company authorized it to acquire and use land not exceeding five hundred acres for burial purposes. After it had acquired the land and spent money in preparing and adorning the same, a statute was passed forbidding the company to use any of its lands for burial purposes outside of its then inclosure, which was less than five hundred acres. Held, that as it did not appear that any nuisance existed or was liable to arise, the statute was not a valid exercise of the police power and was unconstitutional. The court said: "There is no pretense that the cemetery, as constructed, is a nuisance, nor is there any charge that the health or comfort of the people in the vicinity has been or will be affected in the near or even in the distant future. If it can be maintained at all, it must be by some absolute power by which the general assembly, it being the sole judge of the extent of its powers, may declare what shall and what shall not be, independently of all constitutional restrictions. · · · We are unwilling, however, to concede the existence of any indefinable power superior to the constitution that may be invoked whenever the legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use without compensation." The difficulty in reconciling this decision with the weight of authority is wrapped up in a further question. Is the question whether there was a sufficient occasion for the exercise of the police power in any given case a judicial or political question? In Coates v. Mayor, 7 Cow. 585, it was said: "It is of the nature of legislative bodies to judge of the exigency upon which their laws are founded." It may be safely affirmed that the proper rule is that that the discretion of the legislature as to what constitutes a sufficient exigency for the exercise of the police power, if not merely colorable, will not be reviewed by the court. Of course the police regulation must be one in fact and the right to use private property cannot be arbitrarily abridged under the mere pretense of a police regulation. It is also to be observed that the legislature may delegate the exercise of this power to its municipalities who may restrict or prohibit the interment of dead bodies as they may believe necessary. People v. Pratt, 129 N. Y. 68; Kincaid's Appeal, 66 Pa. St. 411; Austin v. Cemetery Association, 87 Tex. 330; Page v. Symonds, 63 N. H. 17. Nor is the police power being a "law of overruling necessity" restricted by rights of contract or long user. For instance, where the right of sepulture had existed for over one hundred years under grants of or titles to cemetery lands, it was held that the length of time was not conclusive if the legislature had given express power to the municipality of Portland to restrict or prohibit the interment of the dead within that city the ordinance under consideration could not be questioned as to its reasonableness. But the court insists that under a mere general provision to provide for the health and comfort of its citizens the municipality had no authority to unreasonably restrict or prohibit the right of burial. This is in line with the weight of authority. Two cases directly in point on this question seem to have been overlooked by the court in the principal case. For instance, in the case of Los Angeles v. Cemetery Association, 124 Cal. 344, it was held that a city cannot prohibit or suppress cemeteries under a charter power to institute police regulations. Again in the case of Austin v. Cemetery Association, 87 Tex. 330, it was held that a municipal ordinance limiting the places within a city in which it shall be lawful to inter deceased human beings is not void on its face. It is valid unless it unreasonably restricts the rights of its citizens to procure places for that purpose within such limits. These cases contain a most exhaustive discussion of this very interesting question. We shall examine them at length. In Los Angeles v. Cemetery Association, the ordinance in question made it "unlawful to locate or establish, extend or enlarge any cemetery or graveyard within the limits of the county of Los Angeles without the permission of the board of supervisors." After showing that a cemetery cannot in the least degree be considered a nuisance *per se*, the court says: "We quite agree with the learned counsel for respondent that there are many considerations which may bring cemeteries within the power of reasonable regulation of both city and county municipalities. · · · Is the ordinance before us a reasonable exercise of the power conferred by the constitution and the statute upon boards of supervisors, and as applicable to counties? The ordinance makes it unlawful to establish or enlarge any cemetery within the limits of the county without the permission of the supervisors. It declares that in no part of Los Angeles county, however remote from any city or town, even though the location be suitable for the purpose and entirely satisfactory to the neighboring inhabitants, no cemetery shall be established except by permission of the supervisors. There are reasons why the burial of the dead should be subject to reasonable regulations, but we can see no more reason why the right to establish cemeteries in a county should be subject to the will of the supervisors than that the right to engage in any other lawful enterprise should be so circumscribed. · · · Under the guise of regulating a business the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business. We do not think it was ever intended by the legislature in the statutory enactment, to include, in the power to make and enforce regulations, a power purely personal and arbitrary." In the case of Austin v. Cemetery Association, the ordinance under consideration, made it unlawful for any person to bury any dead body within the corporate limits of the city of Austin except within a cer-

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shall be permitted, but that it may be controlled by reasonable restrictions as to the manner and circumstances of its performance." Here the court comes to the vital question: "If said ordinance was legally passed by virtue of authority of the charter, have the courts the authority to inquire into the reasonableness or unreasonableness of the ordinance?" In answer to this question the court said: "It is doubtless within the power of the legislature to make arbitrary laws, provided they neither infringe the constitution of the State or of the United States. We are not prepared to say that it could not delegate that power to a municipal corporation. But before it should be held that such grant was intended, it would seem that the language of the charter should be sufficiently explicit clearly to manifest that intention; and, in the absence of such language, we think it should also be held that it was not the intention to confer authority to make an arbitrary and unreasonable law. It occurs to us that it is upon this principle that the courts proceed when they hold that the ordinance of a municipal corporation must be reasonable. We are therefore of opinion that it was not the intention of the legislature to confer power upon the city council of the city of Austin either to prohibit the burial of the dead within the limits of the city, or to unreasonably restrict the rights of its citizens to provide places for that purpose within such limits." The court further held that whether the ordinance was reasonable or unreasonable depended on the facts in each case, and that the question was one of law for the court. Further, the court held that the presumption would be in favor of the reasonableness of the ordinance and that he who claims the contrary must assume the burden of proof. And, finally, the court decided that under the facts in this case the cemetery could proceed in equity by injunction against the city prohibiting them from enforcing the ordinance and was not required to test the law in a criminal proceeding for its violation.

JETSAM AND FLOTSAM.

CHANGES IN WAR REVENUE TAXES.

On Monday, July 1, 1901, the act of March 2, 1901, went into effect amending the war revenue law of 1898, which will remove a number of stamp and other taxes and will modify other charges upon the business of the country. The taxes repealed comprise those on bank checks, issues or obligation of guarantee companies, certificates of damage, certificates of deposit and certain other kinds of certificates, charter parties, commercial brokers, sight drafts, export bills of lading, express receipts, life, marine, inland, fire, casualty and fidelity and guaranty insurance policies, leases, manifests for custom house entry, mortgages or conveyances in trust, orders for the payment of money on sight or on demand, powers of attorney to convey and to sell, promissory notes, protests, telegraph and telephone messages, postoffice money orders, warehouse receipts, perfumery and cosmetics, proprietary medicines and chewing gum. In relation to drafts and orders for the payments of money other than at sight or on demand, and foreign bills of exchange and foreign orders for the payment of money, it may be said that these still remain taxable. The tax of 1 cent also remains upon freight receipts or domestic bills of lading. The requirement that stamps shall be affixed to the following documents, used extensively by all who have business connected with the mercantile marine, will cease on July 1, namely: Certificates of registry and of enrollment, certificates to the acknowledgments of bills of sale of vessels, charter parties of registered vessels, certificates of record of American built vessels owned by aliens, master carpenter certificates, certificates of issue of temporary documents, certificates of ownership, of the surrender of documents and of payment of tonage duty, United States bills of health, certificates to shipping articles required by section 4512 of the revised statutes, certificates of damage by port wardens or marine surveyors, certificates as to wages and effects, certificates of discharge and accounts of wages and effects.

Upon a number of articles and documents reductions and modifications have been made by the new law. For example, the tax on beer is reduced from $2 per barrel, and 7 1-2 per cent. discount, to $1.60 per barrel. The rate on cigars of all descriptions made of tobacco or any substitute therefor, and weighing more than three pounds per thousand, is fixed at $3 per thousand. On cigars, weighing not more than three pounds per thousand, the rate is fixed at 18 cents per pound. On cigarettes, weighing not more than three pounds, and of a wholesale value or price of more than $2 per thousand, 36 cents per pound is charged. On cigarettes, weighing not more than three pounds per thousand, and of a wholesale value or price of not more than $2 per thousand, the charge is fixed at 18 cents per pound. On cigarettes, weighing more than three pounds per thousand, the tax of $3.60 remains. On tobbacco and snuff, the rate of which was fixed by the war revenue law at 12 cents per pound, a discount of 20 per cent. is allowed by the amending law. The rate on foreign bills of exchange is changed from 4 to 2 cents for $100. Conveyances of property below $2,500 in value are now exempted from taxation, while each $500 above that amount is taxed at the rate of 25 cents. The law affecting legacies is modified so as to exclude from taxation legacies of a charitable, literary, religious or educational character after March 1, 1901. Orders for the payment of money by telegraph issued by express companies, drawn in but payable out of the United States, are to pay 2 cents for each $100. Passage tickets from the United States to foreign ports, formerly paying from $1 to $5, are now exempted from taxation when below $50 in value, but for each $50 they pay a rate of 50 cents. On sales of products at exchanges the rate of 1 cent for each $100 is retained, but sales of merchandise in the actual course of transportation are exempted from the tax.

A number of items in the law remain unchanged. These comprise the tax of $50 for each $25,000 of bankers' capital and surplus and $2 for each additional $1,000; the tax of 5 cents for each $100 worth of bonds, debentures, certificates of indebtedness, etc.; the tax of 50 cents on bonds of indemnity or for the execution of the duties of any office; the tax of $50 on brokers; the tax of 10 cents on brokers' contracts, and the tax of $2 for every $100 on certificates of profits, of $2 for each $100 of certificates of stock transfers, and of 5 cents for each $100 of the original issue of the certificates of stock. There also remain the taxes of $10 on custom house brokers; of from $6 to $24, according to sales, on dealers in leaf tobacco, and of $12 on dealers in tobacco whose sales exceed 50,000 pounds. In like manner the law maintains the tax of 2 cents for each $100 on time drafts or inland bills of exchange, of 25 cents to $1 on the entry of goods at the custom house for consumption and of 50 cents for entries for withdrawal. The taxes of from

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$6 to $24 on manufacturers of cigars, of $12 per annum on manufacturers of mixed flour, of 4 cents per barrel on mixed flour, of $20 on pawnbrokers, and of 1-4 per cent. of the gross receipts in excess of $250,000 on petroleum and sugar refineries are also retained, as are the taxes on bowling alleys, circus, theaters, museums, concert halls and other public amusements.

Finally, the new law maintains the tax of 1 cent on sleeping and parlor car tickets, of 1 cent a pint on sparkling and other wines, and of 2 cents on quantities of more than a pint, and of 10 cents per pound on tea, while the special taxes of $50, in addition to other special taxes, on class 2 of brokers and of 2 cents for each $100 on bucket shop transactions, which went into effect on April 1 last, are continued under the new law. It is somewhat difficult to estimate what will be the effect upon the revenue of the changes in the law, but there is, of course, no doubt whatever that the reduction of taxes effected by it will still leave a comfortable surplus at the end of the fiscal year, assuming that at the next session congress will make no material reduction in the revenue rates.—*Bradstreet's Journal.*

BOOK REVIEWS.

COLLIER ON CIVIL SERVICE.

It is not often that we enjoy the novelty of reviewing a treatise on a subject of law wholly new or never before brought down into the systematic form of a text book. Such, however, is the work entitled "The Civil Service Law of the State of New York," by William Miller Collier, president of the New York Civil Service Commission. The compass of the book is not so narrow as its title would seem to indicate, as it embodies copious references to analogous statutes, and to decisions by the federal courts and courts of other States. Civil service legislation inaugurated by the federal government January 16, 1883, has to day found entrance into the statute law of eight States of the Union, and is rapidly gaining in popularity and influence. Appointment to positions in the civil service, either of the State government or of the municipality, according to merit and fitness of the applicant, rather than to political service or preference, is such a clear step in advance that one fails to understand the stubborn opposition that is sometimes made to such legislation. The civil service law, however, is no longer an experiment, and it has established itself as a part of our system of political jurisprudence with which every practitioner of the law must acquaint himself. Mr. Collier's excellently arranged work on this subject will fill every requirement of the lawyer, and to the vast army of public officers and public employees whose powers, rights, and duties are measured and determined by the civil service law, this treatise will be of invaluable service in construing, applying, and enforcing the provisions of that law. Published in law buckram, and for sale at the price of $4.50 by Matthew Bender, Albany, N. Y.

AMERICAN STATE REPORTS, VOL. 78.

The 78th volume of the American State Reports is a welcome addition to the long line of excellent volumes which have preceded it. Probably the most valuable of the contents of these reports are the monographic notes which are exceedingly concise, and at the same time practically exhaustive of the entire subject which they attempt to treat. Probably the most interesting note in this volume is that appended to the case of Booth v. People, 186 Ill. 43, 78 Am. St. Rep. 229, entitled, "Acts Which the Legislature May and May Not Declare Criminal." The treatment of this subject embraces a full discussion of the extent of the right in the legislature under the police power to declare acts criminal which were heretofore innocent, and contain among others the following subtopics: Abandonment of Children, Erection of Building within "Fire Limits," Burial of the Dead, Compulsory Vaccination, Game Laws, Laws against Free Speech, Horse Racing, Lotteries, Miscegenation, Oleomargarine Laws, Licensing of Physicians, Prostitution, Sunday Laws and Ticket Brokerage Laws. Other notes especially valuable and interesting are the following: Fletcher v. American Trust & Banking Co., p. 164, on the "Common Law Powers of Executors;" State v. Michel, p. 364, on the "Computation of Time;" Jordan v. Greensboro Furnace Company, p. 644, on "When and How the Statute of Frauds Must be Pleaded." Published by Bancroft-Whitney Company, San Francisco, Cal.

BOOKS RECEIVED.

American Bankruptcy Reports, Annotated (cited Am. B. R.), Reporting the Bankruptcy Decisions in the United States of the Federal Courts, State Courts and Referees in Bankruptcy. Edited by James W. Eaton and Wm. Miller Collier. Vol. V. Albany, N. Y. Matthew Bender, 1901.

The Law of Bankruptcy, Including the National Bankruptcy Law of 1898, the Rules, Forms, and Orders of the United States Supreme Court, the State Exemption Laws, the Act of 1867, etc., etc. With Citations to all Relevant Decisions. Second Edition, by Edwin C. Brandenburg, LL. M. Author of the Digest of Bankruptcy Decisions; Professor of Procedure in Bankruptcy at Columbian University; in Charge of Bankruptcy Matters in the Department of Justice. Chicago, Callaghan & Company, 1901. Sheep, pp. 1,041. Price, $6 00. Review will follow.

HUMORS OF THE LAW.

A well known San Francisco attorney, who prides himself upon the handling of Chinese witnesses, was defending a railway damage case. Instead of following the usual questions as to name, residence, if the nature of an oath were understood, etc., he began: "What your name?" "Kee Lung." "You live San Francisco?" "Yes." "You save God?" "Mr. Attorney, if you mean 'Do I understand the entity of our Creator?' I will simply say that Thursday evening next I shall address the State Ministerial Association on the subject of the 'Divinity of Christ,' and shall be pleased to have you attend." A roar of laughter swept over the courtroom, and it was some minutes before the examination proceeded.

Hennypeck—Skoots eloped with my wife last night.

Gabbleton—Why, I thought he was your best friend.

Hennypeck—He is!

When William E. Evarts was secretary of state the elevator that carried him to the State department one day contained a number of strangers, presumably applicants for appointment as ministers or consuls. On seeing them, Mr. Evarts whispered to a friend: "This is the largest collection for foreign missions that I've seen taken up in some time."

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"The old judge was one of the kindliest of men," said an attorney of New Orleans to a representative of the *Times Democrat*, speaking of a distinguished member of the local bar, who is now dead, "but his temper was as warm as his heart, and when momentarily exasperated he had a tongue like a razor. When I was studying law in his office we had a copying clerk who was known about the place as 'the late Peter Jones'—a sobriquet he acquired by being always behind time. He was a slow, abstracted, dreamy kind of a fellow, with his mind generally a hundred miles from his business, and he was continually working the judge up to the point of explosion. One day a wire basket fell off the top of his desk and grazed his cheek, making a slight scratch several inches long. Being very busy at the moment, and wishing to protect the abrasion from the air until he could get some court plaster, he slapped on three postage stamps and went on with his work. A little later on he had some papers to take to the United States court, and, forgetting all about his peculiar decoration, he put on his hat and sallied out. He must have created a sensation on the street, but, as usual, his mind was elsewhere, and when he returned in half an hour or so, he was still in blissful ignorance of his Mardi Gras aspect. The three stamps happened to all be of different colors, and he looked like an Apache chief made up for a ghost dance. As he entered the office, the judge raised his head and fixed him with an astonished stare. Poor Jones quailed under his eye. 'Anything—er—wrong, sir?' he inquired, tremulously, when the silent scrutiny became unendurable. 'Yes, sir!' thundered the old gentleman; 'you are carrying too much postage for second-class matter.'"

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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NEW YORK 8, 37, 42, 63, 80, 81, 85, 88
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1. ADULTERATAON—Milk—Evidence.—In the proceeding to recover a penalty for the violation of section 36 of the act to prevent the adulteration of milk (Gen. low the required standard. It is competent for the legislature to declare that the doing of an act shall subject the doer thereof to a penalty, irrespective of his motive or knowledge, and in such a case the courts have no power to require proof of knowledge or motive to be shown.—VANDERGRIFT v. MIEHLA, N. J., 49 Atl. Rep. 16.

2. AGENCY—Authority—Burden of Proof.—Where the defendant, in an action to recover money, has paid the money to a person formerly authorized by plaintiff to collect the same, but whose authority is shown to have been revoked prior to the payment, the burden of showing that the money was paid in good faith, and in reliance on the continuance of the agency, is on the defendant.—WHITAKER v. BALLARD, Mass., 60 N. E. Rep. 879.

3. BILLS AND NOTES—Consideration—Parol Evidence.—A note promising to pay a certain sum of money at a certain date, in consideration of the founding of a college at a place named, is based upon a sufficient consideration. In an action on a note "given in consideration of founding a college," evidence that at the time the note was signed plaintiff undertook to perform certain acts at the request of the maker of the note is admissible to establish that there was a good consideration for the note in the acts which the payee of the note was to perform.—KEUKA COLLEGE v. RAY, N. Y., 60 N. E. Rep. 825.

4. BILLS AND NOTES—Husband and Wife—Ratification.—Where a husband signed his wife's name to a note without her authority, and no adoption of the signature by the wife, nor estoppel, was pleaded, nor proof thereof given, an instruction in a suit on the note against the wife was correct which stated, in substance: "If you find that defendant, with full knowledge of plaintiff's claim of her liability on the note, and the facts and circumstances respecting the indebtedness evidenced thereby, admitted the liability thereon, and promised to pay the same, this will be a ratification; otherwise, if she was not informed of the facts and circumstances respecting the indebtedness evidenced by the note.—MEYER v. WEGENER, Iowa, 86 N. W. Rep. 49.

5. BILLS AND NOTES—Indorsement in Blank—Want of Consideration.—Where defendant was sued as indorser of a note, and it appeared that the note was made payable to him by mistake, and without his knowledge or consent, and that he indorsed it in blank at the request of the true owner, for the purpose of showing title in him, such indorsement was without consideration, and defendant was not liable thereon.—FARMERS' SAV. BANK v. HANSMANN, Iowa, 86 N. W. Rep. 81.

6. BILLS AND NOTES—Pleadings—Joint Answer.—Where suit is brought on a note and to foreclose a mortgage securing it, an answer purporting on its face to answer the entire complaint, but only alleging facts showing a defense to the mortgage, and wholly silent as to the liability on the note, is subject to demurrer.—HOLLINGSWORTH v. MCCOLLY, Ind., 60 N. E. Rep. 871.

7. CHATTEL MORTGAGES—Right of Possession—Execution.—Where one of the members of a firm dealing in race horses was given a power of attorney to act for the firm, and, acting thereunder, mortgaged the horses to pay a judgment for which they were about to be sold, and agreed with the mortgagee that the horses should be entered in races, and the mortgagee should advance the entrance fees and have a lien on the horses therefor, such agreement was not beyond the partner's authority, so as to

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Rev. Stat. 1894, § 7051) provides that, when the business of any person shall be suspended by the action of creditors, the debts owing to employees for labor to an amount not exceeding $50 each for work performed within six months next preceding the seizure of the property of such person shall be treated as preferred debts, and shall be first paid in full. Held, that the statute is not unconstitutional as impairing the obligations of contracts because it operates only on contracts entered into after its enactment; nor is the statute unconstitutional as devesting vested rights, since the legislature has power to regulate the priority of statutory liens, among which are chattel mortgages.—SMALL v. HAMMES, Ind., 60 N. E. Rep. 342.

9. CONTRACTS — Assignment — Breach. — Defendant sold his livery stable to plaintiff and F, as partners, and agreed not to re-engage in the livery business in that town while the parties of the second part were engaged in that business on the premises sold. F assigned his interest in the contract to plaintiff, and thereafter defendant started a livery stable. Held, that the assignment destroyed the identity of the partnership, and the act of defendant was not in violation of his agreement.—BARRON v. COLLENBAUGH, Iowa, 86 N. W. Rep. 53.

10. CONTRACT—Ignorance. — The fact that sureties sign a bond without reading it, though they have opportunity to do so, in reliance on false representations of the principal obligee that it is only a recommendation of the latter, does not relieve them from liability thereon.—SPRING GARDEN INS. CO. v. LEMMON, Iowa, 86 N. W. Rep. 35.

11. CONTRACT—Option.—An agreement of the owners of a certain lot that they will not sell it without first notifying an adjoining owner of the intention to sell, and giving him the privilege of buying the ground at a fair market price, becomes enforceable when the owners of the lot, without notifying the adjoining owner, cause a sale of it to be made by partition proceedings in this court. Such proceedings are a manifestation of an intention to sell.—MYERS v. METZGER, N. J., 48 Atl. Rep. 1113.

12. CONTRACT OF SALE — Agent—Oral Warranty.—A sales agent authorized to sell and warrant farm machinery under written conditions to be required of the purchaser may bind his principal by an oral warranty where he withholds from the purchaser all knowledge of the limitations upon his authority to impose such condition, as in this case.—PARSONS BAND CUTTER & SELF FEEDER CO. v. HAUB, Minn., 86 N. W. Rep. 14.

13. CONTRACT OF SALE—Breach of Warranty—Damages.—A contract in which it was provided that if a certain machine, for and on which notes were given and freight charges paid, did not and could not be made to fill the warranty therein contained, it was to be returned to the place where received, and another machine substituted therefor, or the "money and notes" returned, construed. Held, that the amount paid for freight charges could be recovered, in addition to the amount of the notes, in case of a breach of the warranty and a failure to substitute another machine.—EVENSON v. KEYSTONE MFG. CO., Minn., 86 N. W. Rep. 8.

14. CORPORATION—Contract—Signature of President. —Where a contract is consummated entirely through correspondence, it does not follow, as a matter of law, that the individual signature of the person who is unless he shall file his dissent, and that the shares of any dissenting stockholder shall be acquired by the lessee, the lessee is not required to buy the stock of a member of such corporation who had voted for the lease and afterwards filed a written declaration of dissent.—BOSTON & M. R. R. v. GRAHAM, Mass., 60 N. E. Rep. 405.

16. CORPORATIONS — Taxation — Statutory Requirement.—Pub. Stat. ch. 18, §§ 38, 40, impose a tax on every corporation chartered by the commonwealth, or organized under the general laws for business or profit, having a capital stock divided into shares. The defendant gas company was organized in July, 1896, and in December, 1897, issued $1,000.000 worth of shares, which were paid for in cash. Held, that the fact that defendant's treasurer did not file a certificate with the secretary of State that the capital stock had been paid in, as required by Pub. Stat. ch. 106, § 46, until December 21, 1899, did not relieve the defendant from the payment of the tax assessed on May 1, 1896, since the corporation cannot escape taxation by failing to comply with the statutory requirements.—ATTORNEY GENERAL v. MASSACHUSETTS PIPE LINE GAS CO., Mass., 60 N. E. Rep. 389.

17. DEEDS — Constructive Notice.—Where the purchaser of land at a foreclosure sale notifies tenants thereon that he is the owner, and instructs them to pay the rent to him, and they consent thereto, they become his tenants; and their possession is constructive notice of the purchaser's interest therein to a person afterwards acquiring a deed to the land from the former owner.—HANNAN v. SEIDENTOPF, Iowa, 86 N. W Rep. 44.

18. DEEDS—Quitclaim.—Land worth $4,000 was sold at a foreclosure. The purchaser failed to record his deed, and the former owners transferred it by quitclaim deed to G, who conveyed it to M on the following day by warranty deed. The deed to G stated that it was given in consideration of $1 and other valuable consideration, and that the grantor made no representations as to the title, other than those contained in the deed. G paid for the land with 25,000 shares of mining stock, for which he had paid $75, and he sold the land to M for $440, and it was purchased by the latter without seeing it or obtaining an abstract of title. Held, in an action by the foreclosure purchaser to recover the land, that the evidence was not sufficient to show that M was an innocent purchaser thereof.—HANNAN v. SEIDENTOPF, Iowa, 86 N. W. Rep. 45.

19. EVIDENCE — Expert Witness — Qualification. — Where, in a suit against a railroad for injuries to land caused by fire escaping from the right of way, a witness had resided for years in the neighborhood of the lands, and had been allowed, without objection, to testify as to the value of such lands before they were burned, an objection to the admission of his testimony as to their value after they were burned, on the ground that he had only been on a small portion of the lands since the fire, was to the weight, rather than the competence, of the evidence, and its admission was not error.—CHICAGO, I. & L. RY. CO. v. BROWN, Ind., 60 N. E. Rep. 346.

20. EVIDENCE—Hearing.—Where a brakeman in a suit against a railroad for personal injuries testified that his physician had advised another operation, and that the physician was too ill to appear at the

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prove conversations with, or admissions of, any deceased or insane person, whether a party to the litigation or not, relative to any matter at issue between the litigants, adhered to, and the rule applied.—LOWE v. LOWE, Minn., 86 N. W. Rep. 11.

28. EXECUTORS AND ADMINISTRATORS — Surviving Partner as Executor.—A testator, up to the time of his death, was engaged in business in partnership with one of the two executors named in the will. After the testator's decease such executor continued the business as the surviving partner. He then entered into an agreement with his co-executor, whereby he purchased the interest of the estate at a certain sum, but no money was paid to the co-executor, and no accounting was made to the probate court by either executor. Both executors were discharged without having rendered an accounting, leaving the estate unadministered. In an action against such surviving partner by a subsequently appointed administrator *de bonis non*, to compel an accounting, held, that such surviving partner was not a debtor of the estate at the death of the testator, and that his relation to the estate still remained that of executor, and the jurisdiction of the probate court to compel an accounting was exclusive, and such jurisdiction was not lost by the fact that the executor was discharged, leaving the estate unadministered.—BETCHER v. BETCHER, Minn., 86 N. W. Rep. 1.

24. FINAL JUDGMENT — Abandonment of Ancillary Proceedings.—Where, in an action for divorce, a final judgment for plaintiff is rendered, without an adjudication being had on an issue in ancillary proceedings of attachment and garnishment, that part of the case is abandoned, and the court has no power to afterwards take up the matter of the attachment and garnishment independently, and render a judgment on those issues.—SAHNER v. SAHNER, Ind., 60 N. E. Rep. 269.

25. FIRE INSURANCE — Conditions — Arbitration.—A condition in a fire policy requiring the submission to arbitration of any difference as to a loss on the request in writing of either party, and providing that no action shall be brought on the policy until after the award, is waived on a failure of either party to request an arbitration.—GARRETTSON v. MERCHANTS' & BANKERS' FIRE INS. CO., Iowa, 86 N. W. Rep. 82.

26. FRAUDULENT CONVEYANCES—Husband's Deed to Wife.—A conveyance of land by a husband to his wife by a deed through a third party, to secure her for the principal of money of her separate estate taken and used by him, will be decreed to be a mortgage, and good as against creditors to the extent only of the amount of the principal so received by him, with interest thereon from the date of the delivery of such deed.—ADOUE v. SPENCER, N. J., 49 Atl. Rep. 10.

27. FRAUDULENT CONVEYANCES—Husband's Deed to Wife—Burden of Proof.—Where such a conveyance is attacked by creditors as voluntary or fraudulent, the burden is on the wife to establish that her husband took and used her separate estate; but when that fact is established, whether such taking was with or without her consent, the burden then shifts, and those claiming that such taking and use were by gift of the wife must establish such gift to the husband.—ADOUE v. SPENCER, N. J., 49 Atl. Rep. 10.

28. DAMAGES—Highways.—In an action for the construction of a switch track in the public highway in front of plaintiff's property, an instruction that plaintiff could not recover the amount her property depreciated in value by the means of access thereto being impaired, is not erroneous as not confining the damages to the time of bringing the action, since the action was not brought on the theory of an unlawful obstruction, but as a trespass on plaintiff's land.—PITTSBURGH C. C. & ST. L. RY. CO. v. NOFTSKER, Ind., 60 N. E. Rep. 372.

29. HIGHWAYS—Damages.—Where a jury appointed to assess damages sustained by a landowner in the laying out of a road returned an award in favor of such landowner, and, in a petition by her to recover a balance of the sum so awarded, she alleged that there was sufficient money in the county treasury liable for the payment of a warrant for such balance, but the court failed to find, in conformity with such allegation, that there was money applicable thereto, a judgment requiring the payment of such balance will be reversed, since such claims can only be paid from the particular fund applicable to the construction of roads, and not from general county funds.—BOARD OF COMRS. OF MONROE COUNTY v. STATE, Ind., 60 N. E. Rep. 344.

30. HIGHWAYS—Discontinuance — Owner's Right to Damages.—Where land claimed to be damaged by the alteration of a railroad grade crossing was a highway when the proceedings for alteration were begun, the fact that in the course of the proceedings the highway was discontinued, and the land was taken by the railroad company for railroad purposes, did not preclude a finding that the land was thereby subjected to a more onerous use than it had previously suffered so as to preclude the owners from proof of damages by reason of the alteration.—BULLARD v. NEW YORK, N. H. & H. R. CO., Mass., 60 N. E. Rep. 881.

31. HUSBAND AND WIFE—Gift to Husband—Presumption.—The presumption of law is against a gift by the wife of the principal of her separate property to the husband, and the burden of proving it is upon him who asserts it.—ADOUE v. SPENCER, N. J., 49 Atl. Rep. 10.

32. HUSBAND AND WIFE—Married Women's Act—Gift to Husband.—The statutes in the several States as to the property of married women, when as broad as the Texas statute or our own, have entirely overthrown the common-law rule of the merger of the wife's entity and estate, upon marriage, in the husband. It is unnecessary, under these statutes, that a wife shall take from her husband a promissory note, or other acknowledgment, upon handing him money of her separate estate, to be able to establish that such taking by him was a loan. In the transaction she will be considered as a *feme sole*, and as if a stranger to her husband.—ADOUE v. SPENCER, N. J., 49 Atl. Rep. 10.

33. HUSBAND AND WIFE — Widow's Remarriage — Mortgage.—Where a woman and her second husband executed a mortgage on land which descended from her first husband to her as his widow, there being children of such marriage living, thus violating Burns' Rev. St. 1894, § 2641 (Rev. St. 1881, § 2484; Horner's Rev. St. 1897, § 2484), which forbids a widow remarrying to alienate real estate held by virtue of her previous marriage, etc., a decree of foreclosure thereon will be binding on the wife, and cannot be collaterally attacked.—MAYNARD v. WAIDLICH, Ind., 60 N. E. Rep. 349.

34. INJUNCTION—Separate Actions at Law—Relief in Equity.—Where a common right or a community of interest in the subject-matter of a controversy, or a common title, from which all of the defendants' separate claims, and all questions at issue between the parties plaintiff and defendants, have arisen, can be shown at the trial, an equitable action will lie to restrain and enjoin the several defendants from prosecuting separate actions at law against the plaintiff. Held, that under this rule a cause of action was stated in plaintiff's fourth amended complaint herein. Held, further, that, as the complaint stated a cause of action, it was not error for the court below to cause an order to be issued restraining and prohibiting each of the said defendants from proceeding further in his action at law pending the disposition of this action in equity.—CITY OF ALBERT LEA v. NIELSEN, Minn., 86 N. W. Rep. 88.

35. INJURY TO RAILROAD EMPLOYEE—Evidence.—The complaint alleges that defendant operates a railroad in Montana, and negligently permitted its roadbed to become soft and springy, and allowed sand, gravel

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and stone to be deposited and remain on and near its track, and that it also negligently operated an engine with a defective pilot. While respondent, in the performance of his duties as a brakeman, was riding in the cab of the engine, it sank upon the yielding roadbed, and the defective pilot struck into the gravel and stone, causing a stone to be thrown against the cab window of the engine, breaking the glass thereof, causing a piece of it to enter and injure respondent's eye. Held, that the acts stated were the proximate cause of the injury.— BAKER v. GREAT NORTHERN RY. CO., Minn., 86 N. W. Rep. 88.

36. INSURANCE—Excessive Incumbrance.— Where an insured procured a loan on the insured property, with the proceeds of which he paid off incumbrances existing at the time the policy was issued, and later placed an additional mortgage on the property, aggregating $3,280, the property will not be deemed to have been incumbered for more than $8,000, within the terms of the policy, $400 of the mortgage having been paid before the loss occurred.—MCKIBBAN v. DES MOINES INS. CO., Iowa, 86 N. W. Rep. 39.

37. INTOXICATING LIQUORS—Liquor Tax Certificate—Action on Bond.—Liquor Tax Law, § 23, provides that no person who has been convicted of a felony shall traffic in liquor or be granted a liquor certificate. An application for a liquor license falsely stated that the applicant had never been convicted of a felony. Held, that a surety on his bond, conditioned that the principal would not violate any provision of the liquor tax law, did not guaranty the truth of the statement, and, in the absence of knowledge of its falsity, was not liable for the acts of the principal in selling liquor under the certificate, which, at the election of the State, was void *ab initio*.—LYMAN v. SCHERMERHORN, N. Y., 60 N. E. Rep. 324.

38. LANDLORD AND TENANT—Lease — Coal Lands. — Plaintiffs' lease of coal lands to defendants gave them power to mine and remove all underlying coal. The refuse from the various shafts was to be dumped on the surface of plaintiffs' land. A right of way over the surface for railway track, etc., within specified limits was given to defendants at a certain rental, with privilege to continue such use at their option after the coal had been exhausted from plaintiffs' land. The surface was reserved by plaintiffs for agricultural or other purposes, subject to the rights granted by the lease. Held, that defendants had the right, under the lease, to use the land to remove coal from adjoining land, and hence plaintiffs could not recover additional compensation therefor.—MADISON v. GARFIELD COAL CO., Iowa, 86 N. W. Rep. 41.

39. LANDLORD AND TENANT — Lien for Rent.—In an action for the conversion of grain on which plaintiff claimed a landlord's lien, the fact that plaintiff had neglected to exhaust other property of the tenant on which he had a lien was no defense where, after giving credit for the value of this property, there was still a balance due greater than the amount of plaintiff's recovery.—DERMIDY v. INTERSTATE GRAIN CO., Iowa, 86 N. W. Rep. 30.

40. LIFE INSURANCE—Surrender—Rights of Beneficiary.—A beneficiary cannot enforce by action at law an original policy by treating payments made on a substituted policy issued without her knowledge, on surrender of the original, as payments made on the latter, and inuring to her benefit.—WEATHERBEE v. NEW YORK LIFE INS. CO., Mass., 60 N. E. Rep. 381.

41. LIMITATIONS—Running of Statute — Administrator's Bond.—The statute of limitations commences to run against a cause of action from the time it accrues,

42. LIMITATIONS—Wills — Probate.—Under Code Civ. Proc. § 2628, relating to the running of four years' limitation after the death of an owner of realty, and declaring that, "if the will was concealed by one or more of the heirs of the testator, the limitation" would not begin to run until the delivery of the will to the devisee or to his representatives, or to the proper surrogate, the fact that after the death of an heir a will was found among comparatively worthless papers in his house does not show concealment, within the meaning of the statute, where, after the death of the testator, it was put in evidence in an action to set aside a subsequent will, and all the heirs knew of its existence and contents.—FOX v. FEE, N. Y., 60 N. E. Rep. 281.

43. MASTER AND SERVANT—Contributory Negligence. —Plaintiff, a brakeman, attempted to uncouple two cars with a lever provided for the purpose; but the coupling was out of order, and he could not thus draw the pin. He attempted to draw it with his hand, and while walking between the moving cars his foot was caught between the rail and an unblocked guard rail, whereby he was injured. Held, that plaintiff's contributory negligence, or assumption of risk incident to the condition of the guard rail, was a question for the jury.—TROTT v. CHICAGO, ETC. RY. CO., Iowa, 86 N. W. Rep. 83.

44. MASTER AND SERVANT — Negligence.—Plaintiff worked as a common laborer for defendant several years, and two weeks before the accident defendant's superintendent directed plaintiff to wash out a sewer hole in the slaughter house. The fireman adjusted the hose and nozzle, and, with the assistance of two men to handle the hose, plaintiff entered the hole and washed it out. The next week plaintiff applied to the superintendent for men to assist in handling the hose to wash out the hole, and was told that he did not need help, but must do it himself. The sewer was not cleaned at that time, as the pipe was burst, and the next time plaintiff went to clean it he attached the hose, took the nozzle, and went into the hole; and when the water was turned on the hose became unmanageable, and he was struck and injured by the nozzle. The water had a pressure of 80 pounds, with which pressure it required three men to handle the hose. Held, that the questions of defendant's negligence, and whether plaintiff assumed the risk or was guilty of contributory negligence, were for the jury.— DIEZI v. G. H. HAMMOND CO., Ind., 60 N. E. Rep. 858.

45. MASTER AND SERVANT—Vice-Principal — Negligence.—The plaintiff and S, the servants of the defendant, were assigned the duty of loading a pile-driver hammer upon a wagon. In doing so they used a tree standing by as a tackle post, which was uprooted, fell, and injured the plaintiff, by reason of the force applied in an attempt to swing the hammer upon the wagon by the use of the tackle. S selected the tree and directed the work as foreman. Held, upon the special facts of this case, that the tree was not an appliance furnished by the defendant, but a mere temporary instrumentality provided by the servants themselves during the progress of the work, and that in selecting the tree S was not acting as a vice-principal.—BELL v. LANG, Minn., 86 N. W. Rep. 95.

46. MECHANIC'S LIEN—Statement — Amendment.—A mechanic's lien statement cannot, as to third persons who have acquired rights and interests in the land covered thereby adverse to the lien claimant, be amended to the prejudice of the rights of such third persons after it has been filed in the office of the

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solved, attorney's fees incurred by the mortgagee in removing an injunction were reasonably necessary and hence rightfully allowed from the proceeds on foreclosure. A fee paid an auctioneer in selling property under foreclosure proceedings which is the ordinary and customary charge for such services without express agreement, and under the belief that auctioneers were entitled to such amount, is properly allowed, though there was reasonable probability that an auctioneer might have been found who would have conducted the sale for a much lower fee.—BANGS v. FALLON, Mass., 60 N. E. Rep. 408.

48. MUNICIPAL CORPORATION — Action on Contract—Mandamus.—Where plaintiff agreed to furnish a certain number of lights for the streets, and the town agreed to pay a certain rate per year, payments to be made every month, but not in advance, and after a certain month the town refused payment, not because it lacked funds, but asserting that the contract was void, plaintiff's action for the amount due was properly brought on the contract, instead of by application for *mandamus*.—TOWN OF GOSPORT v. PRITCHARD, Ind., 59 N. E. Rep. 1058.

49. MUNICIPAL CORPORATIONS—Contract—Signature.—A contract for lighting streets, purporting to be the contract of the town, and signed by one as president of the board of trustees, and attested by the clerk, and entered on the proceedings of the board of trustees, is binding on the town, and is not merely the contract of the persons whose names are signed.—TOWN OF GOSPORT v. PRITCHARD, Ind., 59 N. E. Rep. 1058.

50. MUNICIPAL CORPORATIONS — Heavy Teams—Unreasonable Ordinance.—An ordinance of the board of park commissioners of the city of Minneapolis provides that no vehicle which, together with its load weighs more than 2,000 pounds, and which is in use for carrying goods, merchandise, building material, manure, dirt, earth, or other article or commodity, and which has tires less than six inches in width, such shall pass or enter upon any park or parkway. Held, as applicable to a parkway, the ordinance is void, because unreasonable, and in its effect prohibitive of traffic thus classified.—STATE v. ROHART, Minn., 86 N. W. Rep. 93.

51. MUNICIPAL CORPORATIONS—Injuries to Traveler on Highway.—Plaintiff's horse was frightened by a workman, employed in constructing a street in defendant city, dumping stone on the wooden platform of a stone crusher, and the escape of steam from the crusher, which caused a runaway, and the injuries for which plaintiff sued. The street on which the work was being done was laid out with two roadways, and the road on which plaintiff was driving was open to travel, though this fact was contradicted. Held sufficient to justify refusal to direct verdict for defendant, requested on the ground of plaintiff's assumption of the risk.—BUTMAN v. CITY OF NEWTON, Mass., 60 N. E. Rep. 401.

52. MUNICIPAL CORPORATIONS — Obstruction of Streets.—Evidence that the road supervisor authorized defendant to erect scales in a street is not admissible in an action for injuries received because of such scales, since the road supervisor had no authority to grant such right, and evidence of an ordinance authorizing defendant to maintain stock yards within the limits of a municipal corporation, but not on its streets, is immaterial, in an action for a personal injury resulting from the maintenance of scales in the street.—RUPP v. HOWARD, Iowa, 86 N. W. Rep. 88.

53. NEGLIGENCE—Dumping Stone.—Dumping stone on the wooden platform of a stone crusher, and the letting off of steam from the crusher, just as a horse being driven along a roadway, 25 feet away, was opposite and in plain sight, is sufficient to support a finding of negligence.—BUTMAN v. CITY OF NEWTON, Mass., 60 N. E. Rep. 491.

54. NUISANCE — Ice — Sidewalk.—Defendant purchased, and thereafter occupied, a house from the gutter of which a spout led to a groove in and crossing the sidewalk. The water flowing through the spout formed ice on the walk, rendering it dangerous to public travel, and causing injury to plaintiff. Held, that so maintaining the spout constituted a public nuisance, and defendant was not exonerated by the fact that the conditions existed when she purchased the property, and no previous complaint had been made, since, the nuisance being public, her predecessor could not have acquired a right to maintain it.—LEAHAN v. COCHRAN, Mass., 60 N. E. Rep. 888.

55. PARK COMMISSIONERS—Powers—Conveyance of Land — Exemption from Taxation — Contract.—Laws 1889 confers authority upon the board of park commissioners of the city of Minneapolis to contract for the conveyance of land to the city for park purposes in consideration of the exemption of other contiguous lands of the owner from assessments for park purposes, to the amount agreed upon. Such exemptions are not limited by the act to a single assessment made with reference to the property so purchased, but include all assessments, present or future, and also installments not yet entered for collection, but which have been assessed prior to the execution of the contract.—STATE v. DISTRICT COURT OF FOURTH JUDICIAL DIST., Minn., 86 N. W. Rep. 15.

56. PARTITION — Remainders.—Testatrix devised her house and lot to her daughter, subject to the condition that, if such daughter died before either of her grandchildren, all of the legacies given to the daughter under the will should revert to the grandchildren. Held that, in the absence of any intention to restrict the alienation, the house and lot descended to the grandchildren in pareels, for which partition might be maintained.—PULSE v. OSBORN, Ind., 60 N. E. Rep. 374.

57. PARTITION — Remainder Men.—A remainder-man is not entitled to recover of his fellow remainder-men for improvements of the property made by him during the occupancy of the life tenant, as the remainder-men were not tenants in common at the time the improvements were made, such relation not existing until they were entitled to possession.—PULSE v. OSBORN, Ind., 60 N. E. Rep. 374.

58. PENAL STATUTES — Action to Enforce a Penalty—Limitation.—Gen. Laws 1896, ch. 284, § 4, allowing 20 years for bringing an action on a specialty, and not chapter 288, § 8, allowing one year for bringing suits founded on any penal statute, is the statute of limitations applicable to an action authorized by chapter 180, § 22, to enforce the individual liability of stockholders for the debts of the corporation in case of non-performance of statutory duties, since the action, though of a penal character, is not an action to enforce a penalty, within the meaning of the words "penal statute," as used in chapter 288.—KILTON v. PROVIDENCE TOOL CO., R. I., 48 Atl. Rep. 1039.

59. PHYSICIANS AND SURGEONS — Failure to Answer Call—Liability.—A physician, licensed to practice medicine under Act 1897, p. 255, and Act 1899, p. 247, authorizing the licensing of physicians found to possess the necessary qualifications, etc., is not liable for arbitrarily refusing to respond to a call, though he is the only physician available.—HURLEY v. EDDINGFIELD, Ind., 59 N. E. Rep. 1058.

60. PHYSICIANS AND SURGEONS — Negligence—Damages.—Plaintiff, a farm hand, was compelled to have his fingers amputated. Defendant, a physician, performed the operation. Afterwards he refused to further attend him, and amputation of the arm became necessary. Plaintiff sued defendant for negligence. Proof was given, over defendant's objection, of what plaintiff earned before and after the loss of his arm. Defendant contended that proof should be confined to the loss of his earning capacity after the removal of his fingers, which operation was conceded to be necessary. Held not to be reversible error, where the jury's verdict showed that due considera-

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tion was given to such difference in physical perfection.—RICH v. MOORE, Iowa, 86 N. W. Rep. 52.

61. PLEADING AND PRACTICE — Common Law.—In pleading the common law of another State it is sufficient to state as a fact what the law is, without setting out decisions of the courts. Decisions, opinions, and customs constitute the evidence of the law.—CRANDALL v. GREAT NORTHERN R. Co., Minn., 86 N. W. Rep. 10.

62. PLEADING AND PRACTICE — Equitable Action—Trial by Jury.—Where the heir of a grantor, who had deeded land to trustees for the erection and maintenance of a library, sought to rescind the deeds on the ground that the grantor was not of sound mind at the time of the execution thereof, and, further, that the grantees exercised undue influence or fraud, and prayed in her complaint for an accounting, the action was an equitable one, and hence plaintiff was not entitled to a trial by jury as a matter of right.—CARPENTER v. WILLARD LIBRARY TRUSTEES, Ind., 60 N. E. Rep. 865.

63. PLEDGE — Warehouse Receipts.—Where a warehouse receipt has been transferred as collateral, the pledgee has the right to take possession of the property on the surrender and cancellation of the receipt, subject to the lien of the warehouseman for storage, but is not compelled to do so or pay the charges on the property.—DRIGGS v. DEAN, N. Y., 60 N. E. Rep. 336.

64. PUBLIC SCHOOL—Detention of Minor.—Where the return of the State superintendent to the writ in such a case shows that his detention of a female minor child is based upon a finding of the probate court that she possessed proper qualifications of age, health, and intelligence; that she was neglected; that her mother is hopelessly insane and detained in the State hospital; that her father is unable to and does not care to support her, in consequence of which she is on the street, and in peril of health and morality,—the order of the probate court committing such waife to the public school is valid, and justifies her detention by the superintendent of that institution, under section 3, ch. 210, Gen. Laws 1897.—STATE v. MERRILL, Minn., 86 N. W. Rep. 89.

65. REAL PROPERTY — Action to Quiet Title.—Where the title to real estate is in a husband and wife, and the latter dies, and the former sues to quiet title as against her heirs, though no administration has been granted on her estate, and the time therefor has not expired, the heirs, who defend by filing a cross bill to partition the land, cannot join therein an application for the division of personal property owned by the wife, since such heirs are not entitled to share in the possession and control of the personal property until after an administration, or the expiration of the time therefor.—RITCHIE v. BARNES, Iowa, 86 N. W. Rep. 48.

66. REAL PROPERTY—Taxes—Payment by Co-Tenant.—A tenant in common paid taxes on the property during the tenancy of his mother, life tenant thereof, but it did not appear that he paid them on account of the failure of his mother to do so, or that he paid them after default. Held, that he would not be allowed for the taxes in partition proceedings, since it was the life tenant's primary duty to pay them.—BOOTH v. BOOTH, Iowa, 86 N. W. Rep. 51.

67. RECEIVERS—Appointment Pendente Lite—Prerequisites.—Burns' Rev. St. 1894, § 1286, provides that a receiver may be appointed in all actions where it is shown that the property in controversy is in danger of being lost, removed or injured, or where in the the risk was hazardous, that they were making extensions of the plant, and that the property was liable to damage if permitted to remain in their possession. Held, that the court was justified in appointing a receiver to manage the property pending an action to enforce specific performance of such contract.—MEAD v. BUEK, Ind., 60 N. E. Rep. 888.

68. RECEIVERS—Assets.—Where one, in obedience to an order of a court of competent jurisdiction, has turned over to a receiver appointed by it assets in his hands belonging to an insolvent, he cannot be compelled, in a suit in another court, between different parties, to account therefor.—CARTER v. DIME SAV. BANK, Neb., 86 N. W. Rep. 29.

69. REPLEVIN—Body of Dead Dog.—A complaint in replevin to recover the body of a dead dog alleged the wrongful taking and detention, and that the body was of the value of two dollars, in that the hide was of the value of one dollar, and the carcass, exclusive of the hide, of the value of one dollar for fertilizing purposes. Held, that the complaint stated a cause of action, under Burns' Rev. St. 1894, § 1286, providing that, when any personal goods are wrongfully taken or unlawfully detained, the owner may bring an action for the possession thereof, since dogs are property, and the ownership is not lost by the death of the animal, especially if the body is of value.—VANTREESE v. MCGEE, Ind., 60 N. E. Rep. 818.

70. REPLEVIN—Pleading—General Denial.—A plea of general denial is sufficient to entitle the defendant to a return of the goods on a judgment in his favor.—D'ARCY v. STRUEB, Mass., 60 N. E. Rep. 405.

71. RES ADJUDICATA.—Where plaintiffs sued defendants to enjoin a specified use of leased lands as not within a lease, submitting the question for determination whether such use was proper under the lease, and the case was dismissed on it merits, such adjudication will constitute a bar to a subsequent suit by plaintiffs against defendants presenting the same question with reference to defendants' rights under the lease.—MADISON v. GARFIELD COAL CO., Iowa, 86 N. W. Rep. 41.

72. SALES—Warranty—Time.—Where a contract of sale of machiney gave the purchaser a certain time in which to accept and approve a governor which was part thereof, and the evidence showed that before the expiration of the period he notified the seller that the governor was not satisfactory, leading to negotiations on the part of the seller to have the defect remedied, pending which there was nothing to show that either party considered the time for acceptance as running, no acceptance will be implied on the part of the purchaser at the end of the time limited in the contract.—JAMES LEFFEL & CO. v. PIATT, Mich., 86 N. W. Rep. 66.

73. SURETIES — Liabilities. — Where a bond of an agent to his principal does not contain a general provision to answer for the default of the agent, and a provision creating a specific liability in case of such default is defective in leaving the amount blank, the sureties are not liable thereon.—SPRING GARDEN INS. CO. v. LEMMON, Iowa, 86 N. W. Rep. 55.

74. TAXATION—Assignment for Benefit of Creditors—Listing by Assignee.—Personal property in the possession of an assignee for the benefit of creditors of a manufacturing corporation, which is not being reduced to money for distribution among the creditors of the corporation, but is being held and operated, under the orders of the insolvency court, and at the

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or city of which he is an inhabitant on the 1st day of April of the year for which the assessment is made. Plaintiff owned land in F county, but had resided in W county since February, 1896; and her personal property was assessed in W county for the year 1897, and also in F county. The county treasurer of F county threatened to sell plaintiff's land in F county to enforce the collection of the tax on her personal property assessed in that county. Held, that plaintiff was entitled to an injunction restraining collection of the tax in F county as void and as a cloud on the title to her real estate, since she was not a resident of F county on April 1, 1897.—LUKE V. SHERIDAN, Ind., 60 N. E. Rep. 359.

76. TAXATION—Sale—Redemption. — Laws 1888, ch. 390, § 57, permitting a mortgagee to redeem from tax sale within two years after notice of the sale, is not confined to the holders of mortgages outstanding at the time of sale, but authorizes redemption by a mortgagee to whom the title was conveyed by purchaser at foreclosure sale after the property was sold for taxes.—BARRY V. LANCY, Mass., 60 N. E. Rep. 395.

77. TAXATION—Sale—Surplus — Disposition — Mortgagee's Rights.—Where, in a contest between an attaching creditor of the owner of land sold for taxes and a mortgagee of the property for a surplus, the answer of the city, under trustee process, did not show that the sum due on the mortgage was equal to the surplus, it was properly charged as trustee of the attaching creditor.—CUMMINGS V. CHRISTIE, Mass., 60 N. E. Rep. 396.

78. TAXATION SALE—Surplus—Rights of Mortgagor.—Under St. 1888, ch. 390, § 40, providing that, if taxes are not paid, the collector may sell the whole of the land, and, after the taxes and charges are paid therefrom, the city or town shall pay the balance to the owner of the estate on demand, the word "owner" means the owner at the time of the sale, and not the owner at the time of the assessment.—WORCESTER V. CITY OF BOSTON, Mass., 60 N. E. Rep. 410.

79. TRUSTS—Charities.—A trust to create a home for poor women and their young children, and for a temporary home for invalid women, both young and old, and for the poor, sick, and weary of any denomination, creates a valid charity.—AMORY V. ATTORNEY GENERAL, Mass., 60 N. E. Rep. 391.

80. TRUSTS AND TRUSTEES—Partition Sale—Purchase by Trustee.—That the purchaser at partition sale of real estate was trustee of a half interest therein did not prevent his acquiring a valid title not voidable at the instance of the beneficiary, he having an individual interest in the property, and the court being fully advised of the facts, having decreed that any party to the action might purchase at the sale.—CORBIN V. BAKER, N. Y., 60 N. E. Rep. 332.

81. VENDOR AND PURCHASER—Action for Price—Tender of Deed.—No action lies to recover on purchase money notes representing deferred payments to be made on the conveyances of land sold, where no tender of the deed has been made to the purchaser, the agreements to convey and to pay the price being dependent.—EWING V. WIGHTMAN, N. Y., 60 N. E. Rep. 372.

82. VENDOR AND PURCHASER — Contract — Taxes.—Where plaintiff agreed to convey certain lots to defendant by quitclaim deed, free and clear from all incumbrances and taxes, a special assessment for a sewer was a tax, within the meaning of the contract.—WILLIAMS V. MONK, Mass., 60 N. E. Rep. 394.

83. VERDICT—General and Special.—A general verdict for plaintiff for injuries caused by failure of defendant's locomotive, while approaching a highway, to give the proper signals, and its negligence in moving at a high rate of speed, is not inconsistent with special findings that plaintiff, in approaching the crossing, could have seen defendant's train had he looked from a bridge before he reached a point 50 feet from the track, or could have seen it when 50 feet from the crossing, since it is for the jury to say whether he was negligent in failing to look and listen from the particular points indicated in the special findings.—SCHULTE V. CHICAGO, M. & ST. P. RY. CO., Iowa, 86 N. W. Rep. 63.

84. WILLS — Charitable Trusts—Cy Pres Doctrine.—Testatrix created a charitable trust of certain real estate, which she directed should be used as a home for poor women under the administration of a sisterhood, and devised to trustees the residue of her estate, in trust for the maintenance of the home, declaring that, if the sisterhood did not accept, the property was to be conveyed to a hospital for the same charitable purpose. At testatrix's death there was no fund available for the maintenance of the charity, and both the sisterhood and the hospital refused the gift. Held, that the facts that the beneficiaries renounced, and that the trust could not be carried out in the manner prescribed by the testatrix, was not fatal to the charity, since the same could be carried out as nearly as may be by a scheme framed under the sanction of the court.—AMORY V. ATTORNEY GENERAL, Mass., 60 N. E. Rep. 391.

85. WILLS—Construction—Death of Remainder-Man.—Testator devised property to trustees; the income to be paid to his adopted son during life, with remainder in fee to his wife and children, "share and share alike; the issue of such as may have died to take the share to which his, her, or their parents would, if living, have been entitled." Held, that where one of the remainder men dies before the life beneficiary, her share becomes devested and vests in her issue, so that a trustee under her will takes no interest therein.—LYONS V. OSTRANDER, N. Y., 60 N. E. Rep. 384.

86. WILLS—Construction—Powers.—Where testatrix devised the residue of her property to her husband for life, with power to dispose of the same whenever, in his judgment, it might be conducive to his comfort, with remainder to plaintiff in fee, a conveyance by the husband without consideration, and for the purpose of transferring the property so that it would descend to his children, did not constitute a valid execution of the power, and was void.—STOCKER V. FOSTER, Mass., 60 N. E. Rep. 407.

87. WILLS—Contest—Mental Unsoundness.—In a will contest evidence of nonexpert witnesses that testatrix was not able to transact business at the time of and prior to the execution of the will is incompetent, since her incompetency to transact the business of making a will, and not business in general, is alone in issue.—BRACKNEY V. FOGLE, Ind., 60 N. E. Rep. 366.

88. WILLS—Devise—Absolute Gift.—Testator devised the residue of his estate on the death of his wife "to the Round Lake Association, heretofore known as the 'Round Lake Camp Meeting Association of the Methodist Episcopal Church,'" subject to an estate for life of his sister in-law in a certain portion thereof, the amount to be invested, and the income to be devoted by said association to the maintenance of the school at said Round Lake, known as the "Round Lake Summer Institute," which was an incorporated company. Held, to constitute an absolute gift to the association, and not a trust in favor of the institute.—IN RE GRIFFIN'S WILL, N. Y., 60 N. E. Rep. 284.

89. WILLS — Devise in Lieu of Dower — Rights of Widow's Heirs.—Decedent's will provided that defendant, the son, should have the use of all his property for the purpose of maintaining his mother during her natural life, and that after her death defendant should out of the estate, pay a certain sum in annual installments to plaintiff, his sister, the will concluding with the provision that "the remainder of all my property, consisting of real and personal estate, I give and bequeath unto my son," the defendant. Held, such provisions were inconsistent with the widow's dower rights, and, she having taken under the will, plaintiff can claim nothing as her heir.—CAMPBELL V. SANKEY, Iowa, 86 N. W. Rep. 48.

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Central Law Journal.

ST. LOUIS, MO., JULY 26, 1901.

Probably the most important of all studies known to men is also the most neglected—that of the study of man himself. What is known as physiological psychology is comparatively a new science which is rapidly developing many practical features, not the least of which is the movement which is being earnestly promoted by Prof. Arthur MacDonald, specialist in the Bureau of Education at Washington, to establish under the supervision and control of the Department of the Interior a Psycho-Physical Laboratory for sociological, educational and medico-scientific purposes. The purpose of such a laboratory is well set forth in a resolution which is being referred for favorable action to the leading bar associations, both state and national, all over the country. The draft of the resolution is as follows:

Resolved, That we are in favor of the establishment of a Psycho-Physical Laboratory in the Department of the Interior at Washington, for the practical application of physiological psychology to sociological, jurisprudential and abnormal or pathological data, especially as found in institutions for the criminal, pauper and defective classes and in hospitals and also as may be observed in schools and other institutions.

"A rigid and patient study of man," says Prof. MacDonald, "must be based primarily upon the individual, who is the unit in society. If trustworthy knowledge is to be obtained, it must come from the study of large numbers of individuals. Such a laboratory is not in the least in competition with other psycho-physical laboratories in our country. Its purpose is to gather sociological, pathological, or abnormal data, as found especially in children and in criminal, pauper, and defective classes and in hospitals. Besides these data, it is desired to gather more special data with laboratory instruments of precision, and to make such experiments or measurements as are generally considered of value, not only by psycho-physicists and anthropologists, but by physiological and pathological specialists. It is also desirable that the results of similar work in this country and Europe be collected, compared, and published from time to time. If we are ever to have sufficient definite knowledge of living human beings to become a science, it can only be done by the careful study of large numbers of individuals. The more thorough the study and the larger the number, the more useful such investigation can be made to society. We pay out millions to catch, try, and care for criminals, but give very little to study the causes that lead to crime. The study of man, to be of most utility, must be directed first to the causes of crime, pauperism, alchoholism, and other forms of abnormality. To do this the individuals themselves must be studied. As the seeds of evil are usually sown in childhood and youth, it is here that all investigation should commence, for there is little hope of making the world better if we do not seek the causes of social evils at their beginnings."

We earnestly share the sentiments of Prof. MacDonald and heartily indorse his efforts to induce the national government to establish a psycho-physical laboratory for the study of criminology and kindred subjects. Knowledge is power—a trite saying but one which has peculiar significance in this connection. One of the supremest objects of every government is absolute power within itself to suppress crime. The severest penalties of law have been futile to deter the criminal inflamed by passionate anger or a burning lust for gold. The drunkard, the pauper and the criminal are creatures of circumstance, education and heredity and the science that can tell us under what conditions these forces act in evolving the abnormal man, would necessarily put into our hands the secret of how to change those conditions. We especially commend the resolution drafted by Prof. MacDonald to the favorable attention of bar associations all over the country.

NOTES OF IMPORTANT DECISIONS

CONTRACTS FOR FUTURE DELIVERY.—"A decision of importance regarding the validity of contracts for future delivery," says the *Bradstreet's Journal*, "was rendered by the Supreme Court of the United States in the case Clews v. Jamison. This was a suit to recover the difference between the price at which the defendants, stock brokers in Chicago, agreed to purchase a certain number of shares of stock and the price

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at which it sold at auction after the defendants had declined to receive it. The action was dismissed by the United States circuit court, whose decision was affirmed by the circuit court of appeals, in part on the ground that the contract was a gambling one. The supreme court reversed the decisions below, holding that there was nothing in the contracts involved in the case, or in the evidence presented, from which it could be inferred that they fell within the statutes of Illinois on the subject of gambling. It was admitted by all the parties to the suit that the transaction was according to the rules of the Chicago Stock Exchange, which prohibited, under penalty of suspension, sales for mere collection of differences, and also provided that every sale must be one in good faith for the delivery, either present or future, of the article sold, and tha sales 'for the account' should be made upon the basis of an intended actual delivery of the stock at the time when due. The court declared that it would not say that these rules prevented gambling on the exchange, but if gambling were carried on it must be in violation of and not pursuant to the rules.

"Part of the opinion in the case enunciates so clearly and tersely the legal *status* of future contracts that it is worth while to direct special attention to it. The ground is taken that as a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, it must be shown by him who attacks it that it was not intended to deliver the articles sold, and that nothing but the difference between the contract and the market price was to be paid by the parties to the contract. Moreover, the fact that at the time of making a contract for future delivery the party binding himself to sell has not the goods in his possession, and has no means of obtaining them for delivery or otherwise than by purchasing them after the contract is made, does not invalidate the contract. In order to invalidate a contract as a wagering one, the court says, both parties must intend that, instead of the delivery of the article, there shall be a mere payment of the difference between the contract and the market price, and the proof must show that there was a mutual understanding that the transaction was to be a mere settlement of differences, or, in other words, a mere wagering contract. The doctrine here enunciated contains nothing that is novel to the readers of these columns, but the statement of it by the highest court in the country is deserving of being emphasized."

such institutions are to be regarded as governmental instrumentalities and therefore partake of the same immunity extended to other departments of the State, in its sovereign capacity, or to those municipal or *quasi*-municipal corporations invested with such portions of the sovereignty of the State, as are essential to the performance of the functions of local government, unless some statute has expressly admitted the liability of the institution or of the State, or municipal or *quasi*-municipal corporation to respond in damages in actions of that nature. The grounds of this immunity are somtimes confused with the other and different grounds upon which immunity from liability in personal injury cases is extended to charitable institutions endowed and maintained by private benevolence, but the distinction between the theories of immunity in the respective cases is nevertheless valid and substantial, although occasionally obscured by the looseness of expression indulged in by some judges and the slovenliness in arrangement that mars the work of some writers of treatises. This distinction will be developed, and the doctrine formulated in this introduction will be supported, by a review of the American decisions wherein liabilities of this nature were sought to be enforced against either; institutions maintained by State, city, or county taxation.

State Institutions.—In Maia v. Eastern State Hospital,[1] an administrator sued for damages for the death of his intestate alleging the same to have been caused by the negligence of the defendant or its agents in requiring the intestate while a patient and inmate of the defendant's hospital for the insane to dig and excavate in the side of an embankment, the property of the defendant, without providing props or supports to prevent the overhanging earth from falling on him. It appeared from an examination of the statutes constituting the charter of the

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of the commonwealth of insane or disordered minds. The question whether the defendant, a public corporation, acting as a State agency, exercising exclusively governmental functions, was liable for the injuries complained of in the declaration, was consequently decided in the negative.

If the State interposes on behalf of neglected and abandoned children within its confines in its capacity of *parens patria* and assumes their guardianship for the purpose of committing them to an industrial school conducted by a body corporate created by the general assembly and under the control and oversight thereof, maintained by State aid from taxation, such institution will be held to constitute an agency or instrumentality of the State, and its objects charitable. One committed to its care and custody for the purpose of securing the moral and physical training and education which it was its purpose to bestow, by training its inmates to the habits of industry and by instilling into their minds the principles of right living to the end that they might become useful citizens of the State, rather than fill its prisons and poorhouses, is not entitled to an action against the corporation to recover damages for an alleged cruel and inhuman beating resulting in permanent injuries, inflicted on him while an inmate of the institution by one of the servants and employees of the corporation, even though such employee was known to be unfit and incompetent for such services, but was nevertheless kept in its employ.[2] And although the court intimated that the fact that the institution, a house of refuge for homeless or destitute boys, was under the control of an incorporation whose affairs were intrusted to a board of twenty-four managers, ten elected by members of the association, ten chosen by the mayor and city council of the city wherein the institution was located, and four appointed by the Governor, and the current expenses were defra- ration, and clothe it with the immunity and privileges appertaining to public institutions, the court held nevertheless that the fact that the funds of the institution were controlled by the managers solely for the charitable purposes designated by the organic law, entitled such corporation to all of the immunities of an institution resting on an eleemosynary foundation, where a liability was contended for by an inmate of such institution for damages resulting from an assault and battery inflicted by way of punishment by teachers employed by the institution.[3] From the foregoing cases it would seem that State control or representation in the management of any institution whose purpose is charitable, together with its maintenance in whole or in part by appropriations from the State treasury, will constitute it in the strictest sense a governmental instrumentality although it may possess and manage large amounts of property and be governed by corporate officers in almost all particulars like hospitals, asylums, homes, etc., of a similar kind, founded and sustained by private benevolence.

City Hospitals.—Where the conduct and control of such institutions is committed to the city wherein they are located or authority is given by the legislature for the establishment and maintenance thereof by taxation by the city, the management being committed to a corporation similar to those conducting State institutions, the municipality and the corporation are both exempt from liability in the class of cases under discussion on the same theory of immunities recognized with reference to the State institution. In Richmond v. Long,[4] the plaintiff sued for the estimated value of a slave alleged to have been lost by neglect of proper custody and attendance while in the city hospital to which he had been committed while suffering from small-pox, and from which he escaped and soon died by reason of exposure to the inclemency of the weather, the city's liability

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legislating by direction of law for the sanitary police of the city and providing the usual accommodations and public charities for the care and cure of the deceased. Under such a state of facts to require the city to answer for the negligence or misconduct of the superintendent, matron, nurses or attendants of the hospital would seem to us to subvert the fundamental doctrines of the law as we understand and have sought to expound them. If this recovery can be made, we do not perceive why by parity of reasoning the State should not be made liable through its public functionaries in civil actions at the suit of individuals or for losses occurring in the management of its departments and public institutions under its immediate control and supervision."

Somewhat different phraseology is employed by the court in the next case to which reference will be made, Mutraugh v. St. Louis,[5] the establishment and maintenance of a public hospital being held to be a corporate function, "conferred upon the city for the public good" and not for private or corporate advantage, and the city consequently entitled to the same immunities from liability for injuries resulting from negligence or misfeasance of the officers and servants of the institution extended to the State. Such immunity not only constitutes an exception to the general principles of law governing the relation of master and servant, but has also been extended under circumstances that seem to constitute an important qualification to the rule that the owner of real estate is bound to take care that those who come upon his premises on his express or implied invitation must be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party had no reason to look for.[6] Evidence of negligence on the part of the superintendent will not be sufficient to fix a liability if there is no evidence tending to show that he was not a suitable and proper person to be appointed to such

plaintiff sustained personal injuries while on the premises, having rightfully come there to visit a paying patient in order to arrange for the latter's removal from the hospital. The hospital in question was maintained by the city of Boston with such aid as might be derived from donations and dues received from paying patients, the trustees being in a sense, managing agents merely, in maintaining the hospital, subject to the laws and ordinances of the city. The donations, if any were made, were required by law to be used according to the terms of the gift. The money appropriated by the city of Boston could not be legally used otherwise than according to the terms of the appropriation. Under the ordinances, the sums received from paying patients were required to be credited to the account of the hospital and used for the purpose of maintaining it in accordance with the special act constituting its charter. It was therefore held that the corporation of the trustees of the city hospital, of the city of Boston, had in fact, no property. In other words, said corporation was a mere agency of the city, and that municipality was with respect thereto a trustee of all such funds and property and in its management thereof exempt from the responsibilities and duties ordinarily consequent on ownership. "While this act" observed the court, "is a special and not a general statute and is permissive and not imperative upon the part of the city with respect to the establishment of this institution, these distinctions do not render the city liable for negligence in the management of the hospital. The trustees are a body created for the performance of a duty which under the authority of the statute the city of Boston has assumed for the benefit of the public and from the performance of which no profit or advantage is received either by the trustees or by the city. The trustees are, therefore, no more liable for the negligence of their officers and agents than the city would be."[7] The officers, their employees and servants, invested with the

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a person caused by the negligence of the driver of an ambulance wagon, who was appointed by the mayor under the provisions of a statute creating a department of public charities.[8]

County Poor Farms — Asylums, etc.—As before indicated, the establishment, control and maintenance of various charitable institutions has been committed in some instances, to the county. And generally, the county is charged with the police of the poor and discharge of the obligation to relieve paupers by establishing farms and work houses where they are collected and cared for, and when circumstances admit, set to useful labor. While engaged in discharging these duties, which are political or governmental in their nature, the county likewise enjoys immunity from liability in tort. The rule of *respondeat superior* is inapplicable under such circumstances. A county is not therefore liable to either the inmate of its hospital who sustains injuries from the unskillful treatment of its resident physician employed to treat the poor, or from the failure of the officers of the hospital to supply sufficient and wholesome food,[9] especially where it does not appear that the county commissioners were negligent in selecting such physician.[10] The immunity extended to the defendant institution or the municipal corporation or *quasi*-municipal corporation managing and controlling the same, we may also observe here, without undue digression, constitutes an exception to the doctrine recognizing liability of the master for damages and injury consequent on the omission to give the servant due instruction and warning with respect to dangerous machinery and other instrumentalities with whose hazards he is unacquainted or in whose use he is inexperienced. Thus where the plaintiff was engaged in operating a steam ironing machine belonging to the defendant, and used in the laundry department of the county insane asylum, an institution established by special act for the care of the county insane, which was conducted and controlled by the county board of supervisors, who appointed the warden and a board of three trustees to whose immediate management the asylum was committed by the supervisors, subject to such regulations as that body should establish from time to time, the court held that the provisions of said charter contemplated the benefit primarily of the citizens of the county wherein said institution was located. That the control and restraint of the insane and criminal classes are equally necessary for the welfare and safety of the community. The defendant, one of the political divisions of the State, was engaged in the performance of that duty, a duty imposed upon every county in the State. It could discharge that duty either by employing the State to care for its insane or care for them in an asylum within its own borders. In either case it was discharging a duty imposed upon it by law, and was not therefore liable to attendants and assistants employed in the asylum by the board of trustees for the negligence of said warden or trustees.[11] When the case came before the court of appeals it was further held that the fact that the county shared with the State the burden of caring for the insane by withdrawing from the State institutions all indigent insane for whose maintenance it was liable, and secured legislation requiring all pauper insane of the county to enter its own asylum, put the asylum and the county on the same footing as the State with respect to liability for torts in such institution. When an insane person is deprived of his liberty and the custody of his property, placed in close confinement and separated from family and friends, it is an extreme exercise of the police power by the State or some political division thereof, for the protection of society, and to promote the best interests of the unfortunate citizens who may be victims of mental alienation. It therefore follows that the county of Monroe, while acting under the statutes referred to, was engaged in the discharge of a most important public duty, and consequently not liable to plaintiff in damages by reason of her injuries.[12] The warden and trustees were in no legal sense, it was held, agents of the county, but were public officers engaged in the discharge of duties which involved the exercise of the police power, and

[8] Maximillian v. Mayor, etc. of City of New York, 62 N. Y. 168, 20 Am. Rep. 468.

[9] Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151.

[10] Sumner v. County of Dale, 103 Ind. 262, 2 N. E. Rep. 725, 53 Am. Rep. 512.

[11] Hughes v. Monroe County, 29 N. Y. Supp. 495.

[12] Hughes v. County of Monroe, 147 N. Y. 49, 41 N. E. Rep. 407, 39 L. R. A. 33, 41 Cent. L. J. 386.

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in which the general public were interested. * * * The non-liability of counties, and also of municipalities, and other corporations having special charters for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, is established by many cases. For damages caused by the maltreatment of a person committed to jail by the ordinary preparatory to being sent to the lunatic asylum under a statute governing the proceedings to confine a lunatic at the instance of third persons, a county was held not liable. It was said that the injured person must sue the jailer, sheriff, or those who maltreated him while in jail. In this case the plaintiff's limbs were so badly frozen that one of his legs had to be amputated, and the toes on his other foot were frozen off.[13]

A town is not liable for the negligence of a physician, who being placed in charge of its pest house, by its selectmen, during an epidemic of small-pox, permits a nurse to go forth without disinfection, whereby the disease is communicated to third parties.[14] Nor for the negligence generally of persons connected with its sanitary service or hospitals in procuring the assistance of a passer-by in removing a coffin containing the corpse of a small-pox patient from the house in which he lay with that disease, without informing such passer-by of the existence of infection, whereby the plaintiff contracts the same and communicates the contagion to his family resulting in the death of two of his children.[15] A liability has however been worked out by the court in a case almost identical with that of Maia's Admr. v. Hospital,[16] on the theory that the county controlling the institution is not entitled to immunity from liability in case of a neglect of those obligations which the county is held to have incurred when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it at its request. In either alternative it is held that the county is subject to the same liability for the neglect of those special duties to which private corporations would be if the same duties were imposed by the authority conferred on them, including their liability for the wrongful neglect as well as the wrongful act of their officers and agents. The conclusion reached in the case in which the above proposition was announced, does not seem to be supported by the logic of the court. The care of paupers was assuredly one of the duties devolving upon it under general law. If, therefore, the county saw fit to discharge that duty with respect to the pauper insane by establishing and maintaining a hospital where all of them could be cared for, separate from other dependents. it would seem that the assumption of a special duty imposed upon it by its consent, or its voluntary performance thereof, was apparent rather than real. In any event there was a public governmental duty to be performed, and I cannot understand why the performance in one manner should have worked to impose liability where no liability would have been incurred in the event of an accident occurring in the course of the performance of the duty in question, *i. e.*, the care of the indigent insane, in another and perhaps, less humane manner. The action was based on the alleged negligence of the county in permitting a contractor who was employed to lay certain water pipe to the county asylum, the work being done under the supervision of the county engineer, to carry on said work in a dangerous way by failing to require him to shore up the sides of the trench being dug on the grounds of the asylum, by reason of which alleged wrongful act, neglect and default, of the county, by its supervising engineer, then and there present, and directing the work, the sides of the trench caved in on and suffocated plaintiff's son, one of the workmen engaged thereon. The liability of the county was predicated upon the proposition that the duty in the performance of which the county was engaged, was not one imposed by general law on all counties, but a self-imposed one, and that *quoad hoc* the county was a private corporation engaged in a private enterprise, more especially as the work was being done on its own property, and therefore governed by the same rules as to its liability.[17] The distinction attempted

[13] Wilson v. Farmer County, 74 Ga. 818.

[14] Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709.

[15] Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499.

[16] 97 Va. 507, 34 S. E. Rep. 617, 47 L. R. A. 577.

[17] Hannon v. St. Louis Co., 62 Mo. 313, 15 Am. Law Reg. (N. S.) 664.

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to be drawn by the court with respect to the consequences flowing from the performance of a duty imposed by general law, on all the counties, of the State, and those flowing from the performance of self-imposed one, was not, ultimately and exclusively, of determining weight with the court, for in the concluding portion of the opinion the decision is impliedly, in part at least, based upon the consideration that the accident and injury occurred in consequence of the negligent use of its own property, the court observing that "the admitted facts of the case disclose no sound reason * * * why the county in respect to its own property should not be held amenable to the same rules as would certainly prevail were a municipal or private corporation or an individual a party defendant." But as we have already seen above, neither the institution itself nor the city managing and controlling it, incur any liability under such a state of facts, and the decision in Hannon v. St. Louis, is consequently so shaken by its conflict with the opinions entertained by so many other eminent jurisdictions as to make it highly unlikely that it will ever be recognized as authority or given any considerable weight outside the State in which it was rendered.

It will appear from an examination of the cases cited in this article that the doctrine of the non-liability of charitable and eleemosynary institutions for torts resulting in personal injuries and death is a consequence of the development in America of the principles formulated in the earlier English cases. But while we have adhered to the doctrine as often as a case involving it has come before our courts for decision, with the exception of the Missouri decision noted above, the courts of England and the colonies have discarded it. The leading English cases overruling Holiday v. St. Leonards,[18] as an authority for the exception to the rule of *respondeat superior* in the case of a servant employed by a corporation engaged in public or charitable purposes, now hold[19] that whosoever undertakes the performance of or is bound to perform duties, whether they are office, or however they may arise, is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money as a profit by means of discharging the duties or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether a person is guilty of negligence by himself or by his servants. If he elects to perform the duties by servants, if in the nature of things he is obliged to perform the duty by employing servants, he "is responsible for their acts in the same way that he is responsible for his own." The modern English doctrine was applied in New Brunswick in an action for injuries caused to a hospital patient, the injuries being inflicted by negligent failure to supply the necessary medical and surgical attention. The questions were raised by a demurrer to the declaration. The court held that the duty that the defendant owed to the plaintiff was admitted by the demurrer, and a breach of that duty by the negligent failure to supply the medical or surgical attendance which he had the right to have supplied, was also admitted, and therefore the claim that the duty imposed upon the defendant was in fact fulfilled by exercising due care in the selection of physicians, and in having necessary appliances, etc., was not in the case, for such facts, if they so appear, should be set forth by way of plea, that admitting the defendant to be a public charitable institution, that fact does not exempt it from an action for negligence. A public charitable institution is liable to be sued for negligence.[20] And in Breux v. Montreal City Hospital,[21] it is held that a hospital is responsible for the communication of disease to a person occupying an adjacent building where the disease is communicated through negligence in the operation of a scarlet fever department, and the disinfecting of the clothing of the fever patients in a shed adjoining, which forms part of the hospital premises, and where such fever hospital is operated under the control of the city, the latter is also responsible.

Danville, Ill. WM. B. MORRIS.

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ILLEGITIMACY—RECOGNITION BY FATHER.

ALSTON v. ALSTON.

Supreme Court of Iowa, May 14, 1901.

1. Where an illegitimate child was adopted and raised by a man and wife for a consideration paid by the father, their declarations are admissible as to the child's relationship and paternity, as within the exception to the general rule of evidence admitting hearsay in cases of pedigree.

2. Evidence showed that a putative father visited plaintiff on various occasions, spoke to him as his son, and was addressed by him as a son would address a father. The father often referred to him as his son, placed him with a family for adoption, took a special interest in him during his sickness, and not long before his death gave him a warranty deed for 120 acres of land, for the expressed consideration of one dollar. The father knew that plaintiff was reputed to be his son, but never repudiated the relationship. None of the witnesses who testified that they had never heard that the father had such a son were acquainted with the son. Held, sufficient to show that plaintiff was the son of the putative father, and that he was generally and notoriously recognized by him as such.

Action for partition. Defendants William E. Alston, Mary M. Vote and Henry C. Alston, are alleged to be heirs of William Alston, who died intestate in 1896, seised in fee of the real estate described in the petition. The plaintiff William D. Alston alleges that he is a natural son of said William Alston, deceased, recognized by him as such during his lifetime, and plaintiff claims, therefore, to be entitled to share equally in the real estate of the father with the three legitimate heirs, and he asks partition accordingly. The joint plaintiff, Margaret A. Alston, is the wife of William D. Alston, and the joint defendant, Anna A. Alston, is the wife of Henry C. Alston, and their interests in the suit are only their inchoate rights of dower. For purposes of reference in the following opinion, William D. Alston will be treated as sole plaintiff, and the three legitimate children of William Alston will be treated as the defendants. Plaintiff's bill was dismissed upon its merits, and he appeals. Reversed.

McCLAIN, J.: Appellees insisted in the lower court, and still contend here, that appellant cannot have his right as an heir entitled to inherit by reason of illegitimate parentage and recognition determined in a partition suit, and that he must first establish in some other proceeding the fact of heirship. It is not questioned that one who claims as legitimate heir may bring a suit for partition against other heirs in possession of the real property of the common ancestor, and establish his right by proof that he is an heir. An illegitimate child, when recognized as required by statute, is an heir in the same sense as a legitimate child. In each case the plaintiff must show his relationship to the ancestor, and further, the illegitimate must show recognition. "For the purpose of inheritance, an illegitimate child, when recognized, stands on precisely the same footing as if it were legitimate. If the father dies intestate, both inherit, and such right can only be cut off by the will of the father, which is equally effective as to both classes of children." Milburn v. Milburn, 60 Iowa, 411, 14 N. W. Rep. 204. In this case the question was whether the subsequent birth and recognition of an illegitimate child would have the same effect as the subsequent birth of a legitimate child in revoking a will, and it was held that it would. We think the reasoning is fully applicable here. See also McGuire v. Brown, 41 Iowa, 650; Johnson v. Bodine, 108 Iowa, 594, 79 N. W. Rep. 348; Investment Co. v. Caldwell, 152 U. S. 65, 14 Sup. Ct. Rep. 504, 38 L. Ed. 356. We see no reason why plaintiff may not, in this proceeding, allege and prove, if he can, that he is the illegitimate son of William Alston, and that he has been recognized as required by statute to entitle him to inherit.

Prior to the adoption of the Code of 1851, the rule of the common law was in force in this state precluding inheritance by illegitimates from the father under any circumstances, and in that Code provisions similar to those now in force were incorporated, by which illegitimates might inherit from the father when recognized by him as his children, as there specified. These provisions have been substantially in force ever since. Plaintiff was born some years prior to the adoption of the Code of 1851, and some of the evidence relating to recognition refers to acts and conversations of William Alston prior to the adoption of the Code. Appellees insist that evidence of recognition must be strictly limited to acts and conversations subsequent to the time when such recognition would, by law, entitle the plaintiff, if an illegitimate son, to inherit. For this contention they cite the case of Hartinger v. Ferring (C. C.), 24 Fed. Rep. 15, in which the Circuit Court of the United States for the Northern District of Iowa reached the conclusion contended for, but we think this position is untenable. The legislature, having the right to determine the rules of inheritance in accordance with which the property of persons subsequently dying shall be distributed, may provide as it sees fit with reference to who shall be heirs. There is no vested right to inherit until the death of the ancestor. It may, therefore, be provided that illegitimate children already born and recognized shall be considered heirs. The recognition contemplated by the statute is not recognition as prospective heir, but recognition as an illegitimate child; and whoever fulfills the conditions of the statute as to the right to inherit, existing at the time of the death of the ancestor, is entitled to inherit under the statute. There is nothing in the language indicating that it was to be applicable to such recognition as should afterwards be made. It describes a class of persons, and declares that persons of that description shall inherit; it does not refer to or create a *status*. It

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is prospective in its operation as to the right, but there is nothing to suggest that persons of the class described—that is, illegitimates already recognized—shall not inherit under it. It would be just as reasonable to limit the provisions of the statute to illegitimates afterwards begotten and born as to so limit it to illegitimates afterwards recognized, and it would be just as reasonable in the one case as in the other, to argue that to adopt a construction making it applicable to existing illegitimate children would be to give the statute a retrospective effect. But it is not contended by appellees that the statute is to be limited to illegitimates subsequently begotten and born. The cases of Brown v. Bellmarde, 3 Kan. 53, and Stevenson's Heirs v. Sullivant, 5 Wheat. 207, 5 L. Ed. 70, as well as the case of Rice v. Efford, 3 Hen. & M. 225, on which the latter of these two cases is based, all relate to inheritance by illegitimates under a statute passed after the death of the ancestor, and whatever language may have been used apparently supporting the decision in Hartinger v. Ferring, *supra*, must be regarded as pure *dictum*. Van Horn v. Van Horn, 107 Iowa, 257, 77 N. W. Rep. 846, 45 L. R. A. 93, was a case in which plaintiff, claiming to be an illegitimate born and recognized in New Jersey, sought to establish his right to inherit property in Iowa; and defendant contended that inasmuch as, by the laws of New Jersey, an illegitimate son could not inherit the property of the father, his birth and recognition in New Jersey would not entitle him to inherit under the laws of Iowa; but this court says: "The sole inquiry here is, is he (the plaintiff) entitled to inherit the real estate and personal property situated in this state, under the facts presented in evidence? Our conclusion is that the laws of New Jersey are wholly immaterial to this inquiry." Certainly there is no more reason for allowing proof of birth and recognition in a state where those facts do not entitle the illegitimate to inherit than for admitting proof of birth and recognition in Iowa prior to the time when the statutes of this state made those facts sufficient to entitle the illegitimate to inherit. We are of the opinion, therefore, that evidence of acts and conversations on the part of William Alston, tending to show recognition by him of plaintiff as his illegitimate child prior to the adoption of the Code of 1851, may be considered.

Before discussing, however, the evidence of William Alston's recognition of plaintiff, it is necessary to consider what evidence, if any, there is as to paternity; for the defendants' counsel insist that, even though William Alston supposed plaintiff to be his son, still, if he was not in fact a son, then he could not inherit, and counsel object to much of the evidence with reference to paternity of plaintiff, on the ground that it is mere hearsay, and not admissible. But it is well settled that some evidence which would in general be excluded as hearsay, is admissible on the subject of relationship. Prof. Greenleaf states that hearsay in regard to relationship is admitted in cases of pedigree, the principal question in such cases being that of the parentage or descent of the individual, and he says that "in order to ascertain this fact, it is material to know how he (the person in question) was acknowledged and treated by those who were interested in him or sustained towards him any relations of blood or affinity." And while he states the rule in general as limiting evidence of declarations on this subject to those of deceased persons who were related by blood or marriage to the person in question, it is evident that the relationship insisted upon is that which will give rise to an interest justifying the assumption that the person who made the declaration would know the fact by general reputation in the family and among persons likely to be reliably informed. 1 Greenl. Ev. 103; and see Jones, Ev., § 316, and an article in 37 Alb. Law J. 130. In a leading case on the subject, Lord Chancellor Eldon says: "Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registration books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth;" and further, that the "tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken." Whitelocke v. Baker, 13 Ves. 514. In another case, Lord Chancellor Erskin held that the definite relationship of the person who made the declaration to the person about whose paternity it was made need not be established. "It is sufficient if he says, 'A is his relation,' without stating the particular degree, which, perhaps, he could not tell if asked; but it is evidence, from the interest of that person in knowing the family." Vowles v. Young, 13 Ves. 140, 147. And in this last case the declaration of a husband as to the legitimacy or illegitimacy of his wife, was permitted to be shown. Declarations as to the paternity of a child made by the father and mother in their lifetime may be shown, and circumstances indicating a recognition of the relationship on their part. Goodright v. Moss, 2 Cowp. 591. The declarations of a member of the family or a relative are admissible, although such person cannot be presumed to have known of his own personal knowledge the particular facts of which he speaks, and must have made the statement upon information derived from others. Jewell's Lessees v. Jewell, 1 How. 219, 231, 11 L. Ed. 108; Futter v. Randall, 2 Moore & P. 20; People v. Insurance Co., 25 Wend. 205, 209; Copes v. Pearce, 7 Gill, 264; Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323; Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615. Of course, facts which might be shown by proof of

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declarations of a person deceased may be shown by the testimony of the same person living, so that a witness may testify as to who is his father or as to his age, although, of course, he cannot know these matters by personal knowledge. Webb v. Richardson, 42 Vt. 465; Houlton v. Mantueffel, 51 Minn. 185, 53 N. W. Rep. 541; Cheever v. Congdon, 34 Mich. 296.

With these principles to guide us, and confining ourselves to the consideration of direct testimony, and such hearsay only as is authorized to be received by the well-settled principles above announced, we find that the plaintiff is the son of Octavia Daniels, and was born in December, 1843, at the home of her brother, in Jefferson county, about 12 miles west of Fairfield; that not long prior to this time she had been working in a hotel in Fairfield; that William Alston was then residing in Fairfield, and continued to reside there, substantially without intermission, until the time of his death; that William Alston and Octavia Daniels were acquainted with each other at that time; that each of them was then unmarried; that William Alston intermarried with the mother of defendants soon after the birth of plaintiff; that Octavia Daniels intermarried with one Bradley in 1845, at Agency City, in an adjoining county, where she continued to reside until her death, in 1881; that within a few months after his birth, and under an arrangement by William Alston for a consideration paid, plaintiff was taken to raise by Mr. and Mrs. De France, who lived about seven miles north of Fairfield; that plaintiff lived with the De Frances as a member of their family until the death of Mr. De France, and the marriage of Mrs. De France to one Hite, and with the Hites until the death of both of them; that he was recognized by his mother as her son, and was declared by her to be the son of William Alston; that Mr. and Mrs. De France declared him to be the son of William Alston; and that his alf-sister, the daughter of his mother by her marriage with Bradley, knew him as her half-brother, and as the son of William Alston. With reference to the declarations of Mr. and Mrs. De France, they do not come strictly within the rule requiring such declarations to be by a relative by blood or marriage, but it was their family in which plaintiff was brought up, and we hold that their declarations are admissible by reason of such relationship. It is to be borne in mind that it is not the facts which declarants knew of their own knowledge alone that may be established by such declarations, but the facts of relationship and paternity, and that such declarations are admissible, although they relate only to matters of reputation in the family. It is to be borne in mind, also, that there is no possible question in regard to identity. The plaintiff from infancy was known as William D. Alston. He was enrolled by that name when, as a youth, he joined a church, and he continued to be known uninterruptedly by that name. There is no pretense that he was known as the son of Mr. and Mrs. De France. He continued to reside with his foster parents until their death, and afterwards in the neighborhood, until he was more than 30 years of age, and there are many witnesses who testify that they know him now as the same person whom they knew as the foster son of the De Frances. It seems to us that the facts are too numerous, and the evidence too strong, and based on the direct testimony of too many witnesses, to be questioned. It is important also, as explaining lack of direct evidence of some important facts, that all the parties immediately concerned are dead,—William Alston, plaintiff's mother, this mother's brother, and his wife, at whose home the child was born, the husband of the mother, and Mr. and Mrs. De France. The law does not refuse to receive admissible evidence simply because other evidence which would be more satisfactory is unattainable. The very reason for admitting hearsay evidence on such occasions is that "it is the best evidence the nature of the case admits, and because greater evils are apprehended from the rejection of such evidence than its admission." Jackson v. King, 5 Cow. 237, 15 Am. Dec. 468. And see Carter v. Montgomery, 2 Tenn. Ch. 216, 227; Fulkerson v. Holmes, 117 U. S. 389, 397, 6 Sup. Ct. Rep. 780, 29 L. Ed. 915; Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. Rep. 1024, 12 L. R. A. 836; Johnston v. Todd, 5 Beav. 597.

By Code, § 3385, the illegitimate son, in order to inherit from his father, unless the paternity is proven during the father's life, must have been recognized by him as his child, and "such recognition must have been general and notorious, or else in writing." The last question for our consideration, then, is whether the evidence shows general and public recognition by William Alston of plaintiff as his son. What is required is not that the father shall have recognized the illegitimate as entitled to inherit, but only that he shall have recognized him as his child. Van Horn v. Van Horn, 107 Iowa, 247, 77 N. W. Rep. 846, 45 L. R. A. 93; Watson v. Richardson (Iowa), 80 N. W. Rep. 407; Crane v. Crane, 31 Iowa, 296. Now, the evidence in this case shows, practically without contradiction, that William Alston, on several occasions, visited the home of Mr. and Mrs. De France when the plaintiff was there as a child, spoke to him as his son, was addressed by him as a son would address a father, took a special interest in him at a time when he was seriously sick, referred to him as his son in conversations with the half-sister and with others, and, finally, not many years before his death, executed and delivered to him a warranty deed for 120 acres of land for the expressed consideration of one dollar. It appears that William Alston was not a man inclined to be communicative, even to his friends, about his domestic affairs, and he very naturally did not speak without some occasion to do so of his illegitimate son; but it is significant that he knew that his son was called by that name, and that he

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never by any action, so far as is shown by the testimony of either plaintiff's or defendants' witnesses, repudiated the relationship. When spoken to in regard to plaintiff as his son, he never denied the fact, but on various occasions spoke with apparent interest and concern in regard to his welfare. Defendants' counsel contend that expressions attributed to William Alston may be explained on the ground of an interest in the plaintiff arising from some other cause than that of paternity, but it appears that on several occasions persons who were friends or acquaintances of William Alston's spoke to him or joked him about plaintiff being his natural son, thus indicating to him that it was a matter of public comment; and, in view of these facts, acts and conversations on his part thereafter, evidencing an interest in the plaintiff, may properly be construed into a public and general recognition, although, standing alone and apart from the fact of this general belief as known to him, they would not require such an interpretation. But the decision of the case does not depend upon the construction of equivocal acts. There is direct evidence of unequivocal recognition. Many witnesses were introduced by defendants, who testified that they were well acquainted with William Alston, and acquainted in Fairfield and the neighborhood, and that they never heard of William Alston having an illegitimate son; but it is important to notice that in nearly every case they were persons who were not acquainted with the plaintiff. The fact that William Alston did not speak to such persons in regard to the plaintiff as his son is not to be wondered at, and does not tend to overcome the evidence introduced by plaintiff tending to show public and general recognition. With reference to similar evidence, this court has recently said that witnesses called to negative the fact of recognition were "acquaintances of the family, to whom he would not be likely to disclose his relations with this woman [the mother of the illegitimate child], and their evidence throws little light upon Comb's [the father] relationship with her or her offspring." Brown v. Iowa Legion of Honor, 107 Iowa, 439, 444, 78 N. W. Rep. 73. In Blair v. Howell, 68 Iowa, 619, 28 N. W. Rep. 199, it is spoken of as a significant fact as bearing upon recognition that the illegitimate child whose recognition was in question in that case "had no other ostensible parentage, and Bowen well knew this, and knew that others knew it." And the court in that case says that, Bowen's general bearing towards the child "being such as involved a recognition, it follows that the recognition was general." Without claiming that in all respects the acts of recognition in the case we now have before us were as conclusive as those referred to in the case just cited, we think that the view taken by the court of the evidence in that case is very applicable to this one. In Watson v. Richardson (Iowa), 80 N. W. Rep. 407, the court denied to claimant the right to inherit on the ground that the evidence did not show a general recognition, but the acts of the putative father there relied upon were less persuasive in their character than those shown in this case; and the same may be said of Markey v. Markey (Iowa), 79 N. W. Rep. 258. In this case there is no reasonable ground to disbelieve the witnesses for plaintiff as to the material facts sought to be established. There are inconsistencies in their testimony in reference to other facts and circumstances which may be easily accounted for by the remoteness in time of the matters with reference to which they testify, without discredit to their truthfulness; and we may extend, as we do, equal credence to the testimony of defendant's witnesses, without finding that the credibility of the evidence of plaintiff's witnesses is, in any material respect, impaired. If our conclusion were based upon the credit to be given particular witnesses as to facts contradicted by other witnesses, we should feel impelled to give great weight to the conclusions of the trial judge, before whom a considerable part of the testimony was taken in open court; but his finding for defendants was avowedly reached by the exclusion of a large part of the testimony as incompetent, because hearsay, whereas we find that much of the hearsay evidence was entitled to consideration, under the rule which we have already considered. We therefore find that plaintiff is the son of William Alston, and that he was generally and notoriously recognized by him as such. Reversed.

NOTE.—*Legitimation and Recognition of a Bastard Child by its Father.*—Legitimation of bastards either by subsequent marriage or by act or presumption of law is nothing but a fiction of the law which considers such offspring as enjoying the same rights and having the same standing as legitimate children. At common law the lot of one born out of wedlock was exceedingly hard. Being of kin to no one he could not be an heir, nor could he have heirs, save those of his own body. Moreover he could never be legitimated, except, possibly, in extreme cases by Act of Parliament. 1 Black, Com. 459. In nearly every state of the Union the stern rule of the common law has been abrogated, and legitimation is made possible by subsequent marriage of the parent or recognition by the putative father, or both. An examination of some of the most important cases will not be without value as determining just how far this indulgence, under modern statutory enactments can be carried. That the legislature of a state possesses the power by special act to make bastard children legitimate and capable of inheriting has been decided in the following cases: Beall v. Beall, 8 Ga. 210; Perry v. Newson, 36 U. S. 28; McGunnigle v. McKee, 77 Pa. St. 81, 18 Am. Rep. 428. Subsequent marriage will in most states legitimate children who were born before marriage. Brock v. State, 85 Ind. 397; Hunter v. Whitworth, 9 Ala. 965; Adams v. Adams, 36 Ga. 236; Carroll v. Carroll, 20 Tex. 731; Dannelli v. Dannelli, 67 Ky. 51; Smith v. Perry, 80 Va. 563; State v. Lavin, 80 Iowa, 555; Monson v. Palmer, 8 Allen (Mass.), 551; Rockingham v. Mount Holly, 26 Vt. 653; Hunt v. Hunt, 37 Me. 333. Legitimation by recognition or acknowledgment of the father is the question discussed by the court in the principal case, and one

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which deserves careful consideration. In a fewer number of states this is made possible by statute.

It is a sad commentary on modern civilization that illegitimacy is more common to day than ever before, especially in the larger cities. It is therefore not unlikely that the question of legitimacy and legitimation will arise more frequently in the future than they have in the past.

In the first place we notice that the statutes relating to the recognition and adoption of illegitimate children are to be liberally construed, except as to proof of paternity required. *In re* Jessup, 81 Cal. 408, 21 Pac. Rep. 976. In this case petitioner was shown to be the illegitimate son of the testator J. Many witnesses testified that J had taken charge of him from his birth, named him after a favorite uncle, provided him with the best nurses, sent him to school and college, dressed him expensively, often spoke of him and introduced him to his friends as his son, often declared his intention to leave him all his property, and always manifested much affection for him. On the other hand petitioner was kept in the family of a colored woman, whose mother had nursed him, and went by her name. J was never married, nor had what could be called a home, he living much of the time with a mistress; and it appeared that he did not have petitioner assume his (J's) name, because he feared interference from the mother's family. A number of his business and social acquaintances testified that they never heard him speak of having a son, but it appeared that he was a reticent man. Held that the evidence justified the finding that J adopted him under the statute "by publicly acknowledging the child as his own, receiving it as such into his family, and otherwise treating it as if it were a legitimate child." The *status* of a bastard with reference to its legitimation by the acts of the father are determinable by the laws of the latter's domicile, and not by the laws of the domicile of the child and mother. Blythe v. Ayres, 96 Cal. 532, 31 Pac. Rep. 915, affirmed 102 Cal. 254, 36 Pac. Rep. 822. In this case plaintiff's putative father was at all times domiciled in California, her mother at all times domiciled in England, and plaintiff was born in England, and resided there continuously till her father's death. The court held that as the father was domiciled in California, both at the time of her birth, and at the time he performed acts alleged to have resulted in her legitimation, and as California laws authorize the legitimation of bastards by the doing of certain acts, plaintiff was at all times possessed of capacity for legitimation under the statute. See also Lingen v. Lingen, 45 Ala. 410, where it was held that, under a statute regulating the legitimation of bastards, a child of parents never married, legitimated by the laws of a foreign country, cannot inherit real estate in Alabama, and the fact that the child was begotten in Alabama did not alter the case; also the case of Williams v. Kimball, 35 Ala. 49, 16 South. Rep. 283, 48 Am. St. Rep. 238, where it was held that legitimation in Georgia by statute does not make lawful heirs to real estate in Florida of those who were born out of lawful marriage. Where the father of illegitimate children maintains their mother, and provides for the children, and afterwards takes the mother and children into his family, addresses the latter as his sons, and speaks of himself to them as their father, the recognition of the children is "notorious and general," under a statute allowing such children to inherit, although the father sometimes denies that they were his children, and states that he is physically incapable of being a father. Blair v. Howell, 68 Iowa, 619, 28 N. W. Rep. 199. Verbal declarations of the father of a bastard that the latter shall be supported out of his estates after his death do not give the bastard a right of action against his father's administrator. Dunican v. Pope, 47 Ga. 445. To empower an illegitimate child to inherit from his father, the recognition provided for by the Revision § 2442, need not be by a formal avowal, but by letters. Crane v. Crane, 31 Iowa, 296. The case of Brown v. Belmarde, 8 Kan. 41, conflicts with the decision in the principal case on the validity of acts of recognition before the passage of an enabling statute. In that case it was held that the act of 1859, declaring that illegitimate children should inherit from their father if recognized as his children in the manner pointed out by the act, cannot apply to a recognition made before the passage of the act in the form afterwards prescribed by it. The court uses this language in explaining its position: "It is said that there was sufficient evidence to warrant the jury in finding that the father did in the manner required by the statute, recognize the child as his own. Whether there was or was not such testimony is wholly immaterial. No recognition prior to the death of Lavonture, however general or notorious, nay, although it were in writing, could legitimate the child if born out of lawful wedlock, or impart to it a heritable quality. At the time the recognition must have taken place there was no law in force giving to that act such an effect. To give it any legal effect whatever there must have been some law in existence prescribing what that effect should be. The act of 1859 cannot reach back and attach to an action, which at the time of its performance was entirely indifferent, such grave, legal consequences." A peculiar state of facts is disclosed in the case of Ash v. Way, 2 Gratt. (Va.) 203. A bastard married and died, leaving a legitimate child, and the parents of the bastard afterwards married. The father of the bastard, before the father's marriage in the lifetime of the bastard, recognized her as his child, and also after his marriage, which was after the death of the bastard. Held, that the child of the bastard might inherit through his mother from her father. Where the illegitimate child has been legitimized in accordance with the terms of the statute, such child inherits "as if legitimate;" and, in case of the death of such child leaving children, such children of the illegitimate inherit from their grandfather such portion as their mother would have inherited from his estate. Brewer v. Hamor, 83 Me. 251.

The well known exception to the rule excluding hearsay testimony in cases of pedigree is an important phase of this subject and one often passed upon by the courts, but is, notwithstanding that fact, not susceptible of exact limitation, each case resting upon its own peculiar facts. A few general rules set the outside boundaries beyond which the courts may not go, but it to be observed that the tendency, in America at least, is to let down the bars in every instance consistent with safety and fairness. The general rule with its recognized limitations is well stated in Jones on Evidence, § 316: "Declarations of deceased persons may be received when such declarations refer to the age, relationship, birth, marriage, death or legitimacy of persons legally related by blood or marriage to the declarant, and when such declarations were made before the controversy in relation to which they are to be proved arose." Hearsay testimony, therefore, is admissible in establishing the legitimacy or illegitimacy of a person or his after legitimation by the father. In Louisiana

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proof of the paternal descent of natural children may be made ing the following ways: 1. By all kinds of private writings in which the father may have acknowledged the bastard as his child, or may have called it so. 2. When the mother of the child was living in a state of concubinage with the father and resided as such in his house at the time the child was conceived. 3. When the father, either in public or in private, has acknowledged it as his child, or has habitually called it so in conversation, or has caused it to be educated as such. Badillo v. Tio, 6 La. Ann. 129. Statements made by one charged with being the father of a child born out of wedlock, that he had a boy somewhere, that the mother of the boy had been ruined by him, that the mother was pregnant, and that he was going to send her money, do not constitute the general and notorious recognition of the child necessary, under the statute, to entitle it to inherit from the father. McCorkendale v. McCorkendale (Iowa, 1900), 82 N. W. Rep. 754. In Maine no illegitimate child can inherit the estate of his father as heir, unless the written acknowledgment required by the statute has been properly executed. Hunt v. Hunt, 37 Me. 333. When an illegitimate child claims the right to inherit from his father under a statute giving such children that right when they have been recognized by the father as his children, and such recognition has been "general or notorious," though declarations of the putative father are competent to show such recognition, such evidence must be carefully scrutinized. Watson v. Richardson (Iowa, 1899), 80 N. W. Rep. 407. Evidence showing that a putative father recognized an illegitimate child as his own in the home of its foster parents during the first year of its life, and occasionally thereafter, is not sufficient to establish such "general and notorious" recognition by the father as will entitle the child to inherit from him. Watson v. Richardson, *supra*. Under a statute providing that every illegitimate child shall be considered as an heir to the person who shall, in writing signed in the presence of competent witnesses, have acknowledged himself to be the father of such child, the acknowledgment need not be made by the parent for the express purpose of admitting such child to heirship, but a collateral acknowledgment is sufficient. *In re* Rohrer (Wash. 1900), 60 Pac. Rep. 122. The right of an illegitimate child to inherit from its father is given by statute in North Dakota. But it is held that under this section he may inherit where the father has acknowledged him as his child by an instrument in writing, properly witnessed, and then only from his father directly and as an illegitimate child. It is also held, however, under the same section, that if the legal relation of parent and child has been established by an adoption under section 2806, providing for the adoption of illegitimate children, he is clothed with the full right of inheritance of a legitimate child. Eddie v. Eddie, 8 N. Dak. 37[illegible]. See also as construing a similar statute, Lind v. Burke, 56 Neb. 785.

HUMORS OF THE LAW.

"Just for exercise," as he told Judge Sidener, John Sippel kicked Oscar Borgel, a negro, whom he saw

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ABATEMENT AND REVIVAL—Foreclosure—Personal Representative.—Code Civ. Proc. § 385, provides that an action does not abate by the death of a party if the cause of action survives. Held, that the fact that defendant in an action to foreclose a mortgage died more than a year after the commencement of the action, and before the service of summons on her, did not prevent the court from acquiring jurisdiction of her personal representative, since the cause of action did not abate, and the court had implied power to order a new summons to bring in the new party.—UNION SAV. BANK v. BARRETT, Cal., 64 Pac. Rep. 1071.

2. ACTION—Legal or Equitable—Jury Trial.—Where plaintiffs alleged ownership and possession of land, and that defendant claimed title thereto under forged deeds, and prayed cancellation of such deeds, and that defendant be restrained from claiming thereunder, such equitable action cannot be changed into a legal action by defendant filing a cross bill in the nature of ejectment, so as to entitle defendant to a jury trial.—ANGUS v. CRAVEN, Cal., 64 Pac. Rep. 1091.

3. ADMINISTRATOR DE BONIS NON — Recovery of Assets Wasted by Administrator.—An administrator *de bonis non* cannot sue to recover notes belonging to the estate which the administrator turned over to his wife as her share of the estate, the right to recover assets wasted by the administrator being in the distributees.—KARN'S ADMR. v. SEATON, Ky., 62 S. W. Rep. 786.

4. ADMIRALTY — Maritime Liens — Supplies and Repairs Furnished to Owner—Implied Agreement for Lien.—Under the rule that where repairs are ordered in a foreign port by the owner, there must be some affirmative evidence to show that the credit of the ship was pledged as security for payment, to entitle the repairer to a lien, it is not essential that such evidence should show an agreement for a lien in express words, but facts and circumstances which justify the

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which was executed upon a sale by the trustee in a mortgage, the purpose of which was to bar the mortgagor's equity of redemption, must be regarded as holding adversely to the mortgagor from the time his deed is recorded, and possession is taken thereunder, although the sale made by the trustee was irregular or premature; and no actual notice to the mortgagor of the adverse nature of his claim is necessary to invoke the running of the statute of limitations for its protection. — STOUT v. RIGNEY, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 545.

6. AGENCY — Contract. — where plaintiff alleged a wrongful seizure of his goods in the hands of his agent, and the answer, denying his ownership, showed the agent's exclusive possession, manage ment, and control thereof, a contract of agency between plaintiff and the agent was properly admitted to rebut the presumption of the agent's ownership.— KIPP v. SILVERMAN, Mont., 64 Pac. Rep. 884.

7. AGREEMENT — Landlord and Tenant. — Where plaintiff's intestate took up defendant's rent note, and furnished him with supplies, under an agreement that defendant would recognize plaintiff's intestate as landlord, plaintiff was not entitled to a landlord's attachment for the supplies furnished, since such agreement could not create the relation of landlord and tenant.—COKER v. BRITT, Miss., 29 South. Rep. 885.

8. ARBITRATION—Award—Review.—Where an agreement to submit a controversy to arbitration provides that the award shall be faithfully kept as to all things by each of the parties, it will not be reviewed by the courts, in the absence of a showing that the arbitrator was guilty of misconduct.—SKAGIT COUNTY v. TROWBRIDGE, Wash., 64 Pac. Rep. 901.

9. ASSIGNMENTS — Priority — Representations of Agent.—A contractor made an assignment to a bank of the balance due him from a county. On false representations of the bank's vice-president that the county owed enough to the contractor to pay defendant's claim and all others, nothing being said of the previous assignment, defendant obtained an assignment of the same fund to the extent of his debt. Part of this was for material not yet delivered; and on learning of the assignment to the bank defendant refused delivery until secured or paid therefor. The bank paid the amount under agreement that neither party's rights would be prejudiced thereby. Previous to the bank's representations, defendant contemplated attachment of the contractor's property, but the evidence showed no ground of attachment. This property was subsequently mortgaged to the bank to secure another debt not herein involved. Held, that the bank was not estopped by its officer's false representations from claiming priority to the fund assigned, since defendant did not rely or act thereon.—WAXAHACHIE NAT. BANK v. BEILHARZ, Tex., 62 S. W. Rep. 745.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS — Validity. — Where B conveyed his property to his brother on June 22d, and on June 24th it was reconveyed to B, who assigned it to his brother-in-law for the benefit of certain creditors, the assignment, in the absence of evidence that the debts secured were not due or were not *bona fide*, was not void as in fraud of creditors not included in the assignment, since it is not fraud for a creditor to prefer one debtor to another.—CITY NAT. BANK OF NORFOLK v. BRIDGERS, N. Car., 38 S. E. Rep. 888.

11. BANKRUPTCY—Discharge—Appeal Bond—Surety. —Where a surety on an appeal bond was discharged of all his debts and claims provable under the bankruptcy law subsequent to a judgment on such appeal bond, the discharge is a defense to the enforcement of such judgment, since the debt, or damages for breach of the appeal bond, was a provable one, under Bankruptcy Act 1898, § 63, subd. 4, subsec. "a," providing that debts of the bankrupt founded on an express contract may be proved.—COE v. WATERS, Colo., 64 Pac. Rep. 1062.

12. BANKRUPTCY—Void Prior Incumbrances — Mortgages to Hinder Creditors.—A corporation executed mortgages covering all its property to favored creditors, who were not pressing it for payment nor asking to be secured, intending thereby to force indulgence from its other creditors and further advances from those secured. Held, that they were intended to hinder, delay, or defraud creditors, within Bankruptcy Act 1898, § 67, declaring void incumbrances made with such intent within four months prior to filing a petition in bankruptcy.—BAINBRIDGE STATE BANK v. TONGE, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 669.

13. BILLS AND NOTES — Non-negotiable Notes—Defenses.—Where notes given with a mortgage were non-negotiable, but were assigned, the assignee took them subject to all equities; and the mortgagees could set up the defense that by mistake the mortgage included more property than the parties intended, though the assignee had no notice of the mistake. — SAN JOSE RANCH CO. v. SAN JOSE LAND & WATER CO., Cal., 64 Pac. Rep. 1097.

14. CARRIERS — Loss of Goods — Bill of Lading — Reasonableness.—A clause in a bill of lading releasing the carrier from liability for loss or damage of the goods if notice is not presented in writing within 30 days after the delivery thereof, or after due time for such delivery, is unreasonable and void.—GWYN HARPER MFG. CO. v. CAROLINA CENT. R. CO., N. Car., 38 S. E. Rep. 894.

15. CARRIERS — Malicious Injury to Passenger. — Plaintiff, a negro girl, entered the waiting room of defendant's depot with two other colored girls. E, a white man, also entered the same room. The agent refused to sell them tickets, and requested the girls to come into the office and talk it over. The girls refused, and E asked to go into the office, where there was a fire; but the agent drew a revolver and ordered E to leave, and followed him and the girls outside, where plaintiff ran into a pool of water, which caused her to be ill. Held, that a judgment for plaintiff would not be reversed for slight errors in the instructions.—YAZOO & M. V. R. CO. v. MARTIN, Miss., 29 South. Rep. 829.

16. CARRIERS OF LIVE STOCK — Contract Limiting Amount of Liability to Agreed Valuation.— A stipulation in a bill of lading for live stock that in case of loss or injury in shipment the carrier shall not be liable beyond a stated and agreed valuation per head, in consideration of which the shipper is given a lower freight rate, is valid and binding on the parties, although the loss or injury results from the negligence of the carrier. — METROPOLITAN TRUST CO., OF NEW YORK v. TOLEDO, ST. L. & K. C. R. CO., U. S. C. C., D. (Ind.), 107 Fed. Rep. 628.

17. CHAMPERTY AND MAINTENANCE — Agreement to Assist Litigant.—An agreement by one who was not a lawyer to assist infant heirs, to whom he was not related, in the contest of a will, by rendering personal services as their agent, in consideration of "a sum equal to" a certain part of what might be recovered, was void where the litigation was the result of the agent's interference and intermeddling, and though the contract was made in the name of an attorney whose employment the agent procured under an agreement that the agent was to share the fee, which has since been collected by the attorney, the agent cannot require the attorney to divide with him upon the ground that the contract, though illegal, has been executed.—LYNN v. MOSS, Ky., 62 S. W. Rep. 712.

18. CHATTEL MORTGAGES—Disposal of Released Property—Effect of Renewal Mortgage.—If, before the execution of a second renewal chattel mortgage on the same property, included in the first between the same parties, the parties agreed by parol that the mortgagor might dispose of a part of the mortgaged property free from the mortgage liens, and he did so, the rights thereby acquired by third parties to such re-

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leased property are unaffected by the renewal mortgage.—PECOS VALLEY BANK V. EVANS-SNIDER-BUEL CO., U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 654.

19. CONTRACT—Instructions.—In an action upon an account, where the trial is had upon the plea of the general issue and of payment, and there is evidence tending to show that the defendant had never purchased the article alleged to have been sold to him by the plaintiff, and that if he did he had paid for it, a charge is properly refused which instructs the jury that "the burden of proof is on the defendant to establish his plea of payment to the reasonable satisfaction of the jury, and, if the evidence is equally balanced, the plaintiff is entitled to a verdict."—DAVIS WAGON CO. V. CANNON, Ala., 29 South. Rep. 841.

20. CONTRACTS—Rescission — Diligence. — Plaintiff and interveners alleged that they were stockholders in defendant corporation; that defendant P owned a majority of the stock; that, the corporation being indebted to P for land purchased of him, which, by agreement, was to be paid only out of the proceeds of sales of such land, the directors had adopted a resolution authorizing a loan and mortgage of all its property, and, in consideration of P's guarantying the payment of the loan, that he should be paid at once; that the loan was made, and P was paid his claim out of the proceeds. Held, under Civ. Code, § 1691, providing that rescission, when not effected by consent, can be accomplished only by the complainant rescinding promptly on discovering the facts which entitle him to rescind, that rescission should be denied, the action not having been commenced until two years after the acts complained of, and no excuse being offered for the delay.—WILLS V. PORTER, Cal., 64 Pac. Rep. 896.

21. CONVERSION—Claim Against County—Tax Sale.—The defendant county instituted a suit against M and others to recover taxes on certain goods which in fact belonged to plaintiff, and the goods were sold by a receiver, whose actions were directed by the county treasurer and other county officers. A judgment in favor of the county was reversed on appeal and the suit dismissed. Held, that it was proper, in an action by plaintiff against the county for conversion, to charge that the receiver's acts were unauthorized, and that the county was responsible therefor.—ROSE V. PIERCE COUNTY, Wash., 64 Pac. Rep. 913.

22. CONVERSION—Damages.—An instruction, in an action for damages for conversion of a stock of merchandise, that "the burden is on the plaintiff to show that at the times alleged he was the owner of, and entitled to possession of, the goods, etc., and that at said time defendant sheriff wrongfully and unlawfully levied on and sold said goods, to plaintiff's damage; the burden is also on the plaintiff to show that the goods were of any greater value than $1,000, as admitted by the answer, and that he has expended any sum necessarily in endeavoring to recover said property or the value thereof,"—correctly stated the law on the issues of the ownership of the property and its value.—KIPP V. SILVERMAN, Mont., 64 Pac. Rep. 884.

23. CONVERSION—Officer — How far Protected by Writ.—In the absence of a statute, an officer, under a process against one of several co-tenants, may seize and take into his exclusive possession the common property, and a co-tenant, though a stranger to the of shares in a national bank, who sold the same in good faith, without knowledge or reason to believe the bank was insolvent, and who did everything that was reasonably possible to have the proper formal transfer made on the books of the bank, cannot be treated as a shareholder, and held liable to an assessment made by the comptroller upon the subsequent closing of the bank as insolvent, upon evidence showing that the bank was in fact insolvent at the time the sale was made, and that the purchaser was also insolvent. The statute imposes no restriction upon the right to transfer shares because of the insolvency of the bank or the transferee, nor do considerations of public policy justify him where the seller has exercised due diligence, and has acted in the transaction with fairness and good faith.—EARLE V. CARSON, U. S. C. C. of App., Third Circuit, 107 Fed. Rep. 689.

25. CORPORATIONS—Stock Subscriptions — Not Paid Up—Liability of Stockholders.—Where a corporation agrees with its stockholders that only a certain amount of the stock subscribed by each stockholder shall be paid in, but credit is extended to the corporation on faith that its corporate stock is payable in full, and without notice of a different agreement between the corporation and its stockholders, the unpaid subscriptions are assets for the payment of such creditors on the insolvency of the corporation.—BENT V. UNDERDOWN, Ind., 60 N. E. Rep. 507.

26. COURTS—Land Department of the United States—Judicial Power and its Effect.—The land department of the United States is a *quasi*-judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings, and its patents issued thereon, are impervious to collateral attack.—JAMES V. GERMANIA IRON CO., U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 596.

27. CRIMINAL EVIDENCE—Bigamy.—On a trial under an indictment for bigamy, evidence that at the time of the second marriage the defendant had made inquiries to ascertain whether or not his former wife was dead, and that he had received a letter stating that she was dead, is irrelevant, illegal, and properly excluded.—RAND V. STATE, Ala., 29 South. Rep. 844.

28. CRIMINAL EVIDENCE—Homicide.—On a trial under an indictment for murder, where it is shown that the homicide took place at the house occupied by the defendant, and there was evidence tending to show that deceased was trying to gain admittance into the defendant's house at the time of the killing, the fact that the door of the defendant's residence was broken and battered up several months after the homicide is not a circumstance which could in any way aid in determining the character of the homicide, and is plainly irrelevant to the issue being tried; and the error in the admission of such evidence, in the absence of its being shown to the satisfaction of the court that the defendant was not prejudiced thereby, will work a reversal of the judgment of conviction.—ABERNATHY V. STATE, Ala., 29 South. Rep. 844.

29. CRIMINAL EVIDENCE—Homicide—Circumstantial Evidence.—Allowing the state to introduce only circumstantial evidence of defendant's guilt, and not requiring it to call eyewitnesses of the homicide because they were unfriendly to the state, was not erroneous as depriving the defendant of a presumption of inno-

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fendant killed deceased by throwing a stone, which struck deceased on the temple, evidence of a witness who was present, that he heard the lick, and asked R, who was standing two steps from defendant, what it was, and R stated that defendant hit deceased with a rock, was admissible as *res gestæ*, though it did not appear that the defendant heard R's statement; he being present within hearing distance from R at the time.—STATE v. MCCOURRY, N. Car., 38 S. E. Rep. 888.

32. CRIMINAL LAW—Forgery — Indictment.—The indictment charged forgery in uttering a false and fictitious note, dated April 28, 1897, purporting to have been made by R. J. McIntyre to Eddie Bunney for $260, gold coin, payable one year after date. The note offered in evidence corresponded with such description, except that it contained a provision for interest, and for payment of attorney's fees if collected by suit. Held, that there was no material variance, since the description in the indictment was correct, as far as it went, and sufficient to identify the instrument, and the fact that there were conditions in the instrument not inconsistent with, but in addition to, those mentioned in the description, was immaterial, since an indictment is sufficient, without containing a copy of the instrument alleged to be forged.—PEOPLE v. TERRILL, Cal., 64 Pac. Rep. 894.

33. CRIMINAL LAW—Former Jeopardy.—On a trial for forgery, the court excluded the instrument claimed to be forged, on the ground of variance with the indictment, and directed a verdict for defendant; and a verdict was returned of "not guilty, on the ground of a material variance between the note set forth in the indictment and the note offered." Held, that defendant could not be again tried for the offense, since by the verdict he was acquitted, and it was immaterial what reason the jury gave for the acquittal, or that there was in fact no material variance.—PEOPLE v. TERRILL, Cal., 64 Pac. Rep. 894.

34. CRIMINAL LAW—Fraudulent Use of Mails—Indictment.—An indictment for a fraudulent use of the mails, in violation of Rev. St. § 5480, as amended by Act March 2, 1889 (1 Supp. Rev. St. p. 694), not charging a scheme to defraud the public generally, or a class not capable of being resolved into individuals, but clearly importing an intention to defraud definite individuals, is bad, if it does not describe them by name, or give a good and true reason for the omission.—LARKIN v. UNITED STATES, U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 697.

35. CRIMINAL LAW—Homicide—Insanity as Defense.—Where deceased had seduced a sister of defendant, and then married her, the testimony of the county clerk that defendant said when deceased procured the license to marry that he "didn't believe in settling it that way" was testimony in chief, though it contradicted the defendant, who denied that he had made the statement, and should not have been admitted for the commonwealth after defendant had closed his testimony.—ABBOTT v. COMMONWEALTH, Ky., 62 S. W. Rep. 715.

36. CRIMINAL LAW—Homicide — Second Degree.—Where, in a prosecution for homicide, the court was requested to charge that, if the prisoner killed deceased with a deadly weapon, malice would be presumed, and ordinarily the verdict would be murder in the second degree, but, unless the weapon had been prepared for the purpose, its use would not necessarily be evidence of malice, such instruction was properly given, as modified, by adding that it would be sufficient to constitute murder in the second degree, but not express malice.—STATE v. MCCOURRY, N. Car., 38 S. E. Rep. 888.

37. CRIMINAL LAW — Rape—Consent of Woman—Evidence of Want of Chastity.—The court should have instructed the jury that the fact that the woman was of bad character would not relieve defendants of responsibility, but that there could be no conviction if she consented to the sexual intercourse, and was not constrained by force or fear, and that in making their verdict they should take into consideration all the facts and circumstances.—NEACE v. COMMONWEALTH, Ky., 62 S. W. Rep. 733.

38. CRIMINAL LAW—Right to Continuance—Absence of Witnesses—Diligence.—Defendant was indicted for horse theft, and sought a second continuance on account of the absence of three witnesses, by whom alone he could prove that he traded for the horse, and the absence of an attorney whom he had employed to defend him, and to whom he claimed to have given a bill of sale which he received at the time he made the trade. On a former application defendant stated that there were several witnesses by whom he could prove the same facts, and it appeared that the attorney employed had been elevated to the bench, and could no longer act for defendant, but that there had been two terms of court since such attorney's appointment, and no process had been issued to require his attendance as a witness, or effort made to secure the bill of sale. Held, that no diligence was shown to obtain either the witnesses or the bill of sale, and hence defendant was not entitled to a continuance.—PEREZ v. STATE, Tex., 62 S. W. Rep. 748.

39. CRIMINAL LAW—State's Evidence—Nolle Prosequi.—Where a prisoner awaiting trial under indictment agreed with the sheriff and county attorney that he would testify against others, and that in consideration thereof he should not be prosecuted, he is not entitled to a discharge from jail until he has given such testimony, even though he is unable to furnish bail.—EX PARTE GIBSON, Tex., 62 S. W. Rep. 755.

40. CRIMINAL TRIAL—Homicide—Change of Venue.—Pen. Code, § 1033, directs a grant of a change of venue in a criminal case on a showing that a fair trial cannot be had or a jury cannot be obtained. Defendant, who was a man of bad repute, made an assault on a person who had filed an information against him, and fired several shots into his house. The sheriff went to the house of defendant, and was shot by him. A mob was formed, composed of persons of standing in the community, and mob violence was only prevented by prompt removal of defendant to another county. The defendant was denounced in the pulpit and by the press, and public opinion was unanimous that the death penalty should be inflicted. Sixty-eight jurymen were examined on their *voir dire*, and all but eight had formed an opinion as to defendant's guilt, and three of these were excused. Held, that it was error to refuse a change of venue.—PEOPLE v. SUESSER, Cal., 64 Pac. Rep. 1095.

41. DECEDENTS—Estates—Fraudulent Conveyance.—Owing to the provisions of sections 3922, 3928, Rev. St. 1898, creditors of an insolvent estate may not bring an action in their own names to set aside a conveyance made by the decedent in his lifetime, without first having made the demand on the administrator to bring such suit, required by said sections, and having been met with a refusal by him.—FEHRINGER v. COMMERCIAL NAT. BANK OF OGDEN, Utah, 64 Pac. Rep. 1108.

42. DEEDS — Construction — Calls for Swamps.—Where a conveyance of realty calls for a swamp, and thence along the swamp, grantee's title extends only to the banks of the swamp, and not to the run of the swamp, since the rule that a call in a deed for the banks of a stream takes the title to the middle of the stream does not obtain where the call is for a swamp.—ROWE v. CAPE FEAR LUMBER CO., N. Car., 38 S. E. Rep. 896.

43. DEED—Mortgage.—A bill of sale of a house situated on mining ground, given to the party furnishing the lumber for the erection of the house, without a transfer of possession, amounts to nothing but a mortgage securing the debt, and does not pass title.—AZZALIA v. ST. CLAIRE, Utah, 64 Pac. Rep. 1106.

44. DEED—Reservation of Title—Judgment Creditor.—A father conveyed land to his son, reserving title

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thereto in himself until payment of the purchase money. A part thereof was paid, when the son reconveyed it, some of the personal property sold therewith having been changed in the meantime. The father undertook to sell the land under the power contained in the original contract of conveyance, and repurchased from the vendee at such sale. After the original conveyance, a judgment was obtained by plaintiff against the son. Held, that plaintiff had no lien superior to those claiming under the father, since he had never parted with the title to the land.—TAYLOR v. CAPEHART, N. Car., 38 S. E. Rep. 890.

45. DIVORCE—Agreement Relieving Husband of Obligation to Pay Alimony.—Where a husband and wife had separated and were dealing at arm's length, an agreement between them for a dismissal of a divorce suit brought by the wife, and for a division of their personal property, with a stipulation that neither should have any interest in the real estate belonging to the other, was valid; and it being further stipulated that "if either of said parties shall hereafter institute divorce proceedings against the other, or further prosecute the divorce suit above named, it shall not vary the property rights of either of said parties," the agreement relieved the husband of the obligation to pay alimony upon a divorce being subsequently obtained by the wife.—PARSONS v. PARSONS, Ky., 62 S. W. Rep. 719.

46. EASEMENTS—Partition—Rights to Existing Passways.—Each of the several parcels of land allotted in a partition proceeding is subject to the benefits and burdens of existing passways as between it and the other parcels, though there be no reference to passways in the deeds of partition; and a subsequent purchaser of a part of one of the lots takes it subject to an existing passway between it and that part of the lot retained by the vendor.—MUIR v. COX, Ky., 62 S. W. Rep. 723.

47. ELECTIONS—Statement of Expenses — Forfeiture of Office.—Purity of Elections Act (St. 1893, p. 15) section 4, declares that one elected to an office shall forfeit it if he neglects to file a statement of election expenses, as prescribed by section 3, which provides that he shall give an itemized statement, showing in detail all moneys expended by him in aid of his election, giving the names of persons to whom such moneys were paid, and the specific nature of each item; and section 13 provides that on the trial under the act of the right to an office, if it appear that the offenses complained of were trivial, unimportant, and limited in character, the candidate shall not be deprived of his office by reason thereof. Held, that an election was not rendered void by the candidate putting down as a single item, "sundries and incidentals, $23.65;" the statute providing that the candidate may expend $100 for necessary incidentals, and dispensing with vouchers for expenditures in amounts less than $5.—LAND v. CLARK, Cal., 64 Pac. Rep. 1071.

48. EQUITY — Action on Contract — Enforcement of Legal Liability.—A right of action against a city to recover rentals alleged to be due it under a contract with a water company is at law, and the fact that the company has made an equitable assignment of the contract by way of mortgage does not give the assignee the right to sue thereon in equity, merely because his own interest is equitable, and he cannot, by joining the city as defendant, have its rights determined in a suit to foreclose the mortgage. The city is entitled to have its rights and obligations under such contract determined by a trial in a court of law.—CITY OF EAU CLAIRE v. PAYSON, U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 552.

49. EQUITY—Enforcement of Trust—Assignee of Solvent Corporation.—A suit in equity cannot be maintained by one claiming to be a contract creditor of a solvent corporation against an assignee to whom the corporation has conveyed its property in trust to b converted into money and its debts paid therefrome. In such case a court of equity has no jurisdiction to administer the fund in the hands of the trustee for the benefit of creditors, the trustee being merely an agent for the corporation, which owns the property or fund; nor has the creditor, who has no lien on such property or fund, any right of action against the trustee.—AMES & HARRIS v. SABIN, U. S. C. C., D. (Oreg.), 107 Fed. Rep. 582.

50. EVIDENCE—Expert Opinion—Machinery.—Where the facts touching the question whether a machine was impracticable and unsafe cannot be fully communicated to the jury, expert opinion is competent.—HUTCHINSON COOPERAGE CO v. SNIDER, U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 368.

51. EXECUTORS AND ADMINISTRATORS — Conveyance of Property—Rights of Creditors.—Under Code, § 1442, providing that any conveyance of real estate by an heir at law, made within two years after the death of the intestate, shall be void as to estate creditors, but that conveyance made thereafter shall be valid as to *bona fide* purchasers without notice, land so inherited is liable for the debts of the ancestor, though conveyed after the expiration of two years, for full value, to a grantee who has knowledge of such debts.—HOOKER v. YELLOWLEY, N. Car., 38 S. E. Rep. 869.

52. EXECUTORS AND ADMINISTRATORS — Liability of Heir Who Has Sold Estate Descended.—Under Ky. St. § 2087, providing that, "when the heir or devisee shall alien before suit brought the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation to the creditors of the decedent or testator," the administrator is not a necessary party to an action to enforce the liability of the heir; and, where the administrator was joined with the heir, the court erred in refusing to permit plaintiff to dismiss as to the administrator, and in then sustaining a demurrer to the jurisdiction, and dismissing the action as to both defendants, because the administrator resided in another county.—LANCASTER v. WOLFF, Ky., 62 S. W. Rep. 717.

53. EXECUTORS AND ADMINISTRATORS — Liability of Sureties.— Where the surety on an administrator's bond, to whom real estate inherited by the latter from his intestate has been mortgaged as security, defeats a suit on the bond for a debt of the intestate by pleading limitations, he cannot resist a suit by the creditor to enforce payment from mortgaged real estate on the ground that he is solvent, and that the administrator's bond, as representing the personalty, must be exhausted before the realty.—HOOKER v. YELLOWLEY, N. Car., 38 S. E. Rep. 889.

54. ILLEGITIMATE CHILD — Adoption. — Under Civ. Code, § 230, providing that the father of an illegitimate child, by publicly acknowledging it as his own and receiving it into his family, adopts it and makes it, for all purposes, legitimate from the time of its birth, the acknowledging of an illegitimate child by a father without receiving it into his family is not sufficient for its adoption, and such child can confer no right to administer her father's estate.—GARNER v. JUDD, Cal., 64 Pac. Rep. 1076.

55. INJUNCTION — Exclusive Privileges — Ferry. — A free bridge over a river became impassable, and the supervisors licensed plaintiff to establish and operate a ferry for five months. The ferry was established when defendants, without license, set up a ferry a short distance from plaintiffs, for their own use, and for the use of such persons as chose to cross there, and received pay when voluntarily offered. Held, that plaintiff, having given bond and procured license, was entitled to the protection of the law, and that defendants should be enjoined from operating their ferry, and required to compensate plaintiff for the tolls which they had diverted from him.—MCINNIS v. PACE, Miss., 29 South. Rep. 835.

56. INSURANCE—Agreement to Pay Premiums—Mortgagee.—A fire policy containing a mortgage clause, which stated that the mortgagee should pay prem-

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iums in case of the failure of the mortgagor so to do, was delivered to the mortgagee, and transmitted by him to the mortgagor. Afterwards the agents effecting the insurance told the mortgagee that they had not received the premium, and would cancel the policy if not paid for; and the mortgagee told them that the mortgagor would pay, and not to cancel the policy, as the mortgagee would pay it if the mortgagor did not; and the policy was not canceled, in reliance on such promise. Held to constitute a valid contract not to cancel the policy, which would render the mortgagee liable for the premium. — COLBY v. THOMPSON, Colo., 64 Pac. Rep. 1058.

57. JUDGMENT—Default — Res Judicata.—Where an action is brought to recover the accrued interest upon a promissory note which stipulates for the payment of interest in annual installments, a judgment by default in favor of the plaintiff in such action is not *res judicata* in a subsequent action brought by the same plaintiff against the defendant to recover the principal due upon said note, and in such subsequent action the defendant is not estopped from setting up a want of consideration for the note sued on.—CROWDER v. RED MOUNTAIN MIN. CO., Ala., 29 South. Rep. 847.

58. JUDGMENT—Res Adjudicata—Estoppel.—Pending an appeal from a judgment allotting to a debtor a homestead in property upon which an execution has been levied, S, who had purchased the property from the debtor, deposited a part of the purchase price with W, under an agreement that if the judgment should be affirmed the money should be paid to the vendor, but if there should be a reversal the money should be returned to him. Before the appeal was disposed of, the execution creditor brought suit and attached the money in the hands of W; and the court adjudged that the money be paid to plaintiff, but that his execution lien on the property be discharged. Thereafter the judgment allotting homestead was reversed. Held, that the judgment under which plaintiff received the money, being valid, is a bar to the enforcement of the execution lien, though the judgment may have been erroneous. — SCOTT v. LOUISVILLE BANKING CO., Ky., 62 S. W. Rep. 713.

59. JUDGMENT — Res Judicata — Second Appeal. — Where a case has been reversed on appeal, and tried a second time in accord with the supreme court's decision, the supreme court will dismiss the second appeal as *res judicata*; the only error alleged being error in the former decision of the supreme court.—KRAMER v. SOUTHERN RY. CO., N. Car., 38 S. E. Rep. 872.

60. LIMITATION OF ACTIONS — Mortgages — Written Contract — Parol Evidence — Pleadings—Dismissal—Amendment—Answer—Sufficiency.—Where a grantee of real estate agrees in writing with his vendor and the indorser of a mortgage note to assume such indebtedness, and the mortgagee brings suit to be subrogated to the rights of the holder and indorser under such agreement, the grantee, who contends that the written contract does not contain the entire agreement, cannot show a prior oral agreement that the grantee should only assume the mortgage on receipt of a certain sum from his vendor, since the oral agreement was made before the written instrument, and with only one of the parties to the written contract.—WOODCOCK v. BOSTIC, N. Car., 38 S. E. Rep. 881.

61. MASTER AND SERVANT — Employment — Right to Discharge.—The making of an improv'dent contract mon law existing at the date of our separation from England, and hence the courts of one state cannot presume that such rule exists in another state, so as to throw on a plaintiff who has been injured in such other state by the negligence of a fellow-servant, the burden of proving that the rule has been abrogated by statute.—WILLIAMS v. SOUTHERN RY. CO., N. Car., 38 S. E. Rep. 898.

63. MASTER AND SERVANT — Injuries to Brakeman — Appliances.—A brakeman was set to work in switching with a road engine regularly used for that purpose, but unprovided with any special hand hold in front, necessary in his work. No particular projection was used, and the use of any particular one was not forbidden. The brakeman, however, used the figure plate, which was adapted thereto, and most convenient for a man of his size. It had been loose for 24 hours, but was apparently all right when he took hold of it. It gave way, however, and he was thrown under the cowcatcher and injured. Held, that the company owed him the duty of inspecting the plate commensurate with the purpose for which it must be assumed that it knew it was used, and hence, on proof of the foregoing facts, it was error to nonsuit him in an action for damages, enough being shown to require some proof of inspection to overcome the presumption of negligence.—DUNN v. NEW YORK, N. H. & H. R. Co., U. S. C. C. of App., Second Circuit, 107 Fed. Rep. 666.

64. MASTER AND SERVANT—Injuries to Servant—Nonsuit.—Plaintiff, a weaver, was injured while assisting in the repair of a loom which he operated, by a sliver of steel flying from a hammer and striking him in the eye. There was no evidence that the hammer was apparently defective, or was being negligently used. Held, that the plaintiff was properly nonsuited, since the injury was caused by a latent defect in the hammer, for which the defendant was not liable.—MARTIN v. HIGHLAND PARK MFG. CO., N. Car., 38 S. E. Rep. 876.

65. MUNICIPAL CORPORATIONS — Defective Sidewalks —Negligence.—Plaintiff was injured by stepping into a hole in a sidewalk, caused by a plank being broken several days before. There were several churches and a school house on the street, and it was much traveled by those attending the churches and school as well as by those living along the street. The planks of the walk were raised 10 or 12 inches from the ground, and a driveway crossed the walk, where the plank was broken by a loaded wagon. Held, that the question of the negligence of the city in not discovering the defect and repairing the walk was for the jury. —LAURIE v. CITY OF BALLARD, Wash., 64 Pac. Rep. 906.

66. MUNICIPAL CORPORATIONS — Liability for Injury to Property in Making Improvements.—Under Const. § 242, providing that municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, a city is liable for injury to private property in the construction of a sewer.—THOMAN v. CITY OF COVINGTON, Ky., 62 S. W. Rep. 721.

67. MUTUAL BENEFIT INSURANCE—Reinstatement—Waiver of Forfeiture.—The laws of a mutual benefit insurance order authorized the reinstatement of a member only on satisfactory evidence of his good health. A member, who had forfeited his membership by non-payment of his dues, while seriously sick

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68. NEGLIGENCE—Dangerous Property — Place Attractive to Children.—Where a complaint alleged that defendant had a piece of cement tubing, weighing from 500 to 700 pounds, 2 feet in length and 4 1-2 feet in diameter, which was so topheavy that it frequently tipped over from its side to its end, on land adjacent to the street, and not separated therefrom by any fence or other guard, so that, to defendant's knowledge, children were enticed to play with it, because it rolled easily, and that, while plaintiff's intestate and other children were so playing, the pipe tipped over and fatally injured plaintiff's intestate, it stated a cause of action.—KOPPLEKOM v. COLORADO CEMENT PIPE CO., Colo., 64 Pac. Rep. 1047.

69. PAYMENT—Money.—Where plaintiffs sent an account against defendant to an attorney for collection, and in the settlement of another controversy money belonging to the defendant came into the possession of the attorney, and was deposited in the bank in his name, and it was agreed between the attorney and defendant that the attorney should send his own check to plaintiffs in payment of the account, it was error to charge that the agreement did not constitute payment, since the money was appropriated to the debt, and accepted by plaintiff's authorized agent.—MILLHISER v. MARR, N. Car., 38 S. E. Rep. 887.

70. PHYSICIANS AND SURGEONS—Certificate—Recording.—Laws 1885, p. 296, § 1 (Mills' Ann. St. § 3550), provides that the certificate of the state board of medical examiners to the effect that the person holding it was a graduate in medicine from a legally chartered medical school, in good standing, shall be conclusive as to the rights of such person to practice medicine in this state; and section 3554 declares that every person holding such a certificate shall have it recorded in the office of the county clerk of the county in which he resides. Held, that where a physician possessed a certificate of the state board, entitling him to practice medicine, the fact that the certificate was not recorded in the county in which he rendered services constituted no defense to an action for compensation, since the issuance of the certificate was conclusive of his right to practice, and the statute did not make the recording of it a condition precedent to the right to recover for services.—RILEY v. COLLINS, Colo., 64 Pac. Rep. 1052.

71. PLEADING AND PRACTICE—Personal Injuries.—Injury to eyesight may be proved under a complaint alleging that plaintiff was hurled forward with such force as to bruise her knee, wrench her arm, and "otherwise seriously and grievously injure her."—BROOKLYN HEIGHTS R. CO. v. MACLAURY, U. S. C. C. of App., Second Circuit, 107 Fed. Rep. 644.

72. PLEADING AND PRACTICE — Trial—Misconduct of Counsel in Argument.—It was improper to permit counsel for plaintiff, in an action against a railroad company to recover damages for personal injuries, to say, in argument to the jury: "The railroad can appeal this case, but the plaintiff is a poor man, and has no money to appeal with, and will have to accept what you do;" but this error alone would not be sufficient to authorize a reversal.—LOUISVILLE, ETC. RY. CO. v. MORGAN, Ky., 62 S. W. Rep. 786.

73. PRINCIPAL AND SURETY—Sureties in Sheriff's Bond—Homestead.—A surety in a sheriff's bond is not made, the North Carolina court had jurisdiction of the action, and the fellow-servant act of 1897 of that state applied to it, making the railroad company liable.—WILLIAMS v. SOUTHERN RY. CO., N. Car., 38 S. E. Rep. 898.

75. RAILROADS—Persons on Track—Negligence.—Intestate was found early in the morning beneath a trestle on defendant's road severely injured, and died soon thereafter. There was grease on his clothes, apparently from an engine. There was evidence that a train of defendant passed the trestle during the night. Held that, if intestate was on the trestle and was struck by the train, it was negligence in defendant not to have seen him at the time; and if defendant's train knocked the intestate off the trestle, and the employees knew it had done so, and went on without stopping to look after and care for him on a cold winter night, it was negligence sufficient to make defendant liable.—WHITESIDES v. SOUTHERN RY. CO., N. Car., 38 S. E. Rep. 878.

76. RECEIVERS — Parties — Partnership Liability.—Where a contract liability was incurred by a copartnership long before the appointment of a receiver of the partnership assets, the copartners were necessary parties to a suit on such contract, and a complaint against the receiver alone was demurrable.—FLYNN v. FURTH, Wash., 64 Pac. Rep. 903.

77. SHIPPING—Injury to Vessel—Fault of Master.—Recovery cannot be had for injury to a boat by its grounding on an obstruction at a dock, on the going down of the tide, where the master, though notified that there was an obstruction, and directed to breast the boat off from the dock, for which purpose a breasting plank had been fastened to the dock, failed to do so.—LEO v. MCCOLLUM, U. S. D. C., E. D. (N. Y.), 107 Fed. Rep. 742.

78. SHIPPING — Sale of Yacht — Appurtenances — Agency — Scope of Agent's Authority. — A naptha launch used by the owner as a tender, in connection with a 80-foot yacht owned by him, but which could not be carried on the yacht, did not accompany it on its trips, and was not a part of the usual equipment of such yachts, did not by such use, merely as a matter of convenience, become an appurtenance of the yacht, which passed by a sale of the latter. Agents who are authorized by the owner to sell a yacht are not thereby given any authority, either actual or apparent, to sell a naptha launch, sometimes used as a tender to the yacht, but which was not legally an appurtenance thereto, but a separate vessel, and, in the absence of actual authority, they cannot bind the owner by a sale of the launch.—FORREST v. VANDERBILT, U. S. C. C. of App., Third Circuit, 107 Fed. Rep. 784.

79. SLANDER AND LIBEL—False Notice to Creditors' Protective Association.—If a notice given by defendant brewing company to a brewers' protective association of which it was a member, to the effect that plaintiff, one of its customers, was indebted to it, was false, and was given for the purpose of extorting from plaintiff a debt which he had settled, or for the purpose of disabling plaintiff from dealing with other members of the association, and keeping him in its power, after the debt had been paid, there was legal malice authorizing the recovery of damages.—JOHN BRENNER BREWING CO. v. MCGILL, Ky., 62 S. W. Rep. 722.

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§ 910), providing that an assessor shall give bond for the performance of his duties, the sureties on an assessor's official bond are not liable to his successor for fees received by their principal holding over after the expiration of his term, though his bond, in addition to requiring the faithful performance of his duties, requires him to deliver to his successor all the belongings of his office, such latter requirement being surplusage. — PEOPLE v. JACKSON, Colo., 64 Pac. Rep. 1051.

82. TAXATION—Assessment — Loans. — Under Const. art. 13, § 1, providing that "moneys, credits, dues," etc., shall be taxed, loans are taxable, though secured by property exempt from taxation.—SECURITY SAV. BANK v. CITY AND COUNTY OF SAN FRANCISCO, Cal., 64 Pac. Rep. 896.

83. TAXATION—Personalty—Seat in New York Stock Exchange.—A seat in the York Stock Exchange is not personal property, within Laws 1896, ch. 908, § 2, subd. 4, defining personal property for purposes of taxation, and is not taxable to a non-resident under section 7, providing that personal property of a non-resident shall be "taxed to the extent" as if owned by a resident. The value of a seat in the New York Stock Exchange is capital invested in business in the state, but is not taxable, as the taxing statute does not cover it. —PEOPLE v. FEITNER, N. Y., 60 N. E. Rep. 265.

84. TELEGRAPH—Delay in Delivery of Money—Damages—Mental Distress.—In an action against a telegraph company to recover damages for the failure to promptly deliver money transmitted through such company to the plaintiff, the fact that plaintiff was evicted from her house because of her failure to receive such money, and the injury to her reputation generally because of such eviction, are consequences too remote to be considered as elements of damages. Mental distress, unaccompanied by physical injury, is not a proper element of damages recoverable from a telegraph company for a failure to promptly deliver money sent through its agency to plaintiff.—STANSELL v. WESTERN UNION TEL. CO., U. S. C. C., S. D. (Cal.), 107 Fed. Rep. 669.

85. TRESPASS — Cutting Trees on Another's Land — Penalty—Instructions.—One who cuts trees on the land of another, but who at the time of such cutting is under the honest belief that the land is his own, or that it is the land of a third person who has consented to such cutting on his land, is not liable for the penalty prescribed by statute (Code, § 4187). — GLENN v. ADAMS, Ala., 29 South. Rep. 836.

86. TRIAL — Continuance — Absent Witnesses. —An application for a continuance in a criminal case on account of absent witnesses is addressed to the discretion of the trial court, and its refusal is not revisable on appeal, unless it is plainly shown that there was an abuse of such discretion by the trial court. Thus, where an application for a continuance is made by the defendant in a criminal case on account of the absence of some of his witnesses, and the state limits the showing made by the defendant as to what the absent witnesses would testify if present, and there are disclosed no facts which show that the absence of the witnesses is prejudicial to the defendant, the refusal of the application for a continuance is not erroneous.—HUSKEY v. STATE, Ala., 29 South. Rep. 888.

87. TRUSTS AND TRUSTEES—Conveyances by Trustee. —Where two grantors, each owning an individual moiety in realty, convey it to one of them in trust for tion, requiring a fixed monthly payment of dues, and a monthly payment of interest, and a certain premium, aggregating an amount greater than the legal rate of interest, is usurious, the premium being merely additional interest.—SOUTHERN HOME BUILDING & LOAN ASSN. v. TONY, Miss., 29 South. Rep. 827.

89. VENDOR AND PURCHASER—Payment—Receipts.— Where defendant sold land to plaintiff by agreement in form of a lease, deed to be given on payment of 72 monthly installments of $45.07 each, and a note of $1,850, payable 9 years from date, receipts given by defendant to plaintiff 9 years thereafter, at a time subsequent to any payments on the 72 installments and when all payments were on the note, and reciting, "I received $55 rent in advance" for said premises, will, in the absence of explanation or proof of mistake, be conclusive of payment of all the previous installments. — JOHNSTONE v. MULCAHY, Cal., 64 Pac. Rep. 1077.

90. WATERS AND WATER COURSES—Nuisances — Dam —Abatement.—Where a lower riparian owner erects a dam which throws the water back on an upper owner, it is a nuisance, which the latter may abate to the extent necessary to stop the refluence, if he can do so without a breach of the peace.—LILES v. CAWTHORN, Miss., 29 South. Rep. 884.

91. WILLS—Charitable Use—Erection of a Church. — Testator directed that a large part of his property should be converted into money, to be designated as the "general fund," and directed that such fund should be applied to the building of a stone church and school house of convenient size, two stories high, and about 60 feet long by 40 feet wide, etc.; the building to cost about $2,000, and to be paid out of the "general fund." After his death the amount available in such fund was $4,000, but it was found that the testator's entire estate was not sufficient to erect a stone building of the dimensions mentioned. Held, that the provision for the size of the building was directory merely, and that, in the absence of proof that a building could not be constructed of stone of sufficient size and suitable for the purposes contemplated, by the use of the entire amount of the "general fund," it would not be held that such provision of the will was inoperative, or insufficient for its purpose.—PAINE v. FORNEY, N. Car., 38 S. E. Rep. 885.

92. WILL—Construction.—A will in which the testator devises all of his real and personal property to his wife, to have and control it as he would do if living, and "to sell and convey any property she may choose for her support or comfort, as she may see proper, during her natural life; and at her death, what may be left of my said estate, the same to be divided according to law in such cases made and provided,"—gives to his wife an estate for life in all of his property, with the absolute right of disposition of the same without restraint or control by the courts; and her right of disposition is not limited to the necessities for her support and comfort.—CAIN v. CAIN, Ala., 29 South. Rep. 846.

93. WILLS—Devise to Class— Beneficiaries — Particular Estate.—Where testator devised a tract of land to his son's children, to be divided among them after the death of such son, only those children who were born at the time of testator's death were entitled to a share of the land, since there was no provision for an intermediate estate, but the title passed to the devisees immediately on the death of the testator.—WISE v. LEONHARDT, N. Car., 38 S. E. Rep. 892.

94. WRIT OF REVIEW—Trustee—Deposit in Court. —

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Central Law Journal.

ST. LOUIS, MO., AUGUST 2, 1901.

The peculiar value of oral argument is very often greatly underestimated not only by lawyers but also by judges on the bench. How often one observes an attorney carelessly "making a few remarks" to the court and wasting a most precious opportunity to incline the mind of the judge in his favor which not even the most laborious and painstaking brief could even be expected to do. The later generation of lawyers seem to rely more upon the logic of cold type than of burning words addressed to the ear of the court. This tendency of the bar is regretted by Mr. Justice Harlan of the Supreme Court, in a statement made to a correspondent of the *New York Evening Post*, as follows:

"It is a matter of serious regret and concern to this court that the practice of oral argument appears to be falling into disuse. The idea seems to have become general among members of the bar that we prefer arguments presented in the form of written briefs. Such is not the case. There are many times when nothing can take the place of the personal presentation. Briefs are well enough in their way, but it very often happens that the real point upon which a case turns may be overlooked in a brief, while an oral argument may serve to bring it home to the court. A special emphasis, a striking simile may throw new light on an intricate problem, and perhaps reverse a judgment in the mind of the court."

In commenting on this, the *American Law Review*, says:

"The Supreme Court of the United States have always set high value upon oral argument, and difficult cases are often ordered down for reargument by that court. Two hours on a side are allowed for argument, and in cases of great importance, the time is extended. During the argument the judges frequently ask questions, tending to clear

Perhaps the "fretfulness and impatience" of judges, and especially judges of *nisi prius* courts is the lack of preparation on the part attorneys. Oral argument in the general run of it to-day is, in most cases, exceedingly tedious and commonplace and is undoubtedly a great weariness of the flesh to even the most patient judge. How different it was with men like Choate and Webster by whose burning eloquence not only juries but the courts themselves were captivated and constrained to view the law and the facts in the light in which these great advocates saw them. The idea which prevails to a very large extent that judges cannot be moved by the eloquence which would appeal to a jury, is fallacious and ought to be exploded. Judges are human, even with all the classical coldness sometimes assumed by them, and the earnest advocate with his intellectual batteries well primed and his whole nature on fire with zeal for the cause he represents is most likely to overcome the heart and mind of either judge or jury. A revival of forensic argument and a more careful preparation therefor on the part of advocates would greatly lighten the burden of the court in understanding the real point in issue and in arriving at a decision in harmony with the justice and law of the case.

If one question in this country ought to be definitely settled it is that the manufacture and sale of intoxicating liquors is not a natural right protected by the constitution, but is a recognized evil to be suffered or licensed to exist by the people for a consideration. It is held as a favor, which, like all favors, "must be received upon such terms and conditions, and subject to such burdens and inconveniences, as the donor thinks proper to impose and the donee elects to accept." In the recent and important case of State v. Bixman, 62 S. W. Rep. 828, the Supreme Court of Missouri was called upon to wrestle with this question in the form of a state inspection tax. Act of May 4, 1899, declared that beer and malt liquors

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the court held to be a proper exercise of the power of the state, since the manufacture and sale of such beverage is detrimental to public morals, and the legislature has arbitary power to prohibit such manufacture and sale absolutely if it so desired. In answer to the objection that the fee charged for inspection purposes was largely in excess of the costs of such inspection, the court held that the doctrine that an inspection law cannot be legitimately employed to yield a revenue beyond the cost of inspection has no application to a law regulating the manufacture and sale of beer and malt liquors. To the objection that the act interfered with the rights of interstate commerce, the court held that under Act of Congress, August 8, 1890, declaring that all intoxicating liquors transported into a state, on arrival therein are subject to its laws enacted in the exercise of police powers, that part of the act prohibiting the sale of beer or malt liquors till the same are inspected, and the fee therefore paid to the state, is not in violation of the rights of congress over interstate commerce.

NOTES OF IMPORTANT DECISIONS

ATTORNEY'S FEES AS PREFERRED CLAIMS.—On first thought most attorneys would be very much inclined to take exception to the holding of Caldwell, J., in the recent case of Latta v. Lonsdale, 107 Fed. Rep. 585, that a lawyer employed by a railroad company on a yearly salary is not a laborer or employee of the corporation entitling him to a preference over other creditors. The court sums up the question in the following words:

"A lawyer employed by a railroad company on a yearly salary, payable monthly, is not a laborer or employee, within the meaning of the sections quoted. Cent. Dict. tit. 'Wage'; Lewis v. Fisher, 80 Md. 139, 30 Atl. Rep. 608; Casualty Ins. Co.'s Case, 82 Md. 538, 566, 34 Atl. Rep. 778; Bristor v. Smith, 158 N. Y. 157, 53 N. E. Rep. 42; *In re* Stryker, 158 N. Y. 526, 530, 53 N. E. Rep. 525; Bristor v. Kretz, 49 N. Y. Supp. 404; Vane v. Newcombe, 132 U. S. 220, 237, 10 Sup. Ct. Rep. 60, 33 L. Ed. 310; Railroad Co. v. Wilson, 138 U. S. 501, 505, 11 Sup. Ct. Rep. 405, 34 L. Ed. 1023; 3 Thomp. Corp. § 3145. It is very generally believed that corporation lawyers have the opportunity, and are quite able and capable of taking care of themselves when their clients fail, and statutes of the character quoted are not enacted in their interest, but for the protection of wage earners proper, who are laymen, and who have neither the position nor the opportunity nor the capacity to obtain payment or security for their services which the lawyer of the corporation has."

ADVERSE POSSESSION OF GRANTEE UNDER FORECLOSURE SALE.—The running of the statute of limitations in perfecting a title by adverse possession has always managed to come up in some changed form as a mooted question of law. In the recent case of Stout v. Rigney, 107 Fed. Rep. 545, it was held that one who enters upon land under a trustee's deed which purports to convey an absolute title, and which was executed upon a sale by the trustee in a mortgage, the purpose of which was to bar the mortgagor's equity of redemption, must be regarded as holding adversely to the mortgagors from the time his deed is recorded, and possession is taken thereunder, although the sale made by the trustee was irregular or premature; and no actual notice to the mortgagor of the adverse nature of his claim is necessary to invoke the running of the statute of limitations for its protection. The court said:

"We do not believe it to have been essential to render their possession adverse that they (the purchasers at the foreclosure sale) should have notified the complainant that they were holding the land adversely, and would dispute her right to redeem, inasmuch as the entry was made under a deed which purported to convey an absolute title, and which also professed to foreclose her right to redeem. In the case of Rogers v. Brown, 61 Mo. 187, 195, it was ruled, among other things, that the grantee under a fraudulent conveyance would be regarded as holding adversely to creditors who had challenged the validity of the conveyance from the time his deed was recorded, and we perceive no sufficient reason why one who enters upon land under a trustee's deed which purports to convey an absolute title, and to have been made with a view of barring the mortgagor's equity of redemption, should not be regarded as holding adversely to the mortgagor from the time that his deed is recorded and possession is taken, although the sale made by the trustee was irregular or premature. The precise question last suggested arose in the case of Miner v. Beekman, 50 N. Y. 337, 344, in which case it was decided that the statute of limitations began to run against the purchaser of the equity of redemption, who had not been made a party to an action of foreclosure which was brought against the mortgagor, from the time the mortgagee entered into possession as a purchaser under the defective decree of foreclosure. Our conclusion is, therefore, that the complainant's right to redeem was effectually barred by the statute of limitations long before the present bill was filed."

MASTER AND SERVANT — SCOPE OF SERVANT'S EMPLOYMENT.—One of the most difficult questions with which courts and juries have to wrestle arises out of the relation of master and servant in determining whether a certain act committed by a servant for which the master is sought to be

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held liable, is within or beyond the scope of his employment; if the latter, the master is, of course, in no sense liable. No dogmatic rule can be laid down which will solve every statement of facts that may arise, but each case rests upon its own facts, and is decisive of nothing beyond an exactly similar state of facts. In the recent case of Wabash Railroad Co. v. Linton (Ind.), 60 N. E. Rep. 313, the question arose in an interesting form. It was an action against a railroad company for injury to a horse. The complaint alleged that, while the horse was on the railroad track, defendant's servants, riding on a hand car, willfully and intentionally frightened the horse by making loud noises, and willfully and intentionally drove him along the track between the rails at great speed, by shouting and rapidly following him with the car, to a culvert crossing the track, into which he fell, and was injured. Held, that the complaint did not state a cause of action against the railroad company, since the willful acts of its servants complained of were not shown to have been instigated by or committed for the defendant, or in the line of the servant's duty. It will be observed from the reading of the complaint that the appellee has at no place charged the appellant with the commission of any of the acts for which he seeks to hold appellant liable. The charge in either instance is that the act or acts were done by the agents and employees of the appellant, and it does not appear at any place in the complaint that such agents or employees in the commission of such acts were acting in the line of their employment, or that they were doing what they were hired to do, or were acting under the direction of the appellant. It seems to be well settled that neither a willful and tortious nor negligent act resulting in injury, if done by an agent acting without the course of his employment, can be the subject of recovery against the principal. Railway Co. v. Kendall, 138 Ind. 314, 36 N. E. Rep. 415; Railway Co. v. Palmer, 13 Ind. App. 162, 39 N. E. Rep. 881, 41 N. E. Rep. 400; Helfrich v. Williams, 84 Ind. 553; Railway Co. v. Savage, 110 Ind. 156, 9 N. E. Rep. 85; Railway Co. v. Wood, 113 Ind. 544, 14 N. E. Rep. 572, 16 N. E. Rep. 197; Wood, Mast. & S. § 205; Railway Co. v. Peterson, 144 Ind. 214, 42 N. E. Rep. 480, 43 N. E. Rep. 1; Brown v. Engineering Co., 166 Mass. 75, 43 N. E. Rep. 1118, 32 L. R. A. 605.

CORPORATIONS—LIMITATION ON THE RIGHT TO AMEND BY-LAWS.—An interesting point of law is discussed in the recent case of Wooten v. [illegible] the association on the basis of the payment by him of 84 monthly installments of dues and interest. It was held that the vested rights of the stockholder, under his contract of loan, to avail himself of this privilege, could not be defeated by any subsequent change in the internal law of the association whether effected by an alteration in its by-laws or through an amendment to its charter. The opinion of the court is an exceedingly valuable annotation on this very close question. The court said:

"Unquestionably, it is within the power of a corporation to pass such by-laws as are not inconsistent with its charter and the purposes for which it was created; and, as an incident to this power, a corporation may be said to have the right to alter, amend, or repeal its by-laws from time to time as the exigencies of the occasion may render necessary and proper. But even an express grant of authority thus to effect changes in its by-laws does not carry with it any right to exercise such authority in violation of the fundamental law of the land. It is to be remembered that our federal constitution in terms provides that no state shall have power to pass any 'law impairing the obligation of contracts' (Const. art. 1, § 10); and it follows, of course, that a statute which provides generally that a corporation shall have authority to alter its by-laws from time to time is not to be understood as contemplating that the authority thus conferred may be exercised in such manner as injuriously to affect the vested rights of any person between whom and the corporation there exists a contractual relation. To otherwise construe such a statute would be to necessarily pronounce it unconstitutional, and therefore wholly inoperative. Clearly, a corporation cannot assume to exercise any right which it was not within the power of its creator to bestow upon it. So it is that 'a by-law cannot disturb a vested right any more than a statute; indeed, they are, in this respect, on the same plane. And, although a corporation has the power of amending its by-laws, yet, inasmuch as they enter into and form a part of the contracts it makes with its members, they cannot, under the guise of amending its by-laws, impair the obligation of such contracts. Thus, a resolution of the board of directors, or an amendment to the constitution of a building association, which modifies the rights of borrowing members, * * * is *ultra vires*.' See Thornt. & Bl. Bldg. & Loan Assns., § 131, and cases cited. 'If a by-law permit withdrawals when a member joins a [illegible]

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"We find in the second edition of 4 Am. & Eng. Enc. Law, p. 1047, the following statement: 'As to the question whether a by-law granting a right of withdrawal can be altered so as to take away or modify that right, the courts are at variance. It has been held, on the one hand, that such a by-law creates a vested right, and that any attempt to change it will be ineffectual. On the other hand, it has been held that an association having power to change its by-laws may make the alteration in question, as the member holds his membership rights subject to having them modified by the body of which he forms a part.' It is worthy of note that in support of the doctrine that 'such a by-law creates a vested right' American cases are cited, while English decisions alone are referred to as authority for the counter proposition. In the case of Pepe v. Society (1893), 2 Ch. Div. 311, it appeared that: 'By one of the rules of the society, a member, on giving one month's notice in writing, might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members. The plaintiff gave the requisite notice of withdrawal; but after such notice, and before he was repaid, the above rule was altered by giving the directors power to pay off in priority members holding less than £50 in the society.' Under these facts the court reached the somewhat remarkable conclusion 'that, although the plaintiff had, at the date of his notice of withdrawal, under the rule then in force, a vested right to be paid the amount due on his shares, he, being still a member of the society, was liable to have this right devested by a subsequent alteration in the rule duly made, and that he was therefore bound by the altered rule.' This decision, and others of like import, seem to have been predicated upon the idea that under the 'Building Societies Act of 1874' 37 & 38 Vict. c. 42, an association chartered thereunder had authority to change its by-laws at any time, even after its members had acquired vested rights in the premises. See Davies v. Society, 61 Law T. (N. S.) 680; Bradbury v. Wild (1893) 1 Ch. Div. 377; Barnard v. Tomson (1894), 1 Ch. Div. 374; Kemp v. Wright (1894), 2 Ch. Div. 462; Botten v. Society (1895), 2 Ch. Div. 441. Tested by our fundamental law, a statute of that character would be clearly unconstitutional. Fisher v. Patton, 134 Mo. 32, 52, 33 S. W. Rep. 451, 34 S. W. Rep. 1096. It is undoubtedly true that a corporation may, if it so desires, expressly reserve to itself the right to prescribe from time to time how its business shall be conducted; and one subscribing to stock upon the understanding that such right may be exercised in a legitimate manner cannot be heard to assert that by-laws of force at the time he became a shareholder set forth the terms of his contract with the corporation, and therefore cannot be amended or repealed without his consent. Thornt. & Bl. Bldg. & Loan Assns., § 131, pp. 129, 130; Bogards v. Insurance Co., 79 Mich. 440, 44 N. W. Rep. 856; Supreme Lodge v. Knight, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409; Supreme Commandery v. Ainsworth, 71 Ala. 437; Bearden v. Association (Tenn. Ch. App.), 49 S. W. Rep. 64. That is to say, an agreement of this nature will be effectual, provided, of course, it does not militate with some special enactment on the subject; such, for example, as a statute which, in effect, declares, as matter of public policy, that the right of a member of a mutual association to withdraw therefrom upon specified terms and conditions is one which cannot legally be waived. 7 Thomp. Corp. § 8729; Latimer v. Investment Co. (C. C.), 81 Fed. Rep. 776."

After discussing these general principles applicable to all corporations, the court proceeds to prove their special application to building and loan associations: "It is to be borne in mind that one of the distinguishing characteristics of a mutual building and loan association, as compared with private corporations in general, is that in duly transacting its legitimate business, such an association ordinarily deals exclusively with its members. If, after joining an association of this kind under a contract of membership such as that above indicated, a shareholder desires to procure a loan, the terms and conditions upon which the same shall be made to him must necessarily become the subject-matter of another and distinct contract between him and the association. As a general rule, it is agreed that the loan be made in accordance with then existing by-laws prescribing the terms upon which advances may be made to members upon shares of stock held by them. Accordingly such by-laws are to be regarded as setting forth the terms of this special contract (Barbot v. Association, 100 Ga. 681, 694, 695, 28 S. E. Rep. 498), a contract which the association would have no right to repudiate at will, or, by a change in its by-laws, subsequently made, to impair or totally destroy. Becker v. Insurance Co., 48 Mich. 610, 12 N. W. Rep. 874. And, if provision be made in the by-laws then of force that the borrower shall be permitted to thereafter withdraw from the association upon compliance with certain specified conditions respecting the repayment of the loan made to him, it is clear that the privilege thus accorded to him by the express terms of his contract immediately becomes one of which he has a vested right to avail himself at his election. We do not mean to say the association would not be at liberty to stipulate with the borrower, as a condition precedent to making him a loan, that, as to the privilege of withdrawal, or as to like privileges then being recorded to its members, it reserved the right to subsequently effect changes in its by-laws. In the absence of any statutory restrictions in regard to the matter, such a stipulation, if assented to by the borrower, would certainly be binding upon him. In any given case the inquiry should be, what was the contract between the parties? That contract, whatever may be its terms, should, if enforced at all, be given

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the effect it was intended to have. This doctrine is in accord with good law, good morals, and common justice."

REMARKS OF COUNSEL AS REVERSIBLE ERROR IN CIVIL CASES.

Introductory.—Success in the trial of a cause is not always measured by the size of the verdict. Frequently counsel whose remarks to the jury have been within the limits of proper argument have greater reason to congratulate their clients and themselves than have they who obtained larger verdicts at the expense of reversible error in speech or conduct. Impropriety of counsel's remarks is one of the common points on which courts of review are asked to reverse judgments. Term after term the question arises, in numerous instances a single volume of reports containing several decisions dealing more or less extensively with the subject. Lawyers and trial judges have been instructed, lectured, reprimanded and rebuked by the appellate court justices who have at times written patiently in this connection on professional ethics, constitutional privileges, Magna Cartar rights and the benefits of jury trials, and again at times disposed of the case with a terse and stern censure. After all these years of admonition and instruction the question still regularly comes to the front. One reason for this is that exact and definite rules cannot be framed relative to trial arguments. The important and valuable privileges of proper argument cannot legally be denied counsel or his clients, and on the other hand, an abuse of the privileges denies the same or equal rights to others. Many factors, like the character of the suit, the conduct of counsel and witnesses on both sides, and the rulings of the trial court, enter into each case, and must be considered with all its other circumstances, and while, therefore, so long as law suits, lawyers and judges differ, no definite rules can be stated by which to determine when counsels' remarks constitute reversible error, and when they do not; still numerous valuable hints and suggestions are to be derived from a careful consideration of the recent decisions on the subject.

What Remarks are Improper.—In a general way it may be stated that the following remarks in argument are objectionable and improper; statements of facts pertinent to the issue which have not been legally elicited upon the trial of the cause; assumptions *arguendo* that certain facts are in evidence in the case when they are not; comments upon papers that have not been put in evidence, upon the facts of newspaper articles, upon excluded testimony, upon former trial or trials of the case, upon the failure of a certain party to testify or to call a certain witness, and upon facts within the knowledge of counsel, and not sworn to in the case; appeals to sympathy or prejudice foreign to the case, like local or religious prejudice, or prejudice against corporations or trusts; reflections upon the character of parties or witnesses and their conduct and credibility when the same are not in issue, and invective and abuse not justified by the evidence.[1] This statement is of necessity not invariably applicable in each particular to every case. What is proper argument in one case might not be in another. For instance, counsel could certainly with propriety use language in a suit for malicious prosecution or libel that would not be proper in an *assumpsit* suit. It follows that whether or not counsels' remarks are ground for reversal is to be determined ordinarily not so much from the language used as from its occasion, the attendant proceedings and the effect. The controlling considerations in recent cases decided by courts of review are therefore not so much the mere words used, except in flagrant and persistent abuses of privileges, as the conduct of opposing counsel relative to

[1] Thompson on Trials, sec. 955, *et seq.*; Weeks on Attorneys (2d Ed.), p. 248; Hilliard on New Trials (2d Ed.), p. 225; 2 Ency. of Plead. & Prac., p. 741, *et seq.*; Tucker v. Henniker, 41 N. H. 317; citing Mitchum v. State, 11 Ga. 634; Berry v. State, 10 Ga. 522; Hodgson v. Scarlet, 1 Holt, N. P. C. 621; Cutler v. Dixon, 4 Coke, 146, note a; Waterer v. Freeman, Hobart, 266; Weston v. Dobriet, Cro. Jac. 432; Astley v. Cooper, 2 Burr. 807, 3 Black, Com. 29, 1 Saund. 130; Elliott v. Luengene, 44 N. Y. Supp. 775, and cases cited. Brown v. Swineford, 44 Wis. 292, citing among other cases, State v. Smith, 75 N. Car. 306; Ferguson v. State, 49 Ind. 33; Pringle v. Miller, 111 Mich. 663; citing Rutler v. Collins. 98 Mich. 510; Hitchcock v. Moore, 70 Mich. 112; Hollywood v. Reed, 57 Mich. 234; Donovan v. Richmond, 61 Mich. 467; Blaisdell v. Davis, 72 Vt. 295, 48 Atl. Rep. 14; Wood v. Agostines, 72 Vt. 51, 47 Atl. Rep. 108; Steen v. Friend, 20 Ohio Cir. Ct. Rep. 459. These citations could be extended to limits not practicable. The decisions upon the general subject of the article are so numerous that usually only those of recent date have been cited.

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furnishing cause and to making proper objections, the rulings and instructions of the trial court and the finding of the jury as evidencing the absence or presence of prejudice. These are the invariable quantities so to speak in the problem. What an attorney may say in an earnest and spirited argument is uncertain. Improper remarks having been made, what should be done by opposing counsel, judge and jury can be quite definitely ascertained.

Objections and Exceptions of Opposing Counsel.—It is the duty of counsel for either party, if he desires at any time to object to the remarks of his opponent to do so specifically and at the time the remarks are made. Assignments of error in these regards will not otherwise be considered on appeal,[2] especially if the trial court of its own motion instructs the jury to disregard the remarks.[3] The objection must be both prompt and specific, as it does not avail if made at another time or in a general way.[4] As will be seen later, even a direction on the part of the court that counsel should wait before objecting does not excuse delay by the latter. In case a part of the remarks are proper and a part improper, the objection to avail must point out the particular remarks complained of.[5] Furthermore, objecting counsel loses his rights of exception if he remains satisfied with simply his objection even if it is sustained. He must present the rulings, with his exceptions and an assignment of errors, to the appellate court. If he desires a ruling of the court or an instruction to the jury he must request the same. He cannot afterwards criticise the failure of the court to take any particular action unless he invoked that action.[6] If a written charge is desired it must be requested,[7] and without a direction to the jury an objection is of no avail on appeal.[8] If counsel are allowed to controvert the alleged improper remarks especially after admonition of the court concerning the same, there will be no reversal.[9] If the objectionable remarks were called out by previous statements of opposing counsel, and were in legitimate reply thereto, no ground exists for exception; as for instance, where a corporation's attorney had commented on the unpopularity of corporations, his opponent's improper allusions did not cause a reversal, and where a railroad lawyer commented on the plaintiff's failure to call a specialist, the remarks of plaintiff's attorney on his client's inability to pay therefor were not reversible error,[10] but a statement by the plaintiff's counsel characterizing the defense as audacious does not justify the defendant's attorney in arraigning the plaintiff as a moneyed corporation, intent on crushing the defendant.[11] If opposing counsel fails entirely to call the attention of the trial judge to the remarks, and the latter apparently regards them as unworthy of notice, there will be no reversal.[12]

Rulings and Instructions of the Trial Judge.—Courts of appeal justly attach great importance on the subject of counsels' improper remarks to the rulings and holdings of the trial judge relative thereto. He sees the parties, knows the circumstances, is not

[2] N. O., etc. R. Co. v. Clements, 100 Fed. Rep. 415; C. & E. R. R. Co. v. Cleminger, 178 Ill. 536, affirming 77 Ill. App. 186, and citing L. E., etc. R. Co. v. Middleton, 142 Ill. 550, and Seibert v. People, 143 Ill. 571; Ferguson v. Moore, 98 Tenn. 342; S. & E. T. Co. v. L., etc. R. Co., 51 S. W. Rep. 805; W. C. St. Ry. v. Levy, 82 Ill. App. 202; Monroe v. Lumber Co. (N. H.), 39 Atl. Rep. 1019; Ames v. Partridge (Colo.), 58 Pac. Rep. 341; *In re* Thomas' Estate (Colo.), 56 Pac. Rep. 907.

[3] Monroe v. Godkin, 111 Mich. 183.

[4] Gulf, etc. Ry. Co. v. Brown, 16 Tex. Civ. App. 93; Leary, 137 Ill. 323; W. C. St. R. R. Co. v. Sullivan, 165 Ill. 304; W. C. St. R. R. Co. v. Wainatta, 169 Ill. 19, affirming 68 Ill. App. 481, citing Felix v. Scharnweber, 119 Ill. 445; Marder, Luse & Co. v. Leary, 137 Ill. 319; Henry v. C. C. R. Co., 121 Ill. 264; Chicago v. Lesetti, 142 Ill. 642; C. B. & Q. v. Kellogg, 54 Neb. 127; L., etc. Ry. Co. v. Norman, 17 Ind. App. 355, citing Worley v. Moore, 97 Ind. 15; Carter v. Carter, 101 Ind. 450; Choen v. State, 85 Ind. 209; Combs v. State, 75 Ind. 215; L., etc. R. Co. v. McEwan (Ky.), 51 S. W. Rep. 619; Fruchey v. Eagleson, 15 Ind. App. 88, citing C., etc. R. Co. v. Champion, 9 Ind. App. 510; McFadden v. Morn. Jour. Assn., 51 N. Y. Supp. 275; Sutton v. C., etc. R. Co., 98 Wis. 167, citing Andrews v. C., M. & St. P. R. Co., 96 Wis. 348, 361; A., etc. Ry. Co. v. Bagwell, 107 Ga. 157; S. L., etc. Ry. Co. v. Dickens (Tex.), 56 S. W. Rep. 124.

[7] Hogan v. Mo., etc. Ry. Co., 88 Tex. 679.

[8] Andrews v. C., M. & St. P. R. Co., 96 Wis. 361.

[9] Britt v. Burghart, 16 Tex. Civ. App. 78.

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supposed himself to have been influenced by the remarks, and has in many respects a better opportunity than the appellate justices to determine what harm, if any, the remarks caused.[13] His decision in this regard should be obtained at the trial term.[14] Upon the making of improper remarks, if they are heard by the trial judge, it is his duty of his own motion to interfere,[15] and if he does not it has been held that the omission is tantamount to a ruling, that the remarks were warranted, to which an exception lies without a request for such ruling.[16] The better doctrine is that objecting counsel must ask for the ruling desired. If, however, whether of its own motion or in response to the request or motion of objecting counsel, the trial court takes immediate and decided action, stopping the objectionable remarks, reprimanding the offending counsel and directing the jury to disregard the remarks, there will not ordinarily be cause for reversal, especially if the remarks are withdrawn, as it will be presumed that the jury has followed the court's directions, and there is no presumption of injury in such case.[17] Instruction or direction of the court that the jury disregard counsels' improper remarks, is like the case of the introduction on a trial of objectionable and damaging evidence which the court subsequently strikes out and directs the jury to disregard. "The vice is eliminated and theoretically at least the erroneous evidence found no lodgment in the minds of the jury."[18] Neglect on the part of the trial court to interpose and correct counsel or to caution or instruct the jury in the case of a violation of the privileges of argument, is error and reversible error as a rule, and usually where opposing counsel have objected, but it is not always reversible error,[19] the decisive consideration being whether or not there was resulting prejudicial error. To overrule a proper objection is error,[20] and in response to an objection it is not sufficient for the court to say "these arguments are not evidence" or words to that effect in order to remove prejudice.[21] Improper remarks for which there is no excuse should be rebuked with vigor.[22] If the trial court is unable to restrain counsel in his abuse of his privileges evidently the proper course is to grant a new trial.[23] While it is error for the trial judge to make remarks indicating his opinion on

[13] Brown v. Perez, 89 Tex. 286; Erb v. Ins. Co., 98 Iowa. 606; Lawlor v. Kemper, 20 Mont. 13.

[14] Bullard v. B. & M. R. Co., 64 N. H. 27, citing Burnham v. Butler, 58 N. H. 568; Cole v. Boardman, 63 N. H. 583.

[15] Brown v. Swineford, 44 Wis. 282; Houston, etc. R. Co. v. White (Tex.), 56 S. W. Rep. 204.

[16] Cutler v. Skeels, 69 Vt. 161; Magoon v. B. & M. R. Co., 67 Vt. 195, and cases cited.

[17] Yankton v. Douglass, 8 S. Dak. 440; Western, etc. R. R. Co. v. Ledbetter, 99 Ga. 318; Shaler v. Broadway Imp. Co., 47 N. Y. Supp. 815; Riley v. Ry. Co., 68 Mo. App. 652, citing Gidlonsen v. R. R., 129 Mo. 403; Ford v. Cheever, 113 Mich. 440; Wenzel v. Johnston. 112 Mich. 243; Murphy v. Gillum, 79 Mo. App. 564; Tyler, etc. Works v. Ryco (Tex.), 55 S. W. Rep. 350; Baxter v. Detroit Ry., 116 Mich. 188; Ruth v. C., etc. Ry. Co., 70 Mo. App. 190; Felix v. Scharnweber, 119 Ill. 448; Phippen v. Bay Cities, etc. R. Co., 110 Mich. 353, citing Maclean v. Scripps, 52 Mich. 214; Warren v. Halley, 107 Mich. 120; People v. Wirth, 108 Mich. 307; Taylor v. Mallory, 96 Va. 18; Wheeler v. Jenison (Mich.), 79 N. W. Rep. 643; Billings v. Ins. Co., 70 Vt. 477; Abbott v. Mobile, 119 Ala. 595; Distilling Co. v. Riggs (Ky.), 45 S. W. Rep. 99; Collins Park & B. R. Co. v. Ware, 110 Ga. 307, 37 S. E. Rep. 975.

[18] Chesebrough v. Conover, 140 N. Y. 388; Cole v. Fall Brook Coal Co., 159 N. Y. 59, citing Marks v. King, 64 N. Y. 628; Platner v. Platner, 78 N. Y. 90; Gall v. Gall, 114 N. Y. 121; Blashfield v. E. S. Tel., etc. Co., 147 N. Y. 527; Holmes v. Moffat, 120 N. Y. 159. In I. C. R. R. Co. v. Treat, 179 Ill. 576, a judgment for plaintiff was not reversed notwithstanding an improper offer by his attorney, the trial court properly instructing the jury, but Justices Boggs, Cartwright and Phillips filed a dissenting opinion and cited Scripp v. Reilly, 38 Mich. 10; State v. Moore, 104 N. Car. 744; Birmingham Nat. Bk. v. Bradley, 108 Ala. 205; Leach v. Detroit Elec. Ry. (Mich.), 84 N. W. Rep. 316.

[19] Williams v. R. Co., 126 N. Y. 96, citing Mitchum v. State, 11 Ga. 616; Tucker v. Henniker, 41 N. H. 317; Rolfe v. Rumford, 66 Me. 564; Alabama, etc. R. Co. v. Carroll, 28 C. C. A. 207; K. C., etc. R. Co. v. Sokal, 61 Ark. 130, citing L., etc. R. Co. v. Cavenesse, 48 Ark. 131; Brown v. Swineford, 44 Wis. 282; Holder v. State, 58 Ark. 473; Shular v. State, 105 Ind. 304; Waldron v. Waldron, 156 U. S. 361; Coble v. Coble, 79 Vt. 589, citing State v. Smith, 75 N. Car. 306; Devries v. Haywood, 63 N. Car. 58; Jenkins v. North Carolina Ore Co., 65 N. Car. 563; State v. Williams, 65 N. Car. 505; State v. Underwood, 77 N. Car. 502; Pringle v. Miller, 111 Mich. 663; Missouri, etc. R. Co. v. Woods (Tex. Civ. App.), 25 S. W. Rep. 741; Stone and Gravel Co. v. Gates Iron Works, 124 Ill. 623; Rotan v. Maedgen (Tex. Civ. App.), 59 S. W. Rep. 585.

[20] C., etc. Ry. Co. v. Newlin, 74 Ill. App. 648; Railroad Co. v. Stewart, 54 Ohio St. 667.

[21] Hundley v. Chadick, 109 Ala. 575, citing Florence C. & I. Co. v. Field, 104 Ala. 471; Bates v. Morris, 101 Ala. 282; Dollar v. State, 99 Ala. 236; Haynes v. McRea, 101 Ala. 319; Pollock v. Harmon, 94 Ala. 421; Schaidler v. Ry. Co., 102 Wis. 564, 78 N. W. Rep. 732.

[22] Masterson v. Ry. Co., 102 Wis. 571, 78 N. W. Rep. 757.

[23] Morrill v. Palmer, 68 Vt. 1.

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facts necessary to be proved[24] still this will not always cause reversal.[25]

An attorney who errs in his theory of the case and believes that certain questions and evidence are proper when in fact they are improper, has a right to ask such questions, and where the court properly rules thereon the review court will not reverse.[26] The ruling of the trial court on the question of the propriety or impropriety of remarks must be made at the time. If the court directs counsel to wait until the summing up to make their objections the error is reversible,[27] and it is not proper to have it generally understood that all improper remarks are objected to.[28]

Prejudicial Error will Reverse.—Where prejudicial error results from improper remarks notwithstanding the objections interposed and the action of the court in restraining or attempting to restrain counsel and in directing and instructing the jury, courts of review will reverse the judgment.[29] The theory of this is that the error was so great that the prejudice it caused could not be removed by the court's admonitions. This of course usually occurs in cases of flagrant misconduct of counsel; and especially when the conduct is persistent and continuous, and when no rebuke or direction on the part of the court can destroy its influence,[30] as where witnesses are referred to as "ghouls" and "vultures" "prowling among the cots in the hospital"[31] and where the word "union" in a company's name was alleged to mean a monopoly.[32] When counsel neglects or refuses to withdraw the improper remarks, the verdict will be set aside.[33] In cases where there is evidence of error the judgment will at times be affirmed conditionally on *remittitur*.[34] If a case has been closely contested or there is a sharp conflict in evidence these and like considerations will favor a reversal,[35] and where there is a close issue, a judgment may be reversed even if the verdict is not excessive.[36] Courts of review have often and with emphasis announced that improper methods of trying causes will not be tolerated; that the only corrective is for counsel to know that by such methods they imperil whatever verdicts they may obtain, and if trial courts do not by way of rebuke, instruction or granting new trials do their duty as is their power, the appellate courts must apply the corrective.[37]

Allusion somewhat in detail to a few recent cases will show the general trend of judicial decisions. Where plaintiff's attorney said that if the defendant had an honest defense it would arbitrate, but that it was its policy to fight and the court merely told counsel to confine himself to argument, there

[24] I. C. R. R. Co. v. Souders, 178 Ill. 585, citing Andreas v. Ketchum, 77 Ill. 377; Skelly v. Boland, 78 Ill. 438; Feinberg v. People, 174 Ill. 609.

[25] L. E., etc. Ry. Co. v. Close, 5 Ind. App. 444.

[26] Young v. Fox, 49 N. Y. Supp. 634.

[27] Halpern v. Nassau Elec. R. Co., 45 N. Y. Supp. 134, citing Koelges v. Ins. Co., 57 N. Y. 638; Williams v. Railroad Co., 126 N. Y. 96.

[28] Penn. Co. v. Greso, 79 Ill. App. 127.

[29] St. L., etc. R. Co. v. Waren, 65 Ark. 619, citing K. C., etc. R. Co. v. Sokal, 61 Ark. 130; Hood v. C. & N. W. Ry. Co., 95 Iowa, 331, citing Henry v. Ry. Co., 66 Iowa, 56; Rudd v. Rounds, 64 Vt. 432; McHenry Coal Co. v. Sueddon, 89 Ky. 684; Wheeler & W. Mfg. Co. v. Sterrett, 94 Iowa, 160, citing Henry v. R. Co., 70 Iowa, 233; Whitset v. R. Co., 67 Iowa, 159; Jones v. Assn., 92 Iowa, 652; *In re* Barney's Will (Vt.), 44 Atl. Rep. 75; Potter v. Ry. Co. (Mich.), 82 N. W. Rep. 245;

[31] Rudiger v. C., etc. R. Co., 101 Wis. 292, citing Friemark v. Rosenkrans, 81 Wis. 359, and other cases.

[32] Union Compress Co. v. Wolf, 63 Ark. 174, citing L. R., etc. R. Co. v. Cavenesse, 48 Ark. 106, and authorities therein cited.

[33] Robertson v. Madison, 67 N. H. 205.

[34] Wetzel v. Meranger, 85 Ill. App. 457; C., B. & Q. v. Kellogg (Neb.), 76 N. W. Rep. 462, citing on the general subject Iron Co. v. Field (Ala.), 16 South. Rep. 538; Bullard v. R. Co., 64 N. H. 27; Paper Co. v. Banks, 15 Neb. 20; Live Stock Co. v. May, 51 Neb. 474; Martin v. State, 63 Miss. 505; Rudolph v. Landwerlen, 92 Ind. 34.

[35] The Oriental v. Barclay, 16 Tex. Civ. App. 193, citing Willis v. McNeil, 75 Tex. 465; Ry. v. Jarrell, 60 Tex. 268 and other cases; Killoven v. Meehan & Dunn, 68 Mo. App. 212. See also in this connection Giddionsen v. Ry., 129 Mo. 392; Hoffman v. Hoffman, 126 Mo. 416; Olfermann v. Union Depot Ry. Co., 125 Mo. 417; St. L., etc. R. Co. v. Holmes (Tex. Civ. App.), 49 S. W. Rep. 658, citing Tel. Co. v. Teague (Tex.), 27 S. W. Rep. 958; Dillingham v. Wood (Tex.), 27 S. W. Rep. 1074.

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was held to be fatal error.[38] Remarks about an unequal contest between a poor woman and a rich corporation, and charges of drunkenness on the part of defendant's employees, of which there is no evidence, will render it impossible for the supreme court of Texas to reverse a finding of the court of appeals that there was prejudicial error.[39] An argument of plaintiff's attorney that defendant had been guilty of dangerous practices for a long time will cause a reversal, it not being based on evidence;[40] and so will a comment that a deposition had been taken but the court would not allow it to be read, and that counsel's client should not be made to suffer for the court's ignorance;[41] but remarks to the effect that a defending railroad is "an artificial being without life, without soul, as cold as iron, as heartless as marble," etc., will not cause a reversal where there is no showing that opposing counsel asked an instruction and the court refused the same.[42]

Improper Remarks not Causing Prejudice will not Reverse.—In contradistinction to the foregoing rule that where prejudicial error results, which is not removed, there will be a reversal, is the rule that appellate courts will not reverse a judgment on account of improper remarks of counsel unless it is plain that justice was subverted or defeated thereby; when no harm has been done there is no need of a new trial; a just verdict will stand.[43] While a verdict against the clear weight of the evidence will be reversed,[44] a finding of the jury according to the preponderance of the testimony will seldom be disturbed.[45] Even where there is error on the part of the court or the counsel, or both, such errors will be regarded as harmless unless it clearly appears that the objecting party was prejudiced thereby.[46] It will not be assumed that every misstatement of law or fact made by counsel in the course of a heated trial will have the effect of exciting improper prejudices, as the instructions of the court and the good sense of a competent jury will be regarded as sufficient protection against ordinary errors.[47] Illogical and absurd arguments will not justify reversals where it does not appear that the jury was misled or prejudiced.[48] It will be taken into consideration that opposing counsel have the right to reply when such is the fact.[49] Weight also will be given to the fact that the trial judge, the one whose opportunity was the best to determine all pertinent questions, has overruled a motion for a new trial before the appeal and any misconduct of counsel must appear to have been injurious to the objecting party before this action of the trial court will be reversed.[50]

Conclusion.—Fine distinctions and discriminations are connected with various phases of the general subject under discussion to such an extent that, as indicated above, few exact rules in relation thereto of sufficiently general application to be of value, can be framed. The course of the trial lawyer is however moderately clear from the import of the above judicial determinations. While he may differ with the court as to what remarks are proper, he need not necessarily on that account allow the record to contain reversible error if the point of difference is

[38] Ranchan v. Rutland R. Co., 71 Vt. 142, 43 Atl. Rep. 11.

[39] C., etc. R. Co. v. Langston, 92 Tex. 709.

[40] Heald v. C. & M. R Co. (N. H.), 44 Atl. Rep. 77.

[41] Cunningham v. Speagle (Ky.), 50 S. W. Rep. 244.

[42] Landers v. Ohio R. Co. (W. Va.), 33 S. E. Rep. 296.

[43] C. & A. R. R. Co. v. Dillon, 128 Ill. 578; Roose v. Roose, 145 Ind. 165; Buscher v. Scully, 107 Ind. 246 and cases cited; Horms v. Steir, 67 Ill. App. 634, citing W. C. St. R. R. Co. v. Annis, 62 Ill. App. 180; N.C. St. R. Co. v. Leonard, 67 Ill. App. 603, affirmed 167 Ill. 618; M., K. & T. Ry. Co. v. Withers, 16 Tex. Civ. App. 506; Tunnicliff v. Bay Cities Con. Ry. Co., 107 Mich. 261; Sabine v. Merrill, 67 N. H. 226; Texas Brewing Co. v. Walters (Tex. Civ. App.), 43 S. W. Rep. 548; Texas, etc. Ry. Co. v. Hughes (Tex. Civ. App.), 41 S. W. Rep. 821, citing Ry. Co. v. Duelin, 86 Tex. 450; Radford v. Lyon, 65 Tex. 471; Schular v. State, 105 Ind. 289; McDonald v. Ft. Dear. Nat. Bank, 72 Ill. App. 17 (reversed on other grounds); Barber v. Hutchins, 66 Tex. 323; Kohman v. Baldwin (Tex. Civ. App.), 46 S. W. Rep. 396; Chamberlain v. Ry. Co (Mich.), 81 N. W. Rep. 339; Shelby v. Detroit Ry. (Mich.), 81 N. W. Rep. 106; Taylor v. Ins. Co. (Iowa), 82 N. W. Rep. 326.

[44] Cleveland Paper Co. v. Banks, 15 Neb. 20.

[45] Howard v. Howard, 99 Ga. 298; Swift & Co. v. Rutkowski, 82 Ill. App. 108; Willis & Bro. v. Lowry, 66 Tex. 542.

[46] Boltz v. Sullivan, 101 Wis. 608; I. C. R. R. Co. v. Weiland, 179 Ill. 609, affirming 67 Ill. App. 332; Smiley v. Scott, 179 Ill. 142, affirming 77 Ill. App. 555; Demars v. Mfg. Co., 67 N. H. 404; Furnald v. Burbank, 67 N. H. 595.

[47] Knopke v. Ins. Co., 99 Wis. 293, distinguishing Sutton v. R. Co., 98 Wis. 157; Henry v. R. Co., 121 Ill. 268; Perkins v. Roberge (N. H.), 39 Atl. Rep. 583.

[48] Hayes v. Smith, 15 Ohio C. C. 300.

[49] Galveston, etc. Ry. Co. v. Duelin, 86 Tex. 450; Furnish v. Burge (Tenn.), 54 S. W. Rep. 90.

[50] City of Lafayette v. Weaver, 92 Ind. 477.

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not a vital one. If he contemplates knowingly to abuse his privileges of argument he had best not do it. It is difficult to see wherein he could thereby profit. A persistent course in this direction insures a new trial or a reversal, and a large verdict does not even aid a settlement when one or the other of these is certain. If counsel has inadvertently or in any way made improper remarks he should promptly withdraw them with or without objection by the other side and ask the court for a decided and certain instruction to the jury that will have the effect of removing any prejudice caused, and except in a case of flagrant and persistent impropriety, this will be sufficient.

As to the course of counsel who have the right of objection, the decisions are not so clearly of one import. The earlier decisions made it the duty of the court to correct offending counsel and to admonish the jury, a failure to act in this respect being regarded as a ruling that the remarks were proper to which implied ruling counsel could except. According to this line of decisions counsel who is defending, if no others, should ordinarily keep quiet and rejoice in his silence while his opponent piles error upon error in an argumentative structure. The later and better line of decisions is to the general effect that counsel who desires to object to his opponent's remarks must do so at the time they are made and with specification, as otherwise he is presumed to waive any objection, placing the burden upon him to watch his and his client's interests, not upon the trial judge. And this is eminently proper. It being the duty of counsel so desiring to object, it is his further duty to insist upon a decisive ruling to which there can be an exception, all of which becomes a part of the record, and in this way by a proper assignment of error is brought to the attention of the reviewing court.

CYRUS J. WOOD.

Chicago, Ill.

would get the district attorney to dismiss the case against him, and the sheriff said, though he would not promise that much, that he would use his influence to "make it go lighter with him," and the deputy sheriff said "it might make it go lighter with him," and that he "had known men to be turned loose by turning state's evidence," there were such inducements leading defendant to believe that his condition would be bettered by confessing that a confession made under such circumstances was not admissible in evidence.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary. The state introduced appellant's confessions against him. Appellant excepted on the ground that he was under arrest at the time the confessions were made, and was not properly warned, that the confessions were made to officers under promises of reward and persuasion. The state's witnesses (the sheriff and his deputy) testify that a proper warning was given, to-wit, that they told appellant before he confessed to the theft that same would be used against him as evidence. However, appellant introduced two witnesses who stated that the warning given was that his statement could be used for or against him. If this was the warning given, this confession was not admissible. Guinn v. State, 39 Tex. Cr. Rep. 257, 45 S. W. Rep. 694; Unsell v. State, 39 Tex. Cr. Rep. 330, 45 S. W. Rep. 1022. If this were the only question made as to the warning given, it being a matter of controversy as to the character of warning, one being legal and the other illegal, we would hold that a proper charge of the court, submitting this issue to the jury, was the correct practice. The charge, however, was defective in other respects, which we will point out hereafter. As stated before, it was also objected to the confession that, although the warning given may have been a legal one, yet it was made under such promises by the officers as to render it inadmissible. If there was any controversy between the witnesses as to what was said by the officers to the defendant, the court might, by a proper charge, have submitted this issue to the jury. But the officers themselves admit that they used some language of a persuasive character. Loessin shows that he knew Dr. Clark was a friend of defendant, and was using him to get a confession from him. Clark, it seems, told defendant, if he would make a confession and tell who was assisting him in taking the seed, they would get the district attorney to dismiss the case against him. The sheriff thereupon stated he would not go that far, but if he would tell about it it might

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would not go that far, but would use his influence to make it lighter on him. It seems, Kesler, who was introduced by the state on this point, testified that Dr. Clark first stated what he had promised Martin; that is, that they would have the case dismissed against him. The sheriff said he could not promise him that, but he would use his influence to make it lighter on him; and after this Martin made the statement, which was that he and three other parties stole the cotton seed. The language here sought to be used to induce the confession is certainly as strong as the language used in Searcy's Case, 28 Tex. App. 513, 13 S. W. Rep. 782. In Thomas v. State, 35 Tex. Cr. Rep. 178, 32 S. W. Rep. 771, we laid down the principle governing the admissibility of confessions. We quote from that opinion, as follows: "The real question being, in every case, whether or not the confessing mind was influenced in a way to create doubt of the truth of the confession, an involuntary confession, uttered to bring temporal good or avert temporal evil, even when the contemplated benefit is small, will be rejected. The circumstances under which the confession was made are of very great importance. They must be looked to in all cases, and when this is done, and there is nothing pointing to the motive prompting the confession, it will be received. Now, whether there is an express or implied promise to aid the suspected person, or a threat of temporal injury, or whether the suspected person is told that it would be better for him to confess, etc., does not always solve the question. It is true that the inducement under which the confession was uttered is of prime importance, but not always decisive. The inducement and the surrounding circumstances decide the question. The inducement may not be sufficient to show the motive for the confession, but, when read in the light of the surrounding circumstances attending it, it may be ample proof to create doubt of the truth of the confession." Now, when we read the testimony of the state's witnesses in connection with the surrounding circumstances as testified to by them and other witnesses, we are constrained to the opinion that appellant was induced to confess by the promise made to him by the sheriff. It will be observed in this connection that before he made the statement to the sheriff he had already, under the promise made by Dr. Clark, whom the sheriff was using, made the confession to him. No doubt, he believed Clark was acting for the sheriff, and having already secured a confession through Clark by a larger promise, and though this was in part repudiated by the sheriff, yet, evidently, the previous confession was a part of the transaction, and was induced by promises of getting him released from prosecution. Under the circumstances we believe that the confession should have been rejected.

On this subject of confessions, we notice the court gave the following charge: "You will determine from the evidence whether there was or was not a confession under such a warning, as before defined, and voluntarily and freely made, as before instructed. If you so find, you will convict defendant, and assess his punishment by confinement in the penitentiary not less than two, nor more than twelve years." This was evidently a charge on the weight of the testmony; that is, the effect was to tell the jury to convict appellant on his conviction alone. This confession went to the jury as any other testimony, but the court had no right to instruct the jury to convict defendant on his confession; it not being a judicial confession. It is not necessary to discuss other questions, but, for the errors pointed out, the judgment is reversed and the cause remanded.

NOTE.—*Admission of the Confessions as Evidence in Criminal Prosecutions.*—It is a well known rule of law that confessions cannot be received as evidence unless made voluntarily; that is, made without any suggestion of hope or fear by any other person. Brisler v. State, 26 Ala. 107; Young v. State, 50 Ark. 501; Miller v. State, 25 Wis. 384; Roberts v. State, 75 Ga. 8 8; Speer v. State, 4 Tex. App. 474; People v. Taylor, 93 Mich. 638; State v. Suggs, 89 N. C. 627; State v. Hopkirk, 84 N. J. Law, 168. But of course confessions are not to be excluded because not spontaneous, it being only where they have been extorted or dragged reluctantly from the accused through the deliberate excitation of his hopes or fears by some actual promise or threat, that the court should refuse to permit them to go to the jury. For instance, a confession of a prisoner is admissible in evidence where it appears that it was made of his own motion to the witness while visiting him in jail at his request, and that the witness knew of no promises or threats made to him. Mose v. State, 36 Ala. 211. A confession is admissible unless there was a substantial promise of favor made or sanctioned by a person in authority, or some other inducements calculated to make the confession an untrue one. State v. Staley, 14 Minn. 105. A confession made by a defendant on the day of the homicide, before his arrest, without inducements or threats, was admissible. Basye v. State, 45 Neb. 261. But where it appeared that it was doubtful whether or not inducements by the police had not been offered to accused to make a written declaration, purporting to be a voluntary confession, its admission was error, since, under such circumstances accused was entitled to the benefit of the doubt. State v. Garvey, 25 La. Ann. 191. In order to exclude a confession, the influence of hope or fear must be so great that, in the judgment of the court, a confession induced thereby would be unworthy of credit. State v. Patrick, 48 N. Car. 443. Of course declarations made by defendant before any suggestion had been made to arrest him, are admissible. McKenzie v. State (Tex. Crim. App. 1895), 543. Defendant's confessions as to his marriage, in a prosecution for seduction, are admissible when seriously and solemnly made; but the mere acknowledgment of the relation of husband and wife, made idly or to ward off prosecution, or to stifle inquiry, is inadmissible. West v. State, 1 Wis. 259. As a general rule, it may be said the motives with which a voluntary confession is made are, as a general rule, immaterial upon the question of its admissibility. For instance, a voluntary confession of murder is not inadmissible because made to free defendant's sister,

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then under arrest for the crime, from suspicion, especially where defendant testifies in self-defense to every fact contained in the confession, and the sister testifies that he acknowledged to her substantially the same facts immediately after the killing. People v. Smalling, 94 Cal. 112; also State v. Staley, 14 Minn. 105. But see *contra*, Austine v. People, 51 Ill. 236, where it was held that a confession made with a view of compromising the matter with the injured party, is inadmissible. It was held in the case of Woolfolk v. State, 85 Ga. 69, that it was not against public policy to receive in evidence a confession contained in a prayer of the accused overheard while he was alone in his cell.

To render a confession incompetent on the ground that it was induced by the promise of some benefit to accused, the promise must have been made or sanctioned by some person in authority. A confession is never admissible when made under a threat or promise by a person having authority over the prosecution, or in his presence, or by his sanction. Rice v. State, 22 Tex. App. 654; United States v. Stone (C. C.), 8 Fed. Rep. 232. However, a confession made to the prosecuting attorney, voluntarily and without solicitation or promise, is admissible, it not appearing that accused was not fully informed as to the duty of the prosecuting attorney. Walker v. State, 136 Ind. 663. The fact that a confession was made to a justice before whom the preliminary information was filed, does not render it inadmissible. State v. McLaughlin, 44 Iowa, 82. Admissions of accused are not inadmissible merely because made to the officer who arrested him. State v. McLaughlin, *supra*. In a criminal case, the voluntary confessions of one of the defendants were admissible in evidence, though made to witnesses, who happened to be a constable and justice of the peace. State v. Monie, 26 La. Ann. 513. The statements of a prisoner to the prosecuting attorney are competent against him, if he was duly cautioned, and they were not forced from him. People v. Howes, 81 Mich. 396. A confession is not rendered inadmissible by the fact that it was prompted by mere suggestions or advice, or even solemn adjurations, by one holding no official position. State v. Fredericks, 85 Mo. 145. A confession obtained by the promise of a private detective, employed to work up the case, that the Commonwealth would make it easier for the prisoner if he would tell all about the crime, was not "induced by one in authority," and was admissible. Early v. Commonwealth, 86 Va. 921.

After the fact is known that either the influence of hope or fear existed, inducing a confession, explicit warning must be given the prisoner of the consequences of a confession, and it must also be clear that he understood such warning before his confessions are admissible in evidence. Van Buren v. State, 24 Miss. 512; Walker v. State, 28 Tex. App. 112; Rodri- that decision is that the fact confessed was collateral to the fact charged in the indictment. A confession made by defendant after he was told that whatever statements he made would be used as evidence against him, is admissible in evidence against him. Calloway v. State, 103 Ala. 27. In the case of Rizzolo v. Commonwealth, 126 Pa. St. 54, the officer who arrested the defendant said to him: "If you have anything to tell me, tell me the truth; if not, tell me nothing. You have a right to keep your mouth shut, but I tell you now, anything you say to me I shall use against you." Held, that evidence of a confession made to such officer by the defendant, was admissible. Where the sheriff was sent for by a prisoner in his jail to receive a confession which the prisoner was urged to make by a third person, and the sheriff warned the prisoner that his confession must be voluntary, and that he need not expect any favors from him, such confession cannot be objected to as incompetent. The warning given excludes the idea of the sheriff having sanctioned any inducement offered by the third person. Jones v. State, 58 Miss. 349. A statement by an officer who arrested defendant for forgery, made to him: "I have known you a long time, and will help you all I can, and if you say you did not forge that paper, I'll see M, and get him to compromise it with you. If you did do it, it might be best for you to say so; but if you did not, stick to it that you did not," is not sufficient to render a confession made by defendant to the officer inadmissible. Dotson v. State, 88 Ala. 208. A confession made by a prisoner upon the magistrate saying that it "would be better for him to tell the truth, and have no more trouble about it," is inadmissible. Biscoe v. State, 67 Md. 6.

JETSAM AND FLOTSAM.

CORPORATION LAW OF SOUTH DAKOTA.

The laws of South Dakota are more liberal to corporations than those of any other State in the Union. This fact and the very low cost of forming corporate companies, is causing many hundreds of business corporations to organize in South Dakota. The following table shows the comparative cost of incorporating a company with a capitalizatian of $1,000,000, in different States.

	INCORPORATING FEE.
Pennsylvania,	$3,333.33
New York,	1,250.00
New Jersey,	200.00
Delaware,	150.00
South Dakota,	10.00
	ANNUAL FRANCHISE TAX.
Pennsylvania,	$5,000.00
New York, minium rate,	1,250.00
New Jersey,	1,000.00
Delaware,	500.00

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president and counsel of the company is Mr. Ivan W. Goodner, a very careful lawyer, a member of the bar of the United States Supreme Court, and a gentleman widely known throughout the state. For a very low fee the company will furnish resident incorporators, see that articles are in proper form and filed and charter issued. Vast numbers of companies are forming under the South Dakota laws, as their unusually liberal character is becoming more generally known. These corporations are to transact all sorts of business, manufacturing, commercial, gold, silver, copper, iron and zinc mining, and oil companies by the hundred.—*National Corporation Reporter.*

UNIFORMITY IN THE LAW OF COMMERCIAL PAPER.

Another important state has been added to the list of those which have adopted a uniform law of commercial paper. This is Pennsylvania, whose legislature has recently passed the Negotiable Instruments Act. More than a third of the states of the Union have now declared in favor of uniformity in this important branch of the law, and these comprise some of the most important commonwealths in the sisterhoods. When regard is had to the circumstances, the progress thus far attained must be regarded as encouraging, for it is, unfortunately, true, that the path of reform is not usually an easy one, or one traversed with rapidity. The reformer has to contend not alone with active opposition, which, while often difficult to surmount, yet has the salutary effect of stimulating effort, but he has to overcome the deadening influence of inertia, which is often more difficult to combat effectively.

As an illustration of how much may be accomplished by persevering effort in a not very long space of time, it may be worth while to glance at the history of the movement, another step in which we have just recorded. Not quite twenty years ago a codification of the law of bills and notes was enacted in Great Britain. This was, to be precise, in 1882. This measure furnished the basis of the legislation which has now been enacted in so many of the states. As the result of conferences between committees of the American Bar Association and of the Commissioners on Uniformity of Legislation appointed in many of the states, a revision of the British law adapted to American conditions was prepared by Mr. John J. Crawford of the New York city bar. The draft prepared by him was sent to the State Commissioners on Uniform Laws and to many of the authors and experts on that subject inviting criticisms and suggestions, and, after considering such recommendations as were received, the Negotiable Instruments Law was finally evolved and recommended for adoption in the several states.

The task of securing the enactment of the law has not been so easy as the task of framing it, though that was not free from difficulty. In the first year in which it was urged upon the attention of the state legislature (1897), it was adopted by four of them, namely, those of New York, Connecticut, Colorado and Florida. This was not a large number, it is true, but a great gain was made in securing the enactment of the law in what is commercially the most important state in the Union, namely, New York. Four states passed the law in the following year (1898), namely, Massachusetts, Maryland, Virginia and North Carolina. A further advance was scored in 1899, when the law was passed in the District of Columbia and the states of Wisconsin, Tennessee, Oregon, Washington, Utah, Rhode Island and North Dakota. Thus the record stood at the date of the convention of the American Bankers' Association at Richmond in October of last year, as appears from the report of the committee of that body on uniform laws.

Taken as a whole, the progress made may be said to be encouraging. In some of the states, as experience has shown, an uphill fight may yet have to be made, but in others it has failed by only a narrow margin. In California it passed both houses of the legislature, but failed to secure the governor's approval because of some friction which arose between the governor and the legislature. In Illinois it had the influence of the governor and went through the senate and failed in the house. In Indiana a similar result was reached. In Michigan the bill passed the house but failed in the senate. In South Dakota the bill passed the senate and was pending in the house when the legislature adjourned. Of the states which have enacted the law, some, such as New York, Massachusetts and Pennsylvania, are of the first importance from a commercial point of view, and their example may well be counted upon to influence the action of others. The momentum in favor of the law has also been increased by the adhesion of so many widely separated commonwealths, some of which are at one extremity of the United States on the Atlantic Ocean, while others are on the Pacific with the width of a continent between. The history of the movement, even up to the present, has been of a nature to encourage reformers who, as a rule, have to rejoice more at the prospects of hope than at the results of realization.—*Bradstreet's Journal.*

BOOK REVIEWS.

INDEX DIGEST NEW YORK APPEALS REPORTS.

One of the signs of the times is apparent in the new Index Digest to the New York Court of Appeals Reports, just compiled by Colin P. Campbell. It is a digest of a digest. The customary way of editing a digest is simply to gather together the syllabi of the cases and classify them under proper headings. This is called the long digest method and is both cumbersome and faulty. The overburdened reporter in making up a syllabus to a case often mistakes the pivotal point upon which the decision rests, or if he does recognize it, often clothes his thought in such obscure language as to convey no impression on the real meaning which he intended to convey. The short digest method is splendidly exemplified in the book under review. It is a complete digest of the law of New York in one volume. It gives in the shortest form of each opinion, the pith of each opinion, substance of the case without unnecessary multiplication of words. It pays no attention to the syllabus of a case but the case is considered carefully and the particular point decided is given briefly, with great accuracy and clearness, affording instant reference to the immense amount of invaluable matter contained in these reports. For instance, under the head of libel and slander, we note subdivision II. Actionable Words, and under that, the following pithy digests: "Effect of words accusing highway commissioners of larceny, Hayes v. Ball, 72 App. 418. Imputing want of professional capacity to attorney, libelous *per se*, 147 App. 624. To charge one with being a concert hall singer on Coney Island, libelous *per se*, 155 App. 228, etc. This method we consider the highest attainment in digesting and one which inevitable necessity will compel to be universally adopted. In

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regard to Mr. Campbell's work we have only this to say that any one having access to the New York Court of Appeals Reports should not attempt to use them without this valuable aid, and those not having a set will find it of incalculable value in determining whether they will find a decision in support of their point from a court which is recognized as authority by every trribunal in our country. Published in one large royal octavo volume of 1500 pages by Matthew Bender, Albany, N. Y.

BOOKS RECEIVED.

An Index Digest of New York Court of Appeals Decisions, 1847-1901. By Colin P. Campbell, LL.M., Counselor at Law. Albany, N. Y. Matthew Bender, 1901. Sheep, pp. 1,500. Price, $8.50.

HUMORS OF THE LAW.

An Arkansas lawyer writes that some years ago a lawyer living in Illinois thought he might venture to open an office in Arkansas, but first wrote to an acquaintance there, telling of his plan, but saying that he was a Republican and wished to know if his life would be safe, and also if there was an opening there for an honest lawyer. His Arkansas correspondent replied that he could come with perfect impunity, as the game laws would protect his life, and that as an honest lawyer he would be absolutely without competition in the state.

On a Western Circuit, where the Judge and the State's Attorney traveled, they were holding court in a town where a wave of virtue had attacked the gambling houses. A colored helper in one of these houses was being examined as a witness against his employer. The State'sAttorney questioned him closely as to the location and number of the gaming tables, with the following result: Answer. "There was just two tables, boss." Question. "No more than two?" Answer. "No, sah, 'cept in cote time. Then a table's put in the private room where you all was playing last night,"—giving a significant sweep of his hand that included both State's Attorney and Judge.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMIRALTY—Collision — Recovery of Damages — Right to Enforce Contribution.—The rule of the common law that no contribution can be enforced between tort feasors is not the rule in admiralty as between two vessels each of which was in fault for a collision by which a third party sustains damage, but, on the contrary, the right of each to require the other to bear an equitable proportion of the loss has always been enforced as a substantial legal right, and it was in recognition of such right that admiralty rule 59 was promulgated, giving the owner of a vessel proceeded against the right to implead any other vessel contributing to the same collision, to enable the court to enter such decree "as to law and justice shall appertain." But, where the other vessel cannot be brought in because not within the jurisdiction, such accidental fact cannot change the legal right of the libeled vessel, and, where she is compelled to pay the entire damage, she is subrogated to the rights of the original damage claimant, and may bring an independent suit against the other to establish the latter's liability also, and enforce contribution.—THE MARISKA, U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 990.

2. ADMIRALTY — Injury to Vessel at Wharf—Storm.—A steamer came up to her usual berth at a dock during a gale and storm, and, owing to the failure of the wharfinger to make fast her stern line in time to prevent it, she was swung around by the wind, striking and injuring a wharf boat which was moored in the same slip, and crushing an electric launch which was tied up to such boat. It appeared that the line was thrown promptly and the wharfinger acted with reasonable promptness, and that the engines were promptly reversed, but there was not time to make sternway before the ship swung so far that she could not go astern without striking the opposite wharf. Held that, even with the presumption against her as the moving vessel, it could not be found, on such facts, that there was any want of ordinary care or skill on the part of her officers or crew which rendered her liable for the collision, but that the real cause of the accident was the violence of the storm.—THE CITY OF ABERDEEN, U. S. D. C., D. (Wash.), 107 Fed. Rep. 996.

3. ADMIRALTY — Maritime Liens — Wharfage—Contract with Charterer.—The fundamental requisite for the creation of a maritime lien is a maritime claim contracted or incurred on the credit of the vessel, either expressly or by implication, and not on the credit of the owner or other person in interest. No implied agreement arises for a pledge of the credit of a vessel for the rental of wharfage privileges in the port where the charterer, with whom the contract is made, resides where he is not the master, and is required by the charter to pay all expenses and keep the vessel free from liens, and where the owner of the wharf, if he is not informed of the fact or terms of the charter, is put upon inquiry by the circumstances, but makes no inquiry.—THE C. W. MOORE, U. S. D. C., E. D. (Wis.), 107 Fed. Rep. 257.

4. AGENCY—Liability of Agent when Acting as Depository.—Plaintiff deposited $50.00 with defendant under a contract for the purchase of certain real estate from defendant's principal, one of the terms of the contract being that said principal should furnish an abstract of title, and if, upon examination the title should prove defective, said sum so deposited with defendant should be returned to plaintiff. Held, that on the condition arising defendant became personally liable to plaintiff for the $50.00, even though in the meantime he had paid same to his principal.—KRULL V. LEA, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

5. AGENCY—Real Estate Agent—Commission on Sale.—The doctrine is settled in Missouri that a real estate agent for the sale of land is entitled to his commission when he has produced a purchaser who is willing, able and ready to take the same at the price asked by his principal, though the latter refuse to consummate the bargain.—FINCH V. GUARDIAN TRUST CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

6. AGENCY — Revocation — Compensation.—A mere agency not coupled with an interest is revocable at

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the pleasure of the principal, but if the agent incurs expenses and expends time and labor in good faith, the principal will not be permitted to terminate the agency and appropriate the results of the agent's services without compensating him therefor.—ROYAL REMEDY & EXTRACT CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

7. ATTORNEY AND CLIENT—Value of Legal Services—Evidence.—The master is not bound by the opinion of other lawyers as to the value of an attorney's services for which claim is made.—TAINTOR v. FRANKLIN NAT. BANK OF NEW YORK, U. S. C. C., S. D. (N. Y.), 107 Fed. Rep. 825.

8. BANKRUPTCY — Abatement of Proceedings—Death of Bankrupt after Petition Filed.—Under the provisions of Bankr. Act 1898, § 1, cls. 4, 10, that "bankrupt" shall include a person against whom an involuntary petition has been filed, and "commencement of proceedings," with reference to time, shall mean the date when the petition was filed, in connection with section 8, which provides that "the death or insanity of a bankrupt shall not abate the proceedings," the death of a person against whom an involuntary petition has been filed after the service of subpœna, but before the return day, does not require or authorize a dismissal of the petition.—IN RE HICKS, U. S. D. C., D. (Vt.), 107 Fed. Rep. 909.

9. BANKRUPTCY—Claims Provable—Liability as Indorser of Commercial Paper.—The liability of a bankrupt indorser of commercial paper, which did not become absolute till after the filing of the petition, is a debt, within Bankr. Act 1898, § 63, subd. 4, which enumerates debts on contracts, express or implied, among those provable in bankruptcy; and it may be proved against his estate after such liability has become fixed, and within the time limited for proving claims.—MOCH v. MARKET ST. NAT. BANK, U. S. C. C. of App., Third Circuit, 107 Fed. Rep. 897.

10. BANKRUPTCY — Exemption of Bankrupt from Arrest—Injunction.—The determination by a state court in an action against a bankrupt that the debt sued on was created by the fraud of the defendant while acting in a fiduciary capacity, and the awarding of an execution against his body under the state statute, are not conclusive upon the court of bankruptcy on a petition for an injunction to restrain the enforcement of such execution that the debt is one from which the bankrupt will not be released by a discharge under Bankr. Act 1898, § 17, but that question is to be determined by the court of bankruptcy for itself under the federal laws and decisions.—KNOTT v. PUTNAM, U. S. D. C., D. (Vt.), 107 Fed. Rep. 907.

11. BANKRUPTCY—Receiver—Power to Maintain Suit.—The receiver authorized to be appointed by a court of bankruptcy by Bankr. Act 1898, § 2, cl. 3, "in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified," is limited in his powers to the evident purpose for which the statute authorizes his appointment, which is to take charge of the visible property of the bankrupt and preserve it as custodian until the appointment of a trustee. He cannot exercise the powers of a trustee for the creditors, and has no authority to maintain a suit to set aside a preferential payment made by the bankrupt to a creditor, which is conferred only by the act itself, in section 70, subd. "e," and specifically upon the trustee.—BOONVILLE NAT. BANK OF BOONVILLE, IND., v. BLAKEY, U. S. C. C. of APP., Seventh Circuit, 107 Fed. Rep. 897.

guilty of contempt if he refuses, require him to pay over to the trustee money of the bankrupt's estate which he disbursed as such assignee prior to the bankruptcy proceedings, or which he retained for his compensation, subject to approval of the state court. Such a proceeding is not due process of law, and the fact that the assignee appears and contests the rule before the referee is not a waiver of his right to object to the jurisdiction. The provision of Bankr. Act 1898, § 23b, conferring jurisdiction of proceedings by a trustee "by consent of the proposed defendant," refers to consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure; and, where that is unlawful, the appearance of the defendant proceeded against, and his contesting the proceedings, do not confer jurisdiction.—SINSHEIMER v. SIMONSON, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 899.

13. BENEFICIAL ASSOCIATIONS — Change of Beneficiary.—Where a benevolent association such as this adopts a particular method of changing the beneficiary in a benefit certificate, that method becomes exclusive, and the change can be made in no other manner.—GRAND LODGE A. O. U. W. v. ROSS, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

14. BENEFICIAL ASSOCIATIONS — Special Meetings—Notice.—Where the charter provides that regular meetings shall be held on the first Monday of each month, and that special meetings may be called by the chancellor after notice "stating the time, place, object and purpose" of the meeting, a meeting upon a day other than the first Monday of a month is not valid unless the proceedings show that it was authorized as aforesaid.—BOZARTH v. LINCOLN LEGION OF HONOR, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

15. BILLS AND NOTES—Effect of Release of One of Several Joint Indorsers.—Section 889, Rev. St., makes joint and several all contracts which by the common law were joint only. But said section does not apply to the assignment of a promissory note, because the common law did not permit such assignment. Therefore the release of one of several joint debtors at common law released them all. There being no statute upon the subject the common law rule applies to a case where several joint payees assign and indorse a promissory note, and one of them is released by the failure of the indorsee to make proper protest, and therefore, all of said indorsees are released.—NORTHRUP v. CHAMBERS, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

16. CARRIERS OF GOODS—Liability for Negligence of Connecting Carrier.—If a carrier receive goods for shipment beyond its line it is liable to the end of the route unless it specially contracts to carry only to the end of its own line. Thus where a carrier receives live stock for shipment beyond its own line without such special contract, and takes the shipper aboard as a passenger in charge of the live stock, there arises an implied contract to safely carry him the entire route and deliver him at its end.—JONES v. ST. L. & SAN FRANCISCO RY., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

17. CARRIERS OF LIVE STOCK—Failure to Unload Train—Action for Penalties.—By Rev. St. U. S. §§ 4386-4890, no common carrier of live stock conveying it from one state to another shall confine the same in cars longer than 28 consecutive hours without unloading for rest, water, etc., and a penalty of from $100 to $500 for violating the statute is made recoverable in the name of the government by a civil action. Held,

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18. CHATTEL MORTGAGE — Description of Property—Location.—Location of personal property mortgaged is a part of its description, and where the description otherwise is general, and the property is recited in the mortgage to be in B county when it was in fact at the time in S county, the mortgage is void as against innocent purchasers without notice.—JONES BROS. COM. CO. v. LONG, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

19. CONSPIRACY—Felony in Connection Therewith—Distinct Offenses.—Rev. Stat. U. S. §§ 5508, 5509, defining the offense of conspiracy to injure or intimidate citizens in the exercise of civil rights, and subjecting an offender, who has been guilty of a felony in connection therewith, to the punishment prescribed therefor by the state law, does not contemplate two distinct offenses against the United States; the conspiracy only being of federal cognizance, and made punishable, and the other crime being merely an aggravation thereof so that if the conspiracy is not proved there can be no conviction for the felony.—DAVIS v. UNITED STATES, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 753.

20. CONSTITUTIONAL LAW—Right of Suffrage—Prevention on any Account.—Const. Amend. 15, declares that the right of United States citizens to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude, and that congress shall have power to enforce this article by appropriate legislation. Rev. Stat. § 5507, based on such amendment alone, provides that every person who prevents, hinders, controls or intimidates another from exercising, or in exercising the right of suffrage guaranteed by the fifteenth amendment to the United States constitution, by means of bribing, etc., shall be punished. Held, that such statute was unauthorized by such amendment, since the latter does not grant congress the power to make criminal the deprivation of a citizen's right to vote, except in the instance of a discrimination on account of race, color, or previous condition of servitude, and the statute makes it an offense to deprive a man of his right to vote on any account whatever; hence an indictment in the words of the statute is demurrable.—UNITED STATES v. MILLER, U. S. D. C., D. (Ind.), 107 Fed. Rep. 913.

21. CONTEMPT — Imprisonment for Contempt of Injunction—Proper Remedy for Discharge.—*Habeas corpus* is a proper remedy to secure a discharge from imprisonment for contempt in violating an injunction sought on the ground that the prisoner, not being a party to the cause, was not subject to the jurisdiction of the court in the particular case, and hence it had no authority to punish for the offense as charged against him.—IN RE REESE, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 942.

22. CONTRACT—Bridge Company—Defense.—In a suit on the contract for deficiencies in tolls, defendants claimed a release from liability by reason of complainants' reductions in the stipulated rates. On this question individual officers of defendants testified that they each had no information of the reduction, but the proof showed, on the other hand, that during the long period in question these reductions had been submitted to agents and experts of defendants for examination, and that they were not only reasonable, but necessary to prevent diversion of traffic and income. Held, in view of the well-known course of business, and the certainty that changes of rates over one line or system of railroads would soon be felt or known on other lines, and especially in view of the direct interest of defendants in the rates charged, that they must have known thereof, and that their failure to object before suit imported consent, and hence the reductions were no defense.—PITTSBURGH, C., C. & ST. L. RY. CO. v. KEOKUK & H. BRIDGE CO., U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 781.

23. CONTRACTS—Mother and Daughter—Services.—If a daughter give personal attendance upon her mother for ten years, the services are valuable, and whether there be or not an agreement on the mother's part to pay for the same, they are sufficient to support a promissory note executed by the mother therefor.—WOODS v. FLANERY, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

24. CORPORATE DEBTS—Liability of Stockholders—Action to Enforce—Evidence—Question for Jury.—In an action against the record holder of stock to enforce, under the Maine statute, the liability to corporate creditors for the amount unpaid thereon, it appeared that defendant gave a receipt for the stock in question, and thereafter signed a proxy, reciting that he was a stockholder. Held sufficient evidence to entitle plaintiff to go to the jury, under proper instructions, on the question whether defendant dealt with the corporation, and obtained and held the stock, so as to make him liable as a stockholder, within the meaning of the statute, notwithstanding the real or equitable owner of the stock was liable.—DUNN v. HOWE, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 849.

25. CORPORATIONS — Foreign — Place of Business — Effect as to Payment.—A loan by a Tennessee building and loan association, through a traveling soliciting agent, to a resident of Alabama, where all the business in connection therewith was transacted, with the single exception of the association's assent thereto, made when the association had no place of business and authorized local agent in the state, is a violation of Const. Alabama, art. 14, § 4, and Code 1896, §§ 1816, 1818, 1819, enacted pursuant thereto, prohibiting foreign corporations from doing "any business" in the state without at least one known place of business and an authorized agent therein, and hence repayment of the loan cannot be enforced.—DENSON v. CHATTANOOGA NAT. BUILDING & LOAN ASSN., U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 777.

26. CORPORATIONS — Receivers — Mortgage to President.—Where the president of a going corporation loaned its money, taking demand notes therefor, and, wishing to realize, requested security, whereupon the corporation executed a mortgage, and it appeared that the corporation had been and was doing a good business, had assets exceeding its liabilities by $6,000, and had every reason to expect that its business would continue prosperous, such facts were sufficient to justify a finding that the mortgage was made in good faith, with no intention to hinder, delay, or defraud creditors, and a consequent holding that the receiver of the corporation was not entitled to have the mortgage declared fraudulent, and an assignee thereof restrained from foreclosing.—STROHL v. SEATTLE NAT. BANK, Wash., 64 Pac. Rep. 916.

27. DEEDS—Covenants—Suit to Enjoin Breach—Parties Entitled to Maintain.—Complainants alleged that they conveyed certain land to defendant corporation upon a covenant that it should be used exclusively as a campus for a university, being induced thereto by representations made by defendant's representatives as to the great benefit which would accrue from the location and maintenance of the university there to the owners of property in the vicinity. They further alleged that defendant or its lessee was proceeding to erect derricks and other structures on the land for the purpose of drilling for oil thereon, and converting it into an oil field, in violation of such covenant, and thereby preventing its use as a campus, and they prayed for an injunction restraining defendant from making such use of the land. Held, that in the absence of any allegation that complainants were, at the time of filing their bill, the owners of any property in the vicinity which could be injuriously affected, it did not appear that they retained any interest in the covenant which entitled them to maintain suit.—LOS ANGELES UNIVERSITY v. SWARTH, U. S. C. C. of App., Ninth Circuit, 107 Fed. Rep. 796.

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28. DEEDS—Effect of Conditions.—The consequence of the nonfulfillment of a condition on which real estate is conveyed is a forfeiture of the estate; hence, where the deed provides that there shall be no reversion after a certain time for the failure to perform any conditions therein imposed, after the expiration of such time the estate is freed from such conditions, and the grant becomes absolute.—LOS ANGELES UNIVERSITY V. SWARTH, U. S. C. C. of App., Ninth Circuit, 107 Fed. Rep. 796.

29. DEEDS—Estate Created—Defeasible Fee.—A deed conveyed real estate for the sole use of M "and her heirs, and, in default of issue on the death of said M," then to others. Held, that under the law of Georgia, where the property was situate, such deed did not create an estate tail, nor a life estate in M with remainder over, but a fee-simple estate in M, determinable upon the contingency of her death leaving no living issue; and that since, under the laws of the state at the time the deed was executed therein, a fee could not be limited on a fee, the conditional limitation over was void, and M was vested with the estate in fee simple absolute.—PRINTUP V. HILL, U. S. C. C., N. D. (Ga.), 107 Fed. Rep. 789.

30. EXECUTION — Motion to Quash Levy on Wife's Land.—A levy was made on certain real estate under an execution issued on a judgment against defendant. He filed a motion to quash the levy on the ground that title to the land was in his wife and not in him. Held, that the motion was properly overruled. Plaintiff in the execution had the legal right to cause the sale of the husband's interest, whatever it might be in the land, and the purchaser thereof would have had the right to have gone into a court of equity for the purpose of establishing the same.—RYAN V. BRADBERRY, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

31. FIXTURES—Controversy Between Landlord and Tenant.—Fixtures placed in a building by the tenant under an agreement that he may remove the same at the end of his term, do not become incorporated with the realty, but remain the personal property of the tenant, which, so long as he is in possession of the premises, he may lawfully remove or transfer to the succeeding tenant.—MORRISON V. SOHN, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

32. FRAUD AND DECEIT—Distinction Between Fraud as a Defense and as a Cause of Action.—It is not necessary to prove the false representations which induced the making of the contract out of which note in suit originated, were known to be false by the party making them in order to constitute a good defense. Even though made innocently they may be a good defense. And this, though the answer charges them to have been made knowingly. But to support a counterclaim in favor of defendant against plaintiff the representations must have been made with knowledge.—LIVE STOCK REMEDY CO. V. WHITE, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

33. FRAUD AND DECEIT—Proof.—If one makes a material misrepresentation in person or by agent, knowing it is not true; or makes a material statement as true, without knowing whether it is true or false and it turns out to be false, and the other party relies upon it and is thereby induced to trade, it is a fraud upon the latter party.—CHASE V. RUSK, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

34. HABEAS CORPUS—Review of Commitment—Scope of Remedy.—It is incompetent for the court in *habeas corpus* proceedings to review the facts on which the commitment was ordered, or the regularity merely of the proceedings which resulted in the commitment. If any error be committed in these respects, the remedy of the prisoner is by appeal from the order of commitment. — IN RE REESE, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 942.

35. HIGHWAYS—Abandonment — Town Council—Discretionary Power.—Where the owner of land through which a highway passed agreed with the board of aldermen that they would claim no damages by reason of its abandonment, and petitioned the board therefor, whereupon the board exercised the power of abandonment according to the prescribed statutory rules, the general public had no standing in court to complain of such abandonment. Under Gen. Laws, ch. 71, § 28, providing that town councils may abandon the whole or any part of a highway, the question of abandonment is left to the discretion of the town council or board, irrespective of the question whether or not the highway has ceased to be useful to the public generally. — ATTORNEY GENERAL V. SHEPARD, R. I., 49 Atl. Rep. 41.

36. JUDGMENTS—Collateral Attack — Eminent Domain — Rights Acquired by Condemnation — Special Statute.—A decree of a state court may be collaterally attacked in the federal courts for want of jurisdiction over the subject-matter or the person, but not for any error which does not affect such jurisdiction. Under a legislative act expressly authorizing a city to condemn under the power of eminent domain, in the manner provided by law, "all outstanding interest of every kind, character, or description, whether the same be legal or equitable, not owned by said city," in certain water works, such condemnation, when properly made, vests the city with absolute title to the interests condemned, and not merely an easement, measured by the need of the city to use the property for public purposes; and the title will not revert for nonuser.—WOOD V. CITY OF MOBILE, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 846.

37. JUDGMENT—Nunc Pro Tunc.—If the judge's docket shows judgment for a party without more, and the only judgment that can be rendered for said party is one in a particular form, the necessary inference is that such was the judgment intended by the judge, and the clerk's record will be made to conform to that intention. But if the judge's docket shows no judgment, but simply cites the return of a verdict by the jury giving its substance, no such inference arises, because the only judgment appearing in any of the records is that entered by the clerk, and the presumption in its favor controls.—BURNS V. SULLIVAN, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

38. JUDGMENT—Res Judicata.—A petition in a suit to enjoin a village and others from preventing the restoration of plaintiff's street railroad, removed by defendants for plaintiff's failure to comply with the ordinance which authorized its construction and operation, was based on an alleged compliance with such ordinance, but did not pray for damages. A demurrer to the petition for want of facts was overruled, and the court found, *inter alia*, that the rails, ties, etc., had been removed, piled up, and held at plaintiff's order, and in conclusion found, as a matter of law, a failure to comply with the ordinance, for which it expressly denied relief and dismissed the petition, and the decision was affirmed on appeal. Held, that the decree was conclusive in a subsequent action at law by plaintiff as to his right to damages for the removal, but not as to damages for the conversion of his property. — STEWART V. VILLAGE OF ASHTABULA, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 867.

39. LANDLORD AND TENANT — Lease — Failure to Give Possession.—In an action to recover damages for failure to give possession of leased property, the measure of damages is the difference between the leased rental value and the rent reserved, where the premises were necessary to the plaintiff for the purpose of carrying on a new business, since there could be no basis on which to estimate the profits. Where, in action to recover damages for failure to give possession of leased property, all the elements of damage alleged in the complaint were covered by the answers in the special verdict, with a single exception of an item of expense for loss of time in purchasing fixtures to utilize said premises, a general verdict in excess of the special verdict for

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more than the item not covered by the special verdict will be reduced to the amount of such special verdict with the omitted item added.—ENGSTROM v. MERRIAM, Wash., 64 Pac. Rep. 914.

40. PUBLIC LANDS—Cutting and Removal of Timber.—The act of June 3, 1878, authorizing citizens and residents of the states of Colorado, Nevada and the territories, and "all other mineral districts of the United States," to fell and remove timber on the public domain, does not apply to the state of Oregon, there being no such mineral district.—UNITED STATES v. ENGLISH, U. S. C. C., D. (Ore.), 107 Fed. Rep. 867.

41. MARINE INSURANCE — Construction of Policy.—A marine insurance policy covered all shipments of oil from foreign ports to Philadelphia or Boston, or "via port or ports, and at and thence to Providence, with privilege of transshipment, including risk of craft to and from the ship or vessel; such craft to be considered a separate risk." The policy covered "leakage amounting to five per cent. on each barrel over ordinary leakage, which is agreed to be 2 per cent." Other provisions of the policy were: "Not liable for particular average, nor for leakage unless occasioned by stranding or collision with another vessel." "The perils which said insurance company takes on itself are of the seas, fires, pirates, and all other perils, losses, or misfortunes to the detriment of said goods." Held, that the contract authorized oil shipped from Mediterranean ports to Philadelphia or Boston to be carried over land from either place to Providence,—this being the shortest and safest route,—and hence that the company was liable for leakage under the policy, though there was nothing to show whether it occurred on land or water.—PHETTEPLACE v. BRITISH & FOREIGN MARINE INS. CO., R. I., 49 Atl. Rep. 83.

42. MARITIME LIENS—Charter Provisions—Lien of Owner on Cargo for Charter Money.—A provision in a time charter, which leased the ship for the term, and made the charterer owner for the voyages made there under, reserving to the owner, "a lien upon all cargoes and all subfreight for charter money due under this charter," cannot be construed to give the owner a lien upon cargo owned by third persons, and shipped under contract with the charterer, for charter money due; nor has he any lien on such cargo, under either the charter or the maritime law, to compel the shipper to pay the freight to him, such lien being created by the maritime law in favor of the person in possession of the ship. The only effect of such provision purporting to give the owner a lien upon cargo is to bind such cargo as is owned by the charterer to the extent of the charter money due.—AMERICAN STEEL-BARGE CO. v. THE CITY OF EVERETT, U. S. D. C., D. (Mass.), 107 Fed. Rep. 964.

43. MARITIME LIENS—Supplies Furnished in Foreign Port—Contract with Owner.—Where, under a contract with the owner, supplies are furnished to a vessel within the same port or state in which the contract is made, the presumption is that the dealings are not with the ship or upon her credit, but upon the personal responsibility of the owner; and no lien exists in such a case unless a credit of the ship is proved to be within the intention of the parties.—PRINCE v. OGDENSBURG TRANSIT CO., U. S. C. C., D. (Mass.), 107 Fed. Rep. 778.

44. MASTER AND SERVANT—Knowledge by the Latter of Danger.—In order for the knowledge by the servant of the condition of premises or machinery complained of to absolutely and unconditionally prevent his recovery as a matter of law, the condition must have been such as to threaten immediate danger, and that a man of ordinary prudence and caution would not have worked under said condition.—CARDWELL v. CHICAGO, ETC., RY. CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

45. MASTER AND SERVANT—Personal Injuries—Evidence.—Plaintiff, a servant, was injured by the fall of a derrick, due either to inherent weakness, improper ballasting, or violation of defendant's order not to hoist two loads at the same time on the same side of the derrick. The jury found against the last cause. Evidence tended to show that there was no visible weakness in the derrick, but that the accident may have been caused by a change of ballast, for which defendant would be responsible. Held, that a verdict for plaintiff was not against the evidence.—SHERMAN v. J. W. BISHOP CO., R. I., 49 Atl. Rep. 89.

46. MISTAKE OF LAW — Practice.—Where one of two joint defendants, against whom a judgment is rendered in the district court, appeals to the common pleas division of the supreme court, without joining his co defendant therein, under the belief that such joinder is not necessary, and the appeal is dismissed, it is a mistake of law, and is not sufficient to authorize the granting of a new trial in such court.—BASSETT v. LOWENSTEIN, R. I., 49 Atl. Rep. 89.

47. MORTGAGES — Assignment — Subsequent Incumbrancer.—A note secured by a mortgage was indorsed before maturity by the payee to L, and thereafter, but before the note matured, the payee released the mortgage of record. L indorsed the note to a partnership, and after maturity it was sold under an order of court as partnership assets, and purchased by plaintiff, who had no knowledge of the release of the mortgage. Held, that the fact that plaintiff purchased the note after maturity did not postpone his lien in favor of a subsequent *bona fide* incumbrancer of the mortgaged property, on the ground that plaintiff was estopped from denying actual knowledge of the release as shown by the record, since plaintiff was entitled to assert the rights of L.—FISCHER v. WOODRUFF, Wash., 64 Pac. Rep. 923.

48. MUNICIPAL CORPORATIONS — City Printing—Award.—Allegations that a city charter provided that bids should be submitted for the city printing, and that the city council should accept the lowest proposal, and appoint the bidder city printer; and that plaintiff filed a bid to do the city printing for 21 cents per inch for the first insertion, and 20 cents per inch for each subsequent insertion; and that plaintiff's competitor bid 35 cents per inch for the first insertion, and 30 cents per inch for subsequent insertions, measure to be by nonpareil type, matter set solid; and that the city council appointed plaintiff's competitor city printer on the ground that plaintiff's bid was ambiguous; and that there was a general custom that printing was to be measured by nonpareil type set solid, and that plaintiff's bid was made with reference thereto; and that the city council maliciously and fraudulently accepted the bid of plaintiff's competitor with the intention to defraud plaintiff,—stated facts sufficient to constitute a cause of action.—TIMES PRINTING CO. v. CITY OF SEATTLE, Wash., 64 Pac. Rep. 940.

49. MUNICIPAL CORPORATIONS—Liability for Grading—Ordinance.—Plaintiff seeks to recover from the defendant city, damages alleged to have been caused by the grading of a certain street of said city. The grading was done by the street commissioner under the direction of the city council. The city's charter authorized it to enact ordinances for grading and improving its streets. There was in this instance no ordinance enacted. Held, that the city was not liable; it could act only by ordinance and no ordinance had been enacted.—KOEPPEN v. CITY OF SEDALIA, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

50. MUNICIPAL CORPORATIONS—Police Commissioners—State Officers.—The board of police commissioners for the city of Newport, appointed by the governor by and with the consent of the senate, is a state board or commission, within Gen. Laws, ch. 17, § 4, providing that the attorney general, whenever requested, shall act as the legal advisor of all state boards, and shall represent such boards in litigation, since the duties of such commissioners are of a general nature, rather than municipal.—IN RE POLICE COMRS., R. I., 49 Atl. Rep. 87.

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NEGLIGENCE—Duty of One Injured to Call a ician.—An injured person does not at his peril to call in a physician, he is not called upon to ore than exercise reasonable care to prevent an avation of his injuries.—WEBB v. RAILWAY Co., App. (K. C. Div., May 6, 1901, not yet reported.)

NEGLIGENCE—Right of Judgment Defendant to er Over.—A judgment was recovered against an ic street-railroad company for damages for g the death of the plaintiff's husband, who was by receiving an electric shock from a telephone which he was required to handle in the course of work as an employee of the telephone company; complaint in the action alleging that the charge lectricity which killed the deceased was received a feed wire of defendant, which it negligently itted to cross and rest upon the telephone wire. ng paid the judgment, the railroad company ght an action to recover over against the tele- e company, alleging that the crossing of the was due to the negligence of the latter com- . Held, that such action could not be main- d, since the judgment upon which it was based ecessarily recovered upon an adjudication that railroad company had been guilty of actual and ive negligence, which rendered it at least a joint ressor, and precludes it from recovering over.— ITA CONSOL. ST. RY. CO. v. SOUTHERN BELL TEL- NE & TELEGRAPH CO., U. S. C. C., N. D. (Ga.), 107 Rep. 874.

PARTNERSHIP — Accounting.—Where a partner ppropriates funds of his firm, and falsifies its ac- ts, he will be required to account to his partner all damages thereby sustained by the firm, to- er with interest, and then allowed to retain his ion of the partnership assets.—BINGHAM v. KEY- Wash., 64 Pac. Rep. 942.

PLEADING AND PRACTICE — Justice Court—State t.—A statement before a justice of the peace must out the facts constituting plaintiff's cause of ac- n, and show the nature thereof, as for example ther it is based upon contract or negligence.— NION GRAIN CO. v. RAILROAD, Mo. App. (K. C. Div., 6, 1901, not yet reported.)

PLEADING AND PRACTICE — Party in Interest.—In it by the assignee of G, the buyer of certain war- s subsequently found to be void, to recover the e paid therefor, evidence that the buyer signed heck given in payment, "G, Agent," and that his 's money was kept in bank under that account, that all the money G used in his business was t under the same account, and that both G and his signed the assignment of the claim arising out of sale of the warrants, did not establish that G's , and not G, was the real party in interest in such ; and plaintiff was not, therefore, subject to be nited for failure of the complaint to allege G's as the real purchaser.—LATIMER v. BAKER, sh., 64 Pac. Rep. 898.

PLEDGES — Foreclosure — Title.—Where the dgee of city warrants sold them at public sale to nt for a small fraction of their face value, at a time en the warrants had no market value because their lidity was disputed by the city, and when the re- ver of the insolvent pledgor had no money to pay e debt, the sale being solely to secure title to the rrants, so that the pledgee could handle them more nveniently, and not for the purpose of paying the bt, such sale conveyed no title, and the receiver s entitled to redeem the warrants by payment of e debt and proper expenses incurred by the pledgee. UHLENBERG v. CITY OF TACOMA, Wash., 64 Pac. p. 995.

PRINCIPAL AND AGENT — Contracts—Rescission—uthority.—Where the president of a corporation old profit by the rescission of a contract made on half of himself and others with the corporation, e fact that he made the contract for the company uld give him no authority to rescind it, to the det riment of his principal.—WALLACE v. OCEANIC PACK- ING CO., Wash., 64 Pac. Rep. 988.

58. PUBLIC LANDS — Cancellation — Notice.—Public lands were entered under 29 Stat. 89, providing for sale on application stating that such lands were unfit for cultivation, and valuable chiefly for stone or timber, and all requirements thereof were complied with. The entrymen conveyed the tracts to defendant by warranty deeds recorded in the auditor's office of the county where the lands were located. The land department, before instituting proceedings to cancel the entries, was notified by its agent of the transfers. On *ex parte* hearing, the commissioner of the general land office canceled the entries, and issued patents to the land to plaintiff's grantors. Held, that defendant was entitled to notice of the proceedings for cancellation.—WHITNEY v. SPRATT, Wash., 64 Pac. Rep. 919.

59. PUBLIC LANDS—Cutting Timber—Act Prohibiting —Cutting for Use in Quartz Mill.—The proviso to the act of June 3, 1878, § 4, prohibiting the cutting and removal of timber on the public domain, provides that it shall not prevent any miner from clearing land in working his claim, or from taking timber to support his improvements. Held, that the taking of the timber for use in a quartz mill adjacent to the land from which it was cut was not within the proviso, and hence was prohibited by the act.—UNITED STATES v. ENGLISH, U. S. C. C., D. (Oreg.), 107 Fed. Rep. 867.

60. RAILROADS—Liability for Killing Cattle.—It is the duty of a railroad company in operating its trains to be on the lookout for cattle at public road crossings, and it is liable for running down such animals thereat, not only if it saw them in time to have avoided the accident, but also if it could have so seen them by the exercise of ordinary care. This applies to a cow which was on such crossing and having been frightened by an approaching train ran down the track for about 200 yards where she was struck.—SPENCER v. M., K. & T. RY., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

61. SALE—Construction of Contract.—A sale of all the ice in certain ice houses, for a price based upon the quantity shown by an agreed survey made before the contract was reduced to writing, is a sale in bulk, and not of the quantity shown by the survey.—GAGE v. CARPENTER, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 886.

62. SALE—Implied Warranty—Contract Construed.—Defendant sold to plaintiff in bulk all the ice stored in certain ice houses, with the understanding that plaintiff purchased it to resell in the general course of the ice business in a city. Defendant did not put up the ice, but bought it after it was stored, and had never seen it, and so stated to plaintiff, also telling him from whom he purchased it, and that he had no other information as to its condition or quality than the statements of such seller. Held, that under such circumstances there was no implied warranty by defendant that the ice was all of merchantable quality.—GAGE v. CARPENTER, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 886.

63. SALES—Implied Warranty of Quality.—An implied warranty by a seller of an article which is in existence, as to quality or against defects which are not obvious, arises only where the circumstances are such as entitle the buyer to rely upon the knowledge or opportunity of inspection which the seller possesses and he does not possess.—GAGE v. CARPENTER, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 886.

64. SCHOOL AND SCHOOL LANDS — Rescission—Tax Sale.—Where a state canceled a sale of school lands for nonpayment of installments due on the purchase price, a purchaser under a subsequent sale for county taxes acquires no interest in the lands.—STATE v. FROST, Wash., 64 Pac. Rep. 899.

65. STATUTE OF FRAUDS—Pleading.—When the contract is not denied, the statute of frauds must be specifically pleaded; but if denied, the statute may be in-

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voked at the trial without being specifically pleaded. The defense, however, is an affirmative one, and even when the contract is denied the defense will be deemed waived unless it is timely presented. The defense ought to be urged by objecting to the evidence, or by demurrer to the evidence, or in some such way. If no such objection is made, but on the contrary, defendant introduces evidence to disprove the contract, the defense of the statute will be held to have been waived, even though defendant raises it by instructions asked at the close of the whole case.—ROYAL REMEDY AND EXTRACT CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

66. STREETS — Public Use — Loading and Unloading Freight.—The appropriation, whether by custom or ordinance, of a street adjacent to a railroad freight house to the use of teams, trucks and wagons in loading and unloading merchandise, is a legitimate public use of the street, of such importance that a mere trespasser, seeking to interfere therewith, should receive scant favor from a court of conscience.—GENERAL ELECTRIC RY. CO. v. CHICAGO, I. & L. RY. CO., U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 771.

67. TAXATION — Defaulting Tax Collector — Commissions—Rights of Sureties.—Code, Alabama 1896, § 4097, provides that a collector of taxes may retain his commissions when he makes payment into the state treasury. Section 4087 provides that he must also, on or before January 10th and April 10th in each year, account to the auditor under oath for the amount of taxes, etc., and on such accounting shall be allowed by the auditor the amount then due him for commissions, fees, etc. Held, both in view of the statute, and independent thereof, that a defaulting tax collector was not entitled to commissions on money which he failed to pay over, and his sureties could not claim a credit therefor.—WALKER COUNTY, ALA. v. FIDELITY & DEPOSIT CO. OF MARYLAND, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 851.

68. TRUSTS AND TRUSTEES—Duties and Liabilities of Trustee.—A syndicate was formed for the purpose of purchasing certain stocks and real estate owned by one of the members, at agreed prices. Some of the members contributed their proportion of the required fund, which was placed in the hands of one of their number as custodian. An executive committee was also created. After a time the seller insisted that the purchase should be completed or the option surrendered, and the custodian paid over to him the fund collected. The seller conveyed to the custodian a portion of the property, which at the option price exceeded in value the amount he received, and also a large amount of the stocks, subject to a pledge thereof to secure an indebtedness which the contributions due from the remaining members of the syndicate were more than sufficient to meet. The project was subsequently abandoned, and nothing further was done toward carrying out the plans of the syndicate. Held, in a suit by members of the syndicate against the legal representatives of the seller and the custodian after their deaths, that it must be presumed, in the absence of evidence to the contrary, that the custodian paid over the money by direction of the executive committee, and with the knowledge and consent of all the persons concerned, and, there being no evidence of bad faith, that neither he nor the seller who received it could be charged with liability for its misappropriation, under the circumstances.—HOGG v. HOAG, U. S. C. C., S. D. (N. Y.), 107 Fed. Rep. 807.

69. UNITED STATES COURTS—Amount in Controversy—Joinder of Causes of Action.—A federal court has jurisdiction of an action at law between citizens of different states to recover an amount in excess of $2,000, based upon a number of separate claims, some of which were assigned to the plaintiff by others, where the joinder of such claims is permitted by the statute of the state, and the assignors were all residents of states other than that of defendant's residence, although no one of the claims is alone sufficient in amount to give the court jurisdiction.—BRIGHAM-HOPKINS CO. v. GROSS, U. S. C. C., D. (Wash.), 107 Fed. Rep. 769.

70. UNITED STATES COURTS — Intervention—Refusal—Granting Appeal as of Course.—There being two kinds of intervention, one belonging to the class of cases in which leave to intervene is entirely discretionary, and the other to that class in which the right is absolute, and it being sometimes difficult to determine to which a particular intervention belongs, the correct practice for a chancellor, after refusing leave to intervene, is to grant an appeal as a matter of course, if prayed for, as the intervenor otherwise would be entirely without remedy if the refusal should be a mistake.—UNITED STATES v. PHILIPS, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 834.

71. UNITED STATES COURTS — Jurisdiction of Removed Cause — Diverse Citizenship.—Though the circuit court cannot acquire jurisdiction by original process issued therefrom in a controversy between citizens of different states unless defendant is a resident of the district, yet where defendant, pursuant to the statute of removal, has a cause removed from the state to the federal court on the ground of diverse citizenship of the parties without regard to the residence of defendant, the latter cannot thereafter object to jurisdiction on account of its non-residence in the district.—WOODCOCK v. BALTIMORE & O. R. CO., U. S. C. C., N. D. (Ohio), 107 Fed. Rep. 767.

72. VERDICT—Compensatory and Punitive Damages Separately Stated.—Jury, in their verdict, under section 595, Rev. St., should state separately the compensatory and punitive damages, and where both kinds of damages are claimed by plaintiff and the jury return a verdict finding in his favor generally and in a lump sum, such verdict is bad.—JOHNSON v. BEDFORD, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

73. WILLS—Devise—Life Estate.—The title in question depended upon a will which contained, among others, the following provision: "It is my will that if any of my children or grandchildren should die without issue, I wish their share to be equally divided among my remaining heirs, and so as to all my children and grandchildren." Held, that the devisees received only a life estate. Cross v. Hoch, 149 Mo. 525, discussed and held to be just in point.—KRULL v. LEA, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

74. WILLS — Rule in Shelley's Case — Modification.—Pub. St. ch. 181, § 2, provides that no person seised in fee simple shall have a right to devise any estate in fee tail for a longer time than to the children of the first devisee, and a devise for life to any person and to the children or issue generally of such devisee, in fee-simple, shall not vest a fee-tail estate in the first devisee, but an estate for life only, and the remainder shall, on his decease, vest in his children or issue generally, agreeably to the direction of such will. Testator provided that after the decease of his wife, S, one-third of his estate should go to his son, C, for and during the term of his natural life, and that after his decease the estate so given as a life estate should go to the heirs of C, and to their assigns, forever. Held, that an estate in fee-simple was vested in C on the death of S.—IN RE MANCHESTER, R. I., 49 Atl. Rep. 86.

75. WITNESSES — Physician and Patient — Privilege Waived.—The provisions of the statute (Sec. 4659, Rev. St.) rendering physicians incompetent to testify to information acquired by them from their patients and which was necessary to enable them to prescribe for and treat said patients create a privilege in favor of the patients which they may lawfully waive. Thus where the patient goes upon the stand and fully testifies to all the secrets of the sick room, telling what was done by the physician and all about the treatment, he thereby waives the privilege of the statute, and the opposite party has the right to call the physician as a witness and to examine him in relation to the matter.—WEBB v. RAILWAY CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

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Central Law Journal.

ST. LOUIS, MO., AUGUST 9, 1901.

One of the most interesting and perplexing problems of law was recently decided by the Appellate Court of Indiana in the case of Guethler v. Altman, 60 N. E. Rep. 355, where it was held that a store keeper had no right of action against a school teacher and members of a school board because of their maliciously dissuading pupils, by threats and otherwise, not to trade with him, no dishonesty or anything of a reproachful nature being imputed to him. The court reviews the authorities as follows:

"There seems to be some conflict in the cases as to whether a party is liable in damages for wrongfully and maliciously inducing another to break a contract with a third party. The better-reasoned cases hold there is no liability unless certain relations exist. In Lumley v. Gye, 22 Law J. Q. B. 463, it is held there is a liability if the contract is for exclusive personal services. In Jones v. Stanley, 76 N. Car. 355, the rule is applied to every case where one person maliciously persuades another to break any contract with a third person. In Boyson v. Thorn, 98 Cal. 578, 33 Pac. Rep. 492, 21 L. R. A. 233, it is held the action will not lie unless the relation of master and servant, or other personal relation, exists. Bourlier v. Macauley, 91 Ky. 135, 15 S. W. Rep. 60, 11 L. R. A. 550, holds that the action will not lie unless the party breaking his contract has, by coercion or deception, been procured to do so against his will or contrary to his purpose, or the party breaking the contract is within the statutory exception of apprentices, menial servants, and others whose sole means of living is by manual labor. See, also, Chambers v. Baldwin, 91 Ky. 121, 15 S. W. Rep. 57, 11 L. R. A. 545. We know of no authority holding that an action will lie for maliciously persuading a party not to enter into a contract. In Allen v. Flood (1898), App. Cas. 1, the jury found that Allen had maliciously induced the employers to discharge Flood and Taylor and not to engage them, and gave them a verdict for damages. It was held that Allen had violated no legal right of Flood and Taylor, had done no unlawful act, and used no unlawful means in procuring their dismissal; that his conduct was therefore not actionable, however malicious or bad his motive might be; and that, notwithstanding the verdict, Allen was entitled to judgment. See Lyons v. Wilkins (1898), Law J. Ch. 383. In the case at bar no contract relation existed, and reasoning from the above cases, we must conclude that there is no right of action for maliciously persuading the pupils not to enter into any contract of purchase, or make any purchases, of merchandise from appellant. If the language used had imputed dishonesty or anything of a reproachful character, appellant could have his action, but that is not the case made by the pleading."

How far a geographical name may be used for trade purposes and become the subject of a trade-mark, is well illustrated in the late case of La Republique Francaise v. Saratoga Vichy Springs Co., 107 Fed. Rep. 459. It seems that the name "Vichy," a geographical name applied to mineral waters by the owners of springs in the Commune of Vichy, France, to designate the locality of origin, and indicate the general characteristics of their waters, long favorably known to the trade, was very prominently displayed on labels on bottles purporting to contain "Saratoga Vichy Water," the "Saratoga" over it being in far less conspicuous type, so that, if the bottles stood on a table or shelf, the word "Vichy" was the marked and prominent object of sight, but otherwise purchasers would not mistake it for the French article. It was held by the court that the effect of such a label was to represent to purchasers unaccustomed to the article that the water in such bottles came from the French wells, and that the use of the name in such form would be enjoined. The court bases its decision upon the following argument: It is true that a mere geographical name, without attending facts, which have caused the name to become significant of a particular manufacture and to identify the manufacture as the product of a particular person, is not the subject of a trade-mark. The distinction, however, between mere names of a locality and the secondary signification of names which identify an article with its manufac-

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turer or producer, and which tell the public that an article so produced is of singular excellence, with the result that the use of the name by a non-resident producer is unfair to the competitor and fraudulent to the public, has been long recognized. Elgin Nat. Watch Co. v. Illinois Watch-Case Co., 179 U. S. 665, 21 Sup. Ct. Rep. 270, 45 L. Ed. —. The decision in Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581, referred only to a denial of the exclusive right of a resident of a district of country to the application of its name to a well-known article of commerce—in that instance coal—so "as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation." The decisions are abundant that where the name of a district of a country has been used by an inhabitant of that district to identify his product, and has become significant of the success, and a declaration of the superiority of the product, a non-resident manufacturer cannot properly use the name to deceive the public and fraudulently obtain the good will which belongs to his competitor. Thus a watchmaker of some other town than Waltham cannot properly call the articles which he produces "Waltham Watches." The opinion in Flour Mills Co. v. Eagle, 30 C. C. A. 386, 86 Fed. Rep. 608, which exhaustively collates the authorities upon the subject, among which Thompson v. Montgomery, 41 Ch. Div. 35, and Wotherspoon v. Currie, L. R. 5 H. L. 508, are important, states as the result of the decisions the distinction which has been referred to as follows: "The distinction, both in the English and American cases, is between those where a geographical name has been adopted and claimed as a trade-mark proper and those where, as in the case at bar, it has been adopted first as merely indicating the place of manufacture, and afterwards, in course of time, has become a well-known sign and synonym for superior excellence. In the latter class of cases persons residing at other places will not be permitted to use the geographical name so adopted as a brand or label for similar goods for the mere purpose by fraud and false representation of appropriating the good will and business which long-continued industry and skill and a generous use of capital has rightfully built up."

NOTES OF IMPORTANT DECISIONS

FRAUDULENT CONVEYANCES — DEED FROM HUSBAND TO WIFE.—A point of law interesting to creditors has just been decided by the Court of Appeals of New Jersey, in the case of Adone v. Spencer, 49 Atl. Rep. 10, where it was held by the court that a conveyance of land by a husband to his wife by deed through a third party, to secure her for the principal of money of her separate estate taken and used by him, will be decreed to be a mortgage, and good as against creditors to the extent only of the amount of the principal so received by him with interest thereon from the date of the delivery of such deed. And it was further held that where such a conveyance is attacked by creditors as voluntary or fraudulent, the burden is on the wife to establish that her husband took and used her separate estate; but when that fact is established, whether such taking was with or without her consent, the burden then shifts, and those claiming that such taking and use were by gift of the wife must establish such gift to the husband. In support of the court's conclusion that conveyances to secure debts are mortgages, the court cites the following authorities: Meleck v. Creamer, 25 N. J. Eq. 429; Cake v. Shull, 45 N. J. Eq. 208; Winters v. Earl, 52 N. J. Eq. 52.

TAXATION—SEAT IN THE NEW YORK STOCK EXCHANGE AS PERSONALTY.—It was recently held by the Court of Appeals of New York in the case of People v. Feitner, 60 N. E. Rep. 265, that a seat in the New York Stock Exchange was not personal property within the law defining personal property for purposes of taxation, and is not taxable to a non-resident under a section of the statute providing that personal property of a non-resident shall be taxed "to the extent" as if owned by a resident. The court said: "This court has thus held that a seat in the New York Stock Exchange is, in a certain sense, property, and possessed of considerable value, and that an assignee in bankruptcy takes such interest as the owner has, and may realize thereon if the governing committee decides to recognize and seat the proposed transferee. We have been cited to no case where the stock exchange has admitted to membership the purchaser at a judicial sale. The court has no power to compel such action, and the probability of a creditor reaching a favorable result by selling the seat of a member is, to say the least, exceedingly remote. The record before us discloses that, where a member voluntarily contracts to sell his seat, it is always upon the condition that the agreement shall be void unless the proposed transferee is elected by the admissions committee. This membership, while in a certain sense personal property 'clogged with conditions,' is clearly not such personal property as is taxable under the laws of this state."

PHYSICIANS — FAILURE TO ANSWER CALL.—It has always been a disputed question, among

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laymen at least, whether a physician or surgeon is not bound to answer a call for his services, especially in cases of severe emergency, and where no other medical assistance is to be obtained. Reprehensible and unprofessional as such an arbitrary refusal would be, it is still not sufficient to hold the offending individual liable for any of its consequences. Such seems to be the opinion of the Supreme Court of Indiana in the recent case of Hurley v. Eddingfield, 59 N. E. Rep. 1058, where the exact holding of the court was that a physician, licensed to practice medicine by a statute authorizing the licensing of physicians found to possess the necessary qualifications, etc., is not liable for arbitrarily refusing to respond to a call, though he is the only physician available. The court said: "Decedent became dangerously ill, and sent for appellee. No other physician was procurable in time to be of any use, and decedent relied upon appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. Death ensued, without decedent's fault, and wholly from appellee's wrongful act. Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to every one who applied. Whart. Neg. § 731. The act regulating the practice of medicine provides for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practicing without liconse. Acts 1897, p. 255; Acts 1899, p. 247. The act is a preventative, not a compulsive measure. In obtaining the state's license (permission) to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark."

DIVORCE—RIGHT OF WIFE'S ATTORNEYS TO RECOVER COMPENSATION FROM THE HUSBAND.—The interesting question of the right of the wife's attorneys in a suit for divorce brought by the wife against her husband to recover their compensation from the latter is discussed in the recent case of Dodd v. Hein (Tex.), 62 S. W. Rep. 811. In this case it was held that a petition in an action by attorneys to recover compensation from the husband for prosecuting a divorce suit against him on behalf of the wife which alleges that the attorneys relied on representations of the wife as to the husband's treatment of her, and that such representations showed a good cause of divorce, but that the jury found that the conduct of the husband did not authorize a divorce, affirmatively shows that the suit was not brought in good faith and for probable cause, and is insufficient to support a recovery. The court said in part:

"That counsel for the wife in a divorce proceeding can recover, in an independent action against the husband, a reasonable fee for services in a divorce suit, when the grounds for the divorce were probably true, and there was reasonable cause for bringing the suit, and the suit was brought in good faith, seems now to be settled law in this state. Ceccato v. Deutschman (Tex. Civ. App.), 47 S. W. Rep. 739; Bord v. Stubb (Tex. Civ. App.), 54 S. W. Rep. 634; McClelland v. McClelland (Tex. Civ. App.), 37 S. W. Rep. 350. These decisions, as do all the American opinions fixing such liability upon the husband, proceed upon the principle that the services rendered by counsel for the wife in instituting and prosecuting a suit for a divorce against the husband are as for necessaries furnished the wife. To constitute such services rendered the wife by counsel necessaries, it is essential that they be rendered in the prosecution of a *bona fide* suit for divorce, based upon reasonable grounds, instituted and conducted in good faith and on probable cause. It is the wife who must in good faith and on probable cause institute and prosecute the suit for a divorce, in order to constitute the services rendered by counsel necessaries. The *bona fide* belief of counsel whom she may have employed to institute such proceedings that she has, upon representations made to him by her, a sufficient ground for divorce, is not sufficient. If her representations to counsel are untrue, and she is not, under all the facts and circumstances known to her, reasonably entitled to a divorce, she cannot institute and prosecute a suit therefor in good faith; and to charge her husband with the fees of her counsel in such case would not be a charge for necessaries furnished her, for the services of counsel so rendered would be wholly unnecessary. As is said by the Supreme Court of Georgia in Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637: 'As this power on her part is founded on the necessity of the case, so its extent does not exceed the demands of the necessity. Where the action is not necessary for the wife's protection, or it does not appear that the grounds for the wife's complaint were true, the law will not imply a promise on the part of the husband to pay for legal services rendered to the wife in prosecuting an action for divorce.' Sherwin v. Maben, 78 Iowa, 467, 43 N. W. Rep. 292. In our opinion, it affirmatively appears from appellants' petition that the suit for divorce, in which they claim that the appellee is liable to them for services rendered as counsel, was not brought and prosecuted in good faith upon probable ground by appellee's wife, and that she was not entitled to a divorce in the suit wherein the alleged professional services were rendered by appellants, and that, therefore, their petition states no cause of action, and that the court below did not err in sustaining appellee's exception to it."

JURISDICTION OF FEDERAL COURTS—REMOVAL OF CAUSES.—The United States Circuit Court for the District of Kentucky, recently decided an interesting point of law in regard to the

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removal of causes to federal courts. In the case of Whitworth v. Railroad, 107 Fed. Rep. 557, it was held that a defendant by appearing in the courts of a state in which neither plaintiff nor defendant resided, and filing a bond and petition to remove the case to the federal court, thereby waived his right to be sued in the district of his residence guaranteed by the judiciary act, and thereby submitted himself to the jurisdiction of the state court; and hence plaintiff, after removal, is not entitled to have the cause remanded on the ground that the federal circuit court had no jurisdiction, in that neither plaintiff nor defendant was a resident of the state in which the suit was brought. The court gives an excellent review of the authorities:

"Neither of the parties to this action being a citizen, resident, or inhabitant of Kentucky (as, for the purpose of this case, we may assume is the fact), it is contended that the language of the statute above referred to, when properly construed, literally and necessarily excludes the right to remove the case, because, as neither party to the action is a resident or inhabitant of Kentucky, the circuit court of the United States would not, under section 1 of the act referred to, have original cognizance thereof, and consequently that the right of removal does not exist under section 2. Counsel for the plaintiff, in support of the motion to remand, cite the court to the cases of Yuba County v. Pioneer Gold Min. Co. (C. C.), 32 Fed. Rep. 183; Telegraph Co. v. Brown, *Id.* 337; Harold v. Mining Co. (C. C.), 33 Fed. Rep. 529; Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. Rep. 935, 36 L. Ed. 768; Railroad Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. Rep. 563, 39 L. Ed. 672.

"Undoubtedly, if there were no other decisions, those in the three cases first named would seem strongly to support the contention of the plaintiff, whatever may be said as to the two others referred to by his counsel. But while the judges who wrote, and those who concurred in, the opinions in those three cases did so rule at a date immediately succeeding the enactment of the statute, those cases have been expressly overruled, and the whole current of decisions since that time has been the other way, and it may be regarded as conclusively established that the right of removal exists in such cases where a general appearance is entered, especially if followed by an answer to the merits of the controversy. The cases are numerous, but the court will refer only to the following: Cowell v. Supply Co. (C. C.), 96 Fed. Rep. 769; Creagh v. Society (C. C.), 83 Fed. Rep. 849; Duncan v. Associated Press (C. C.), 81 Fed. Rep. 417; Long v. Long (C. C.), 73 Fed. Rep. 369; Sherwood v. Mississippi Valley Co. (C. C.), 55 Fed. Rep. 1; Bank v. Pagenstecher (C. C.), 44 Fed. Rep. 705; Uhle v. Burnham (C. C.), 42 Fed. Rep. 1; Amsinck v. Balderston (C. C.), 41 Fed. Rep. 641; Burck v. Taylor (C. C.), 39 Fed. Rep. 581; Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C.), 37 Fed. Rep. 3; First Nat. Bank v. Merchants' Bank, *Id.* 657; Hulbert v. City of Topeka (C. C.), 34 Fed. Rep. 511; Wilson v. Telegraph Co., *Id.* 561; Fales v. Railroad Co. (C. C.), 32 Fed. Rep. 673. Judge Dillon, in his well approved work on Removal of Causes (in section 96), says: 'At first it was held that if the action was brought against a defendant in a district of which he was not an inhabitant, so that the federal court would not have originally had jurisdiction of it under the first section of the act, it could not be removed under the second section. But this position was soon abandoned. It was next considered that, while the right of removal might depend upon the capacity of the particular federal court to entertain original jurisdiction of the suit sought to be removed, yet the statute permitted the plaintiff to sue the defendant in the federal district of the plaintiff's own residence as well as in that of which the defendant was an inhabitant, where the federal jurisdiction depended only on the fact of a diverse citizenship of the parties; and therefore such a suit was removable by the defendant, if brought in a state court of the plaintiff's own state. But this rule was in turn superseded by a more liberal doctrine. It came to be perceived that the restrictive language of the first section of the act was referable only to suits commenced in a federal court by original process or proceeding, and had no application to suits removed from state courts, and that the word "jurisdiction" in the clause in the section relating to suits of which the federal courts may have original jurisdiction is not to be taken in the narrow sense of a jurisdiction over the person of the defendant by reason of his residence within certain territorial limits, but in a wider sense, meaning jurisdiction over the whole class of cases enumerated in the statute. Accordingly, it is now well settled that, where the parties are citizens of different states and the other conditions of removability are satisfied, the cause may be removed to a federal court, notwithstanding the fact that neither plaintiff nor defendant is a citizen or resident of the state where the suit is brought, or of the district within the territorial jurisdiction of the federal court to which it is to be transferred.'"

HUSBAND AND WIFE — MARRIED WOMEN'S ACTS—GIFT TO HUSBAND.—The extent to which a wife will be considered a *feme sole* in making a gift to her husband, as affected by the Married Women's Acts, is splendidly illustrated by the decision of the Court of Appeals of New Jersey in the recent case of Adams v. Spencer, 49 Atl. Rep. 10. The court held that the statutes in the several states as to the property of married women, when as broad as the Texas statutes, or that of New Jersey, have entirely overthrown the common-law ruleof the merger of the wife's entity and estate, upon marriage, in the husband, and that it is unnecessary under these statutes; that a wife shall take from her husband a promissory note, or other acknowledgment, upon

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handing him money of her separate estate, to be able to establish that such taking by him was a loan. In such a transaction she will be considered as a *feme sole*, and as if a stranger to her husband. The court's opinion is a valuable annotation on the extent to which the recent married women's acts have gone in abrogating the common-law disability of the wife in contracting with her husband. The court said in part: "The statutes now existing in the several states as to the property of married women have entirely overthrown the common-law rule of the merger of the wife's entity and estate, upon marriage, in the husband. It is no longer necessary to hold that, because a husband takes his wife's property into his possession, she is remediless. Nor is it necessary that she take from her husband a promissory note, or some other acknowledgment, that the handing him the money was not a gift. There seems no reason in common sense that when a husband takes of the principal of his wife's estate into his possession, that he should be presumed to acquire it as his own unless she has exacted some evidence in writing, or an express agreement by him, otherwise. There are many reasons why the rule should be the reverse of this, and that such a taking should be deemed a loan to him unless he prove otherwise. In equity, surely, no other rule should obtain. Even at common law a wife in equity might have a separate estate over which she had the *jus disponendi* as if she were a *feme sole*. Caton v. Rideaut, 1 Macn. & G. 599; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908. If it is clear that a husband has taken the principal of his wife's separate estate, with or without her consent, but without an express gift or clearly implied intent to give, equity should hold it not to be a gift, but to be treated in the same manner as the money or property of any other person taken by the husband under like circumstances would be treated. The true principle is stated by Mr. Justice Field, of the United States Supreme Court, in speaking for that court, as follows: 'We are of the opinion that * * * there would be no presumption, since the passage of the married woman's act, that she intended to give to her husband the moneys she placed in his hand, any more than a gift would be inferred from a third person who in like manner deposited money with him. * * * We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him.' Stickney v. Stickney 131 U. S. 227, 9 Sup. Ct. Rep. 677, 33 L. Ed. 136. The married woman's act of the District of Columbia, upon which this decision was founded, is very similar to that of our own state, and not as clear and full as that of Texas. The Supreme Court of Pennsylvania has even stated the proposition in some of its phases more strongly than the United States Supreme Court. Grabill v. Moyer, 45 Pa. 533. They say (Strong, J.): 'When the act of assembly declares, as it does, that all property, real, personal and mixed, which shall accrue to any married woman during coverture by will, descent, deed of conveyance, or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property; when the leading purpose of the act is to protect the wife's estate by excluding the husband—it is impossible for us to declare that mere possession of it by the husband is proof that the title has passed from the wife to him. After it has been shown, as it was in this case, that the property accrued to the wife by descent from her father's brother's estate, the presumption necessarily is that it continued hers. In such a case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value, for the law does not transmit it without the act of the parties. If mere possession were sufficient evidence of a gift, the act of 1848 would be useless to the wife. Nothing is more easy than for the husband to obtain possession, even against the consent of the wife; and when he obtains it with her consent it can be at most but a slight evidence of a gift.' This case has since been followed in Bergey's Appeal, 60 Pa. 408. In passing upon a like case the Supreme Court of Michigan says: 'The usual rule is that, if one gives another money at his request, the law will imply a promise to repay; and we see no injustice in applying the rule against a husband, where there are no circumstances tending to show a different understanding between the parties. This court has frequently held that the presumption of the law is against a gift by the wife to the husband, and the burden of proving it is upon him.' Sykes v. Bank, 115 Mich. 321, 73 N. W. Rep. 369.

"The Missouri supreme court holds that, where a husband had reduced his wife's personal property to possession before the passage of the married woman's act of 1875, as he had the legal right to do, after the passage of that act the fact that he had done so would, to the extent he had so done, furnish a sufficient consideration for a valid deed of gift of land to the wife to make restitution of funds so taken. Scrutchfield v. Sauter, 119 Mo. 615, 24 S. W. Rep. 137. The Supreme Court of Pennsylvania, in *Re* Hauer's Estate, clearly states the rule here elucidated, and the distinction between the presumption as to a gift by the wife of her separate estate as between principal and income used by her husband, as follows: 'But a broad and plain distinction is drawn by the cases between the receipt by the husband of the income of his wife's separate property and the receipt by him of the principal or *corpus* of her estate. A gift of the income may be implied from his receipt of it with her consent, but a gift of the principal will not be presumed from her mere acquiescence in his receipt and use of it.' *In re* Hauer's Estate, 140 Pa. 420, 425, 21 Atl. Rep. 445, 446.

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"It will answer no useful purpose to further extend this opinion by reference to other authorities. Since 1848—which was about the year of the beginning of the statutory creation of the wife's separate property rights—the trend of the decisions in all the states has been toward the rule here contended for. It can safely be said that with scarcely an exception the Supreme Court of the United States and the courts of last resort of all the States have held that, as to the principal of the wife's separate estate taken into the possession of a husband, and used by him, he or his personal representative is bound to account to her, and that to sustain a refusal to so do, or to relieve from equitable liability to so do, the burden is on him to establish that he received such property as a gift from her. His mere possession of it will not imply such a gift any more than it would from a like receipt from any other person. There appears no good reason, either in law or morals, why such should not be the rule."

EFFECT OF STATUTES FIXING THE FACE OF A POLICY OF INSURANCE AS A LIQUIDATED DEMAND.

Of comparatively recent years the legislatures of quite a number of the states have passed laws fixing the amount of recovery in the event of a loss of property protected by a fire insurance policy. These laws are usually restricted to real estate for the reason, no doubt, that this is fixed, tangible and easily ascertainable, and it is not so easy for the assured to perpetrate a fraud of any kind, as in the case of personalty, which can be conveniently removed, concealed or misrepresented. The theory of the law is, it is but proper that the companies pay for what they insure where they have every opportunity to ascertain the precise *status* of the property covered; for the supposition is, they take a premium upon the basis of a full liability in case of a total loss. But while this may be supposed, it is not really the case according to the letter of the contract, for the policies always stipulate for a deduction of some kind in some amount by reason of one provision or another. In Mississippi it is provided: "In suits brought upon policies of insurance against loss by fire, hereafter issued or renewed, the insurer shall not be permitted to deny that the property insured was worth, at the time of issuing the policy, the full value upon which the insurance was calculated."[1] In Missouri the law is: "In all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth, at the time of issuing the policy, the full amount insured therein on said property; and in case of total loss of the property insured the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured."[2] In Arkansas, by Act March 18, 1889, it is provided: "A fire insurance policy in case of a total loss of the property insured, shall be held and considered a liquidated demand against the company taking such risk for the full amount stated in such policy, or the full amount upon which the company charges, collects or receives a premium."[3] This law is restricted to real property. Acts more or less similar are to be found in a number of other states; and when these laws have been enacted they operate upon every contract of insurance of the kind embodied in their provisions, and become part and parcel of the agreement itself. The law reads its provisions into these contracts regardless of any other stipulation or agreement of the parties. As was well expressed by the Supreme Court of Ohio, the statute "moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the assured's liability."[4] It is clear, however, that the operation of these statutes must be restricted to contracts of insurance made after they become effective. They cannot alter or deny vested rights existing by virtue of a contract of insurance in force at the time of their enactment. This the legisla-

[1] Acts Miss. 1896, ch. 56.

[2] Rev. St. Mo. 1889, ch. 89, § 5897, art. 4.

[3] Acts Ark. 1899, p. 112.

[4] Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. Rep. 1072; Emery v. Piscatqua Fire & Marine Ins. Co., 52 Me. 322; White v. Connecticut Mut. Life Ins. Co., 5 Cent. L. J. 486; Reilly v. Franklin Ins. Co., 43 Wis. 449; Oshkosh Gas Light Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. Rep. 819; Chamberlain v. New Hampshire Fire Ins. Co., 55 N. H. 249; Wall v. Equitable Life Assur. Soc., 39 Fed. Rep. 273; Lancashire Fire Ins. Co. v. Bush (Neb.), 82 N. W. Rep. 313; Western Assurance Co. v. Phelps (Miss.), 27 South. Rep. 745; Cayon v. Dwelling House Ins. Co., 68 Wis. 510, 32 N. W. Rep. 540; Home Ins. Co. v. Bean, 42 Neb. 537, 60 N. W. Rep. 907; Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. Rep. 718; Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. Rep. 911.

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ture of no state can do.[5] As the law itself fixes the measure of recovery, this becomes mandatory as a part of the legal *status* between the insurer and assured. And while the assured could, no doubt, in a case of *bona fide* controversy over a contract of insurance accept an amount less than the face of the policy as a compromise adjustment of the dispute, and thereby preclude himself from any further benefits by reason of the contract, yet he cannot, by contract or otherwise short of fraud or criminal conduct, as a rule, waive the benefits or requirements of the law.[6] This being true, an agreement on the part of the assured to accept, in full satisfaction of his demand, an amount less than the full face of the policy would not preclude or estop him from afterward maintaining an action against the company for the difference between the face amount and amount received, for such a contract would, in addition to being contrary to the policy of the law, be without consideration to support it.[7] It necessarily follows, therefore, that the acceptance by the assured of a policy or contract of insurance providing for a mode of settlement different from that fixed by law, does not preclude the holder of the policy from insisting upon a recovery for the amount of the policy.[8] Likewise a stipulation in the contract of insurance whereby the assured agrees, in case of loss, to consider the property insured personalty where the law fixes the amount of recovery on real property only. This is nothing less than an attempt to evade the force of the law and will not be permitted.[9] Nor is the force and effect of the statute diminished in the least by a provision in the policy giving the insurer the option to rebuild in event of a loss. For if this provision were effective the loss would not become a liquidated demand for the face of the policy, and as the law and the stipulation cannot both stand, the latter must give way to the former.[10] Practically all fire insurance policies contain a provision that, in event of other insurance on the property the company shall not be liable in any event for a greater amount than the proportion which the face of the policy bears to the total insurance. The law supplants these provisions also, and the assured may recover from every company having a policy on the property just as though there had been but one contract, and this is necessarily true, though the various recoveries thus allowed may be several times the value of the property covered.[11] Upon principle, however, this doctrine should not be carried to the extreme. For while the purpose of these laws is to assure the policy holder of just what his rights are, and to defeat the many provisions of a policy providing for an adjustment of a loss for a less amount than the face of the policy in case of total destruction, yet the law should not be so perverted as to serve as a sword of injustice. Statistics show that there are more losses of property by fire in the night time than during the day. Experience also teaches the well informed underwriter that at least half of the losses from fire are fraudulent or suspicious. It is obvious that it is necessary for a company wishing to do a legitimate business and succeed, must steer clear of these fraudulent losses as far as possible, which is but justice to itself and the honest policy holders. If, therefore, an applicant for insurance should fraudulently conceal from a company the fact that he had insurance on the property in

[5] Chamberlain v. New Hampshire Fire Ins. Co., 55 N. H. 249; Reilly v. Franklin Fire Ins. Co., 43 Wis. 449.

[6] Western Assurance Co. v. Phelps (Miss.), 27 South. Rep. 745; Havens v. Germania Fire Ins. Co., 125 Mo. 403, 27 S. W. Rep. 718; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. Rep. 1072; Dugger v. Mechanics' & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. Rep. 5; Phœnix Ins. Co. v. Levy, 12 Tex. Civ. App. 45, 33 S. W. Rep. 992.

[7] Heaslet v. Spratlin, 54 Ark. 185, 15 S. W. Rep. 461; Warren v. Skinner, 20 Conn. 559; Bailey v. Day, 26 Me. 88; Cumber v. Wane, 1 Str. 426; Blanchard v. Noyes, 3 N. H. 518; Fitch v. Sutton, 5 East, 230; Miller v. Eldridge, 126 Ind. 467, 27 N. E. Rep. 132;

[9] Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27

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contemplation to the amount of its value or more, and thereby induce a contract, certainly no just court would adjudge that a loss under a policy thus obtained should be paid in whole or in part whether it contained a clause for contribution or not. In such cases the fraud strikes at the very foundation of the contract. Were it otherwise, it is but clear that the statute would encourage and license the most reprehensible and unconscionable conduct on the part of those taking insurance in bad faith. Upon this principle it would never be held by any court that the insured could wilfully and criminally burn his own property and then invoke the aid of the law to collect the policy.[12] But where there are several policies upon the same property with the consent of the companies, the effect of a total loss is to make them all severally liable for the face of the respective policies. In the case of a sea-going vessel protected by valued policies when the loss is partial, only the measure of recovery is the actual damage. That is, the cost of the necessary repairs, less the usual deduction for the difference in value between the new and the old.[13] In cases of this kind, the liability of the several companies is in proportion to the amount the several policies bear to the whole liability.[14] When these statutes fix the amount of recovery in cases of a total loss to real property there can be no proper contention that the statute must embrace losses on personal property as well. These laws are an invasion of the common law, and should not be construed beyond their letter or necessary intendment.[15] Where the insurance is on both real and personal property, and evidenced by single policy, the amount of recovery for a loss on the building, if total, would be the amount specified in the policy on the building; while the remaining personal property would be subject to the three-quarter loss clause and other provisions of the policy. But if the policy should be written for a total amount on real and personal property without designating any particular sum for either kind of property the question of the extent of recovery becomes more difficult. Here there would be no specified amount in the policy on the building and as the policy covers the building as part only of the risk, it could not well be said that a total loss of the building would entitle the assured to recover the full face of the policy, only a part, and an indefinite part, of which covered the building. The loss might be more extensive on the personal property than on the building, or might be the reverse. The loss on both might be more than the value of either kind of property. There is no fixed amount recoverable on either, and as, in the nature of things, the measure of recovery on the building could not be fixed by the amount of the policy on the building and personalty together it would seem that the adjustment of the loss would have to be made regardless of the statute, for, reading these laws strictly, they can only apply where the policy fixes some definite amount on the building. All losses, however, are not total, and when not, the rules of adjustment in force before the passage of the valued policy law apply. In order, therefore, to ascertain the amount recoverable, it is, of course, necessary to learn whether there has been a total loss. The burden of showing a total loss is properly upon the assured, for he assumes, in his action against the company, the affirmative of the proposition, and if there has been only a partial loss, he is not entitled to the full amount of the policy but only the actual damage subject to the three-fourths loss clause or other valid provisions of the policy.[16] If there is no dispute about the facts, or if they be such that no two impartial minds can reach a different conclusion, the question of a total loss will be one of law; otherwise, one of fact.[17] Again, there may arise a question as to whether the property in dispute is real or personal. The general rule for ascertaining this is: All structures and improvements placed upon land with a view to permanency and permanently

[12] See Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. Rep. 1072.

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affixed to the realty are deemed a part of the realty in law.[18] The fact that a building may have been previously destroyed in part by fire will not change the rule that the face of the policy must be taken to be a liquidated demand against the company. For, while the building may have been previously burned in part, it is nevertheless true that the destruction of the remainder of the building during the life of a policy thereon comes within the law and fixes the amount recoverable.[19] In cases of this kind, it is the building as it stood when the insurance became effective, not at a time before there was any previous injury thereto. The structure, in other words, is still a building, or realty, within the meaning of the valued policy acts. Policies of insurance usually stipulate that any false swearing by the assured in making proofs of loss, or otherwise in connection with the contract of insurance, shall avoid the contract. It has been held that swearing falsely will not vitiate the obligation under these laws unless done before the insurance became effective.[20] And a false statement as to the value of the property in procuring the insurance will not prevent a full recovery unless made fraudulently.[21] The statute overrules all provisions of the policy restricting the amount of recovery by a three-fourths loss or value clause or other like stipulation.[22] And the fact that the assured may fail to furnish plans and specifications of a building destroyed, when demanded by the company and required by the policy, will not preclude a complete recovery.[23] And of course an agreement to arbitrate the amount of the loss or the amount recoverable is ineffective.[24] But by no means does or should it follow that the insurer must be precluded from legitimately protecting himself from fraud, imposition or other injury by reasonable stipulations and requirements which become, according to the contract, conditions precedent to a right of recovery. And it is doubtful, at least, if the decision of one of the numerous courts of appeal in Texas, referred to herein, declaring a failure to furnish plans and specifications of the building as a condition of a right of recovery inoperative. For such a requirement does not in the least militate against the right to recover the full amount of the policy, but is required as a condition of any recovery at all. Without the valued policy acts it would not be seriously contended that such clauses are void. They should not be any more so than the requirements of proofs of loss. They are in the nature of proofs, and may serve at least some purpose in showing whether the assured has acted in good faith in effecting the insurance. Upon this principle it has been held that the insured is not entitled to recover unless he furnishes proofs of loss as required by the policy.[25] The making of proofs of loss simply entitles the assured to recover. If he is entitled to recover anything after this is done, he will be entitled to recover the face of the policy. If the proofs are not furnished by the assured, or waived by the insurer, there can be no recovery in whole or in part. The requirement of this kind does not deny the right to a full recovery when proofs are properly made. Again, policies generally stipulate against an increase in the hazard of the risk. And if the assured ignores this and a loss occurs, he will be precluded from a recovery in any amount, regardless of the valued policy law.[26] Likewise, the companies have a right to embody in their policies stipulations against vacancy. For this is but another way of fortifying against an increased hazard, as experience teaches that a vacant house is more apt to burn than one occupied. In other words, the insured agrees to pay the

[18] British-American Assurance Co. v. Bradford, 60 Kan. 82, 55 Pac. Rep. 335.
[19] Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 13 S. W. Rep. 337.
[20] Bammessel v. Brewers Fire Ins. Co., 43 Wis. 463.
[21] Cayon v. Dwelling-House Ins. Co., 68 Wis. 510, 32

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lation of it will preclude any recovery.[27] The period of limitation within which an action may be brought is usually limited by the policy to six or twelve months. An action on a policy on realty under these laws, therefore, would, upon principle, have to be brought within the time thus fixed, else no recovery in whole or in part could be had. The fact that the law makes the face of the policy a liquidated demand does not do away with the statute of limitations, nor with the period fixed in the policy within which the suit must be brought as condition of recovery.[28]

These statutory changes in the common law liability of insurance companies on contracts of insurance have not been favored by the companies. They have contested them on various grounds and, as a rule, with results in favor of the force and effect of the statute bearing on the subject. This opposition to the law has been carried through all the courts to the Supreme Court of the United States. The validity of the Missouri statute before referred to, was assailed in an action on a policy of insurance for $800 on a barn, issued to one Daggs by the Orient Insurance Company, a corporation organized under the laws of Connecticut, and doing a general insurance business in Missouri. There was no controversy about the facts in the case, but the company set up in its answer a clause of the policy as follows: "Said insurance company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and that the loss or damage shall be ascertained or estimated according to the actual cash value of the property at the time of the fire, and shall in no case exceed what it will cost to replace the same." It was further alleged in the answer that the actual value of the property destroyed did not exceed $100, and that the statute was invalidated by reason of that clause of the national constitution declaring that no state can pass any law impairing the obligation of contracts. The drag-net fourteenth amendment was also invoked to obliterate the state law. To this plea a demurrer was filed by the plaintiff, which brought the issues as to the validity of the Missouri law squarely before the court for determination. The circuit court sustained the contention of the plaintiff, and this ruling was affirmed on appeal to the Missouri Supreme Court sitting *in banc*.[29] From this decision the company sued out a writ of error, and brought the record up to the Supreme Court of the United States for review. That learned tribunal, speaking through Mr. Justice McKenna, held that the provisions of the state law came clearly within the police power of the state; "that the state surely has the power to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by plaintiff in error;" that, after the company knowingly undertakes to indemnify the assured in a certain amount upon certain property by reason of loss or damage by fire, with the statute staring it in the face, and which, by force of law, becomes a part and parcel of every contract, is estopped to say it is not liable as prescribed by the state law; that the several states may prescribe the liabilities under which corporations created under its laws shall conduct their business, and that foreign corporations of like character are no less subject to this authority.[30] The theory is, it is not so much the impairing of a contract as it is holding the parties to it when it has been made. For the law of the land is of more dignity than a contract which repudiates the law itself. So it may be considered settled authoritatively, by both state and national courts, that these valued policy acts are effective and binding.

Nashville, Ark. W. C. RODGERS.

[27] Hilton v. Phœnix Assurance Co., 92 Me. 272, 42 Atl. Rep. 212.

33 Am. Law Reg. & Rev. (Vol. 2, N. S.) 52.

[29] Baggs v. Orient Insurance Co., 136 Mo. 382, 38 S. W. Rep. 85.

[30] Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281. Similar conclusions have been reached in other jurisdictions. Lancashire Ins. Co. v. Bush (Neb.), 82 N. W. Rep. 313; Dugger v. Mechanics' & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. Rep. 5; Phœnix Ins. Co. v. Levy, 12 Tex. Civ. App. 45, 33 S. W. Rep. 992.

CORPORATIONS—OFFICERS—RIGHT TO COMPENSATION.

BASSETT v. FAIRCHILD.

Supreme Court of California, May 9, 1901.

Where a director of a corporation performed services as its manager, not pertaining to his duties as director, he is entitled to recover the reasonable value of such services, though no rate of compensa-

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tion was fixed by the board of directors prior to performance of the services.

MCFARLAND, J. It is averred in the complaint that each of the plaintiffs is the owner of at least five shares of the capital stock of the corporation defendant, the Bitumen Consolidated Mining Company, the capital stock being $300,000, divided into shares of $100 each, and that this action is brought on behalf of themselves and other stockholders. It is also averred that during the times when the alleged wrongs were committed, defendants Fairchild, Perine, Walrath and Miles were directors of the corporation defendant; the whole number of directors being six, and the other two being Bassett and one Swift. It is further averred that said defendants, being a majority of the board of directors, improperly expended certain moneys of the corporation, and the purpose of the action is to recover from them the amount of money alleged to have been thus expended. The court rendered judgment against Fairchild, Perine, and Walrath for $10,729.90, which sum consists of $8,665.80 found to have been improperly expended, and legal interest thereon for several years; and against defendant Miles for $7,129.90 for money, and interest thereon, found to have been improperly expended by the directors by acts in which he participated. From the judgment, and from an order denying their motion for a new trial, the defendants appeal. The chief item of appellants' liability allowed by the court, which is contested by appellants, is $6,475 paid defendant Fairchild for services as general manager of the corporation defendant before his compensation therefor had been fixed, which sum, with interest thereon, makes up the main amount of the judgment. There is no averment, or proof, or finding of any fraud committed by appellants, but the theory of the complaint seems to be that in authorizing the payment of the said money to Fairchild the appellants acted with gross neglignce. The appellants admit the payment of this money, and justify it. The findings seem to follow the theory of the complaint; but so far as they may be construed to find that appellants were guilty of such negligence as would render them liable on the ground of negligence alone, or that they willfully intended to injure the corporation for their own personal gain, they are not supported by evidence. It is apparent, therefore, that the judgment was based on the principle that the payment of the money to Fairchild was unlawful because it was paid before his salary as general manager had been fixed, and that, as will be seen hereafter, it was so entirely illegal and *ultra vires* that it could not be ratified or made valid by any subsequent act of either the directors or the stockholders. Immediately after the organization of the corporation, and in September, 1891, Fairchild was duly elected vice president and general manager, and remained such during the time mentioned in the complaint. He immediately commenced to perform his duties as general manager, which duties were numerous and onerous, and occupied almost his entire time. The various kinds of work which he did as manager fully appear in the evidence, and need not be here given in detail. There is no doubt that his services were highly valuable, and there is no doubt that they were of such a character as to preclude any reasonable supposition that they were to be gratuitous. But there was no resolution of the board of directors and no express contract determining what compensation he should have for his services as manager prior to November 9, 1892, and for this reason it is contended by respondents that he cannot legally have any compensation prior to that date. Fairchild expected to receive compensation for his work as manager, the amount to depend somewhat upon the volume of business that would be developed, and the testimony of Walrath, president, and Perine, treasurer, of the corporation, shows that it was not expected by them or the other directors that he was to work gratuitously. Moreover, his work as manager was done with the knowledge of the directors, but there was no formal action taken on the subject until November 9, 1892. Some time before that date the president paid Fairchild, on account of his services, out of the money of the corporation, $3,600; and on November 9, 1892, the board of directors passed a resolution which, after reciting that Fairchild had been in the employ of the corporation since its organization "as managing agent and manager," and had been paid by the president $3,600 for his services, declared that "the acts of said president in advancing and paying said J. A. Fairchild said sum of $3,600 on account of his services be, and the same is hereby, approved, ratified, and confirmed." There were present at this meeting four directors, who constituted a quorum. Fairchild was one of the four, but he did not vote on the resolution, which was passed by the votes of the other three. At this same meeting a resolution was passed reciting that Fairchild had been elected general manager in September, 1891, and had ever since been acting as such without having his salary fixed, and declaring that his salary "be, and the same is hereby, fixed at the monthly sum of $200 per month from November 1, 1891, to April 1, 1892, and that thereafter he should receive a salary of $750 per month, which should remain the same until changed by the board of directors." On the 10th day of January, 1893, there was a general meeting of the stockholders. At this meeting there were present stockholders representing 2,510 shares of the capital stock of 3,000 shares; and by a resolution adopted by a majority of the shares, exclusive of those represented by Fairchild, it was resolved "that all the acts of the board of directors and officers of this company for the past year be approved and ratified." The by-laws provide that "the compensation and terms of office of an officer of the corporation

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(other than directors) shall be fixed and determined by the board of directors." This language does not on its face mean that the compensation must be expressly and definitely agreed upon and settled before performance of the services; but respondents contend that under the general law, established by judicial decisions, there can be no lawful allowance to an officer of a corporation for services, no matter what their character and value, where the amount of the compensation had not been fixed prior to the rendition of the services. Many authorities on this subject have been cited on both sides, and they are to some extent conflicting. Most of those cited by respondents merely declare the rule that a "director" as such, without some previous understanding is not entitled to pay for services which are within the ordinary duties to be expected of him as director, although some of them no doubt apply the rule to other officers or agents who are also directors, but as to the last proposition the weight of authority and reason is the other way. As a general rule, when one person performs valuable services for another, whether the other be a corporation or a natural person, the law raises an implied promise to pay a reasonable compensation for the services, unless they are performed under circumstances which show an understanding that they were to be gratuitous. It frequently happens that one natural person performs valuable services far another natural person for which the former cannot recover, because circumstances show that they were rendered without any expectation of compensation. Now, it has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary services as are usually rendered by directors without pay; for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing. The correct rule is stated by the United States Supreme Court in Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. Rep. 36, 34 L. Ed. 608. In that case, Fitzgerald, who was a director of a corporation and treasurer, acted as superintendent and geueral manager, and as such did valuable work, "not at all pertaining to his office as director," and the question was whether he was entitled to compensation for such work done before any compensation was fixed. The opinion of the court states that the trial court "instructed the jury that 'if Fitzgerald, the plaintiff, acted as superintendent, treasurer, or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant' (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services are reasonably worth, and afterwards repeated this instruction more in detail, confining it to services as manager." The verdict was for Fitzgerald, and the judgment was affirmed. The court said: "The general rule is well stated by Mr. Justice Morton (since chief justice of Massachusetts), in Pew v. Bank, 130 Mass. 391, 395: 'A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of the party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the party who receives and is benefited by them, would and ought to understand that compensation was to be paid for them.' Tested by this rule, we think that the court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly have been held as matter of law that he was not so entitled." Rogers v. Railway Co., 22 Minn. 25, is a case directly in point. It is stronger in support of the proposition above stated than the case at bar, because the charter of the corporation in that case provided that the board of directors should appoint the officers, "and fix their compensation for the services to be rendered." Rogers was a director, and was appointed secretary of the corporation, and also acted as its land commissioner and attorney, and sued for the value of services rendered in such capacities. There had been no compensation fixed, nor any contract made, before the services were rendered, and it was contended there, as here, that no compensation could be recovered for past services. But it was held otherwise. The court said, among other things, as follows: "The evidence showed that the plaintiff, while acting as land commissioner, was a member of the board of directors. If his services as land commissioner had been performed by him simply as a director, it might by that he could not recover for the same, since, in the absence of a special agreement for compensation, he would, according to many authorities, be presumed to have acted gratuit-

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ously. But the duties and labors of a land commissioner of a land grant railroad company do not necessarily nor presumptively pertain to a director as such. Indeed, it would be unreasonable to suppose that duties so onerous would be undertaken by one acting simply as a director without pay. For such extraordinary services, outside of and beyond his duties as director, a party may certainly recover, notwithstanding his directorship; for the reason that, even if he performs the duties of director gratuitousy, these services are not a part of those duties" (citing cases). In Henry v. Railroad Co., 27 Vt. 435, there was a standing resolution of the board that a director should not receive more than two dollars per day for special services, yet a director was allowed to recover for services which were outside his duties as a director in an amount much greater than could have been allowed under the resolution for services as director. The court said: "There are services which may be rendered for the benefit of a corporation, the performance of which may be delegated by the directors to other persons. For that purpose the directors may employ, as their agents, those who are not members of the corporation, or they may employ one of their own number. A director is not incapacitated to discharge those duties, and receive the same compensation which other agents would be entitled to recover. * * * In rendering those services the plaintiff was not acting in his official capacity as director, but as the agent of the corporation, and his compensation is no more limited by that vote than it would be if the services had been rendered by others who were not directors." In Sawyer v. Bank, 6 Allen, 209, the court, speaking of the circumstances under which the presumption arises that officers of a corporation are to be paid for their services, says: "Such a presumption arises in reference to any species of work, labor, or employment which is usually and commonly the subject of hire and reward, and paid for, whether any specific bargain is or is not made concerning it." In Beach, Priv. Corp. § 208, the author says: "When the charter of a corporation provides that certain officers may be elected, and their salary fixed, by a board of directors, and a president is thus elected, but with a salary named, the law raises an assumpsit on the part of the corporation to pay a reasonable compensation for his services rendered after election." In Mor. Priv. Corp. § 508, the author says: "If a director is properly employed to perform services which do not pertain to his office as director, he is entitled to such compensation as has been agreed upon, or as the services are reasonably worth." There are many other authorities to the same effect as those above cited, but they are too numerous to refer to here. 311; Severson v. Milling Co., 18 Mont. 13, 44 Pac. Rep. 79; Felton v. Mining Co., 16 Mont. 81, 40 Pac. Rep. 70. There was nothing decided in McCarthy v. Water Co., 111 Cal. 328, 43 Pac. Rep. 956, that conflicts with the views heretofore stated. There the plaintiff, who was a director of the corporation defendant, sought to recover of the latter the value of services rendered without any previously fixed salary or compensation; and a judgment in his favor was reversed merely because the trial court had erroneously excluded evidence offered by the defendant which "tended to show the relations of the parties, * * * and to throw light on the question whether or not it was intended that he should have compensation." The court referred to Barstow v. Railroad Co., 42 Cal. 465,—which was also an action brought by a director to recover for services rendered before his compensation had been fixed,—and quoted from the opinion in the latter case as follows: "The situation of the parties at the time—the relations, if any, in which they stood, of a business character or otherwise—are important to be known and considered in order to arrive at a correct solution of the ultimate question involved." In neither the McCarthy case nor the Barstow case is there anything in the nature of a decision that there cannot be a recovery by an officer of a corporation who is also a director unless his salary had been previously fixed, but the contrary in both cases is assumed and necessarily decided. In the Mc Carthy case it is assumed that plaintiff could have recovered on "an implied contract arising out of, and inferable from, the situation and relation of the parties;" and it is further said that "respondent, being a director of appellant, was not entitled to compensation for services rendered the corporation unless the circumstances were such as to raise an implied assumpsit to pay what they were reasonably worth." We conclude, therefore, upon the authorities above noticed, as well as upon reasonable and just principles, that Fairchild was not precluded from having a legal claim for the value of his services merely because that value had not been fixed beforehand.

NOTE.—*Right of Directors of a Corporation to Compensation for Services.*—At common law, a trustee was not entitled to compensation, and could not recover on a *quantum meruit;* and the president and directors of a corporation are trustees for the stockholders, and for that reason the law does not imply a promise to pay them for discharging the duties imposed upon persons occupying that position. Cheney v. Railroad, 68 Ill. 570; N. Y. & N. H. R. R. v. Ketchum, 27 Conn. 170. This trust relation is now generally recognized by the great weight of authority, and contracts between directors and the corporation are by most authorities held to be constructively fraudu-

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services rendered by a director of a railroad company, who is also an attorney, in procuring aid notes, rights of way, and working upon interest in the construction of the road in the communities through which it is projected, in order to secure aid in its construction by donations and subscriptions, and also in enlisting capitalists in the enterprise, are not embraced in the ordinary duties of a director of the company, and are such as the company may legally contract for; and if rendered at the request of the board of directors, the law implies a promise to pay what they are reasonably worth, if such value is not fixed by the resolution of the board. As this case goes farther than any other in asserting the right of a director to contract with the corporation and to receive compensation for services not within the ordinary duties of a director, we quote part of the court's reasoning: "The directors of a corporation are its agents. The entire management of corporate affairs is committed to their charge, upon the trust and confidence that they shall be cared for and managed within the limits of the powers conferred by law upon the corporation and for the common benefit of all the stockholders. But the rule is not an arbitrary one. Although it has been held by some courts that a director cannot enter into a valid contract with the corporation of which he is agent, although the corporation is represented in the transaction by a majority of the board, yet the decided weight of authority and of reason supports the doctrine that such contract would be valid. · · · It is true that contracts entered into between agents of the corporation occupying positions of trust and confidence, and a corporation will always be scrutinized with jealous care by courts to see that no advantage is taken of the corporation, or the rights and interests of its stockholders jeopardized, but it cannot be said that contracts fairly entered into, and honestly executed, where no one is defrauded or overreached, are invalid. In this case the circumstances are free from suspicion. · · · These were services which were not embraced in the ordinary duties of a director of the company. They were valuable to the corporation, and were such as to which they had the right to agree upon the compensation to be paid; and if his services were engaged for the above purposes, and they were performed, there arose an implied agreement that they should pay what such services were reasonably worth." While we would not take exception to the statement of the court in this case that it is supported "by the great weight of authority," it seems that the tendency is very strong in the best considered cases to carry out the trust relation to its logical conclusion, and to put the ban of disapproval on all contracts made by the directors of a corporation with one of their own number, whether fair or not, and hold them to be, if not necessarily void, at least voidable, at the option of the corporation or dissenting stockholders. Port v. Russell, 36 Ind. 60; Munson v. Railroad, 103 N. Y. 73; European R. R. v. Poor, 59 Me. 277; Wardell v. Railroad, 103 U. S. 651; Aberdeen v. Blackie, 1 Macq. 461; Bird Coal Co. v. Humes, 157 knowledge on that of the corporation that he expected payment, he cannot recover therefor. In Illinois it was held in an early case that a director of a bank cannot claim a reward offered by the bank for the discovery of a robber of the bank. It is his duty, if he obtains any information upon the subject, to communicate it to the bank without reward. Stacy v. Bank, 5 Ill. 91. This case is still the law in Illinois, but a distinction was made in the later case of Holder v. Railroad, 71 Ill. 106, where it was held that where the office of treasurer, secretary, etc., is held by a mere stockholder or other person not connected with the direction, management and disposal of the corporate property, he is entitled to compensation for services rendered as such officer, though no compensation was provided therefor. Where the directors of a corporation appoint one of their number to act as a ministerial officer of the corporation, he is *prima facie* entitled to reasonable compensation for his services as such officer. First National Bank v. Drake, 29 Kan. 311. There is no implied contract on the part of a corporation whose objects are partly charitable to pay for official services rendered by its president, though the services were meritorious and valuable, and he expressed an expectation of being paid therefor in the presence of the directors, who did not reply. Sawyer v. Pawner's Bank, 88 Mass. 207. A director of a corporation appointed secretary thereof, is not entitled to compensation for services as secretary in the absence of an express agreement therefor. Pfeiffer v. Lansberg Brake Co., 44 Mo. App. 59. The director of a corporation is not entitled to compensation for his services in procuring title to the plant, in the absence of a special agreement to that effect. Bailey v. Burgess, 48 N. J. Eq. 411. In New York it was held in the case of Barrie v. Water Proofing Co., 50 Hun, 257, that the president of a corporation is not entitled, in the absence of agreement, to any compensation for services performed in the discharge of the duties of his office. But in the later case of Reed v. Hayt, 109 N. Y. 659, it was held that where the president of a corporation has served as such for many years without salary, and advanced to the company considerable sums of money, the directors have the right to compensate him for his services and advances by issuing to him, in good faith, all the shares of stock remaining in the treasury.

It is a rule well established by authority that directors and officers cannot recover against the corporation compensation for performing the duties of their offices, where no express contract is proved. Crumlish v. Imp. Co., 38 W. Va. 390, 18 S. E. Rep. 456, 45 Am. St. Rep. 872; Barry v. Copper Co., 52 Ill. App. 183; Starbuck v. Railroad, 83 Hun, 534; Citizens' National Bank v. Elliott, 55 Iowa, 104, 39 Am. Rep. 167; Maux Gravel Road Co. v. Branegan, 40 Ind. 361; Holland v. Lewiston Falls Bank, 52 Me. 564. But an officer can recover on an implied contract for services rendered the corporation, provided such services are outside of his duties as such officer. Santa Clara Assn. v. Meredith, 49 Md. 389, 33 Am. Rep. 264; Outterson v. Paper Co., 66 Hun, 629. A director is never

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18, 44 Pac. Rep. 79. In order that a "managing director" may recover for his services, it must appear that the services rendered were outside of his duties as a director, and that it was well understood by the proper corporate officers that they were to be paid for by the corporation. Brown v. Silver Mines, 17 Colo. 421, 30 Pac. Rep. 66. A director of a corporation who acted as treasurer, for which office no compensation had been provided, cannot recover against the corporation therefor, since such services are presumed to have been performed as a part of his duties as director. Holder v. Railway Co., 71 Ill. 106, 22 Am. Rep. 89. Generally railroad directors are not bound to render any services to the corporation beyond their board meetings. Therefore, if, by a vote of the board, a director be empowered to transact certain business, he will be entitled to a reasonable compensation. Shackelford v. Railroad, 37 Miss. 202. But in Missouri the rule is more stringently enforced and it was there held in a late case that a director employed by the corporation to perform services not incidental to his duties as director is not entitled to compensation therefor, unless it is fixed by corporate action before the rendition of the services. Rose v. Eclipse Carbonating Co., 60 Mo. App. 28.

JETSAM AND FLOTSAM.

THE LAWYER'S VACATION.

Mr. Howard L. Smith's remarks to the Illinois Bar on this subject were, in part, as follows: "Not the least important part of the lawyer's vocation is to secure his vacation. We must find a vacation. Many a lawyer takes a vacation in a grudging and regretful manner, with the hope that a two weeks' rest will enable him to work like a horse the balance of the year. This is the wrong point of view, for it puts the lawyer in the same plane as and gives him no higher ideals than the greedy commercialist. The lawyer should not take just sufficient vacation to enable him to work to his maximum capacity the rest of the year. He should rather do just enough work to enable him to enjoy the maximum possible amount of vacation. I have no patience with the strenuous life that is strenuous only for the sake of strenuousness, that finds its highest ideals in the unceasing activity of the buzz saw, propelled by unreasoning belts, that whirls with unceasing hum, whether there be anything to cut or not; whirls the faster the less there is to do, and stops only to be greased or filed, that it may buzz some more. Let the worshipers of wealth, the devotees of commercialism, be human buzz saws, if they will. The true lawyer cannot forget that his is something more than a business, that it is a learned and elegant profession, the chief instrument of which is the human intellect, as sharpened, strengthened and refined by education, travel, experience, books, art, culture. The all pervading commercial spirit of the age tends somewhat too strongly to infect even the professions with sordid ideals and so-called business methods. Some metropolitan law offices affect an organiz[illegible]

several lawyers in New York city who have received fees bigger than the one paid to Mr. Parsons by the Sugar Trust. Lawyers, especially those whose offices are in the Wall street district, have been devoting a large share of their attention to promoting. The joining together of great syndicates has proved more beneficial from a monetary point of view than any other branch of law practice.

Secretary of War Elihu Root drew the Astoria gas bill. Just how much Mr. Root got for drawing this ingenious measure is not generally known. Wall street lawyers figure that if Mr. Root was paid cash his fee was about $25,000, and if he was paid in stock that he received at least $50,000.

One of the most successful lawyers of the Wall street district is said to be John C. Tomlinson. He represented the Havana Commercial, the biggest tobacco syndicate in the world. He succeeded in bringing eighteen of the largest tobacco growers in Cuba together. For this service Mr. Tomlinson received a fee of $300,000. Denver Gas paid him $100,000, while Denver Water netted Mr. Tomlinson a fee of $50,000.

It is known that Fish, Richardson & Storrow received a fee of $50,000 from the General Electric Company for looking after one single case for that corporation. George Nelson Bromwell, who succeeded in reorganizing the copper mining syndicates with which Mr. Rockefeller is connected, is said to have received a fee of $400,000.—*Philadelphia Press.*

HYPNOTISM AS AN EXCUSE FOR CRIME.

The frequency with which the plea of hypnotism is being entered as a defense against criminal charges is becoming disquieting, chiefly because of the credence that is accorded to it in the vulgar mind. A recent case at Red Bud, Illinois, carries the matter to a *reductio ad absurdum*, and yet shows the dangerous hold that the notion of hypnotism as conferring an immunity from responsibility has taken upon people at large, from whom, of course, juries are drawn. A young man deliberately killed another young man after previously expressing his intention of killing him "on sight." He then gave himself up, and pleaded that he had killed his victim because the latter "had hypnotized him to his detriment." The coroner's jury acquitted the prisoner, apparently without any hesitation.

It is not by any means established that hypnotism can compel a person to the performance of any act otherwise morally impossible to the subject, or such as to revolt his moral sense in a moral condition. Hypnotism does not differ essentially from other forms of suggestion. It is all of a piece with the worked-up fury of a crowd incited to violence by the diatribes of a mob orator, or the thousand and one forms of suggestion to which we all respond, by reflex action as it were, nearly every day of our lives. Under the influence of the slightest suggestions, we daily perform almost unconscious acts. But were the suggestions such as to prompt us to something totally at variance with our preconceived ideas and natural qualities and impulses, the spell would be broken and the in-

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wrongly seem to the subject to be possible, the subject becomes rebellious to the influence of the suggestion.

Further, if these absurd pleas of hypnotism are to be accepted, then in all forms of mob violence and crowd suggestion we must logically hold the doers of violence unanswerable for their acts. The capacity to recognize evil is by no means necessarily equivalent to the power to resist the impulse thereto, and there are many cases in which, without any pretense of hypnotism consciously or unconsciously exercised from without, the subject, while fully conscious of the gravity of the offense, is powerless to resist his impulses—which is only another name for "self suggestions." The question of responsibility is one, therefore, for a careful examination of the subject, rather than of the circumstances, and what has to be decided is not whether the person was the subject of suggestion, whether from another person—"hypnotic" so-called—or from his own depraved impulses but whether he was so far a defective as to be really unable to resist them. The man who is "hypnotised," the subject of "crowd suggestion," and the victim of morbid impulses, most commonly of the sexual type, stand in the same category and should all be judged by the same rules. Not all subjects of morbid perversion are irresponsible; neither are all people who plead "hypnotism" as an excuse for their crimes, nor all transgressors under the influences of crowd suggestion, as in lynchings, mob violence and the like. Such a plea should be received with the greatest caution, and in regard to hypnotism, as in the other cases, the entire morbid chain of perversion should be clearly demonstrated before the subject is held to be irresponsible and is absolved from the consequences of his crime.—*New York Medical Journal.*

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCOUNT — Allowance of Claims.—Where it was shown in an accounting that complainant had leased land on shares, and defendant received the rent, promising to keep an account thereof, but failing to do so, defendant was properly debited with the rental value of the land.—GRUETT v. DIBBLE, Mich., 86 N. W. Rep. 120.

2. BENEFICIAL ASSOCIATIONS—Change of Beneficiary—Association By-Laws.—A member of a mutual benefit association designated his wife and sister as the beneficiaries in his certificate, and on his deathbed requested by letter that his wife be made the sole beneficiary, which letter was not received by the association until after the member's death, when the letter was returned without any action thereon. The by-laws of the association prescribed the mode of changing the beneficiary of a certificate by surrender of the certificate to the camp clerk by the member, and a filling out by him of the surrender clause thereon in the clerk's presence. Held, that the change could only be made in the mode provided by the by-laws.—MODERN WOODMEN OF AMERICA v. LITTLE, Iowa, 86 N. W. Rep. 216.

3. BILLS AND NOTES—Negotiable Instruments—Bonds Payable to Bearer.—Bonds executed to a corporation payable to it or bearer, and secured by a mortgage on real estate, were not negotiable instruments, and are subject, in the hands of a purchaser, to all the defenses the obligor had against the original holder before he received notice of the assignment.—HEFFERMAN v. BRIBERLY, Ky., 62 S. W. Rep. 852.

4. CARRIERS — Injury to Passengers—Negligence.—Where a through passenger leaves the train at an intermediate station, and the employees of the train carelessly give it a sudden jerk just as she is attempting to re-enter it on the side opposite the platform, whereby she is injured, such carelessness is negligence, as to her, rendering the carrier liable.—ST. LOUIS & S. W. RY. CO. v. HUMPHREYS, Tex., 62 S. W. Rep. 793.

5. CARRIERS OF GOODS—Connecting Carriers—Limitation of Liability.—A bill of lading provided that goods should be delivered to successive carriers, and that no carrier should be liable for loss or damage after said goods were ready for delivery to the next carrier. A railroad company transported the goods to a seaport with proper diligence. The goods were deposited in the railroad company's warehouse ready for shipment when the boats of the connecting carrier should arrive. The connecting carrier had no warehouse or dock. While the goods were awaiting transportation, they were destroyed by fire, not caused by defendant's negligence. Held that the railroad company was not liable.—COURTEEN v. KANAWHA DISPATCH, Wis., 86 N. W. Rep. 176.

6. CONTRACT—Construction—Acts of Parties.—Plaintiff and defendants entered into a contract by which plaintiff agreed to construct a sawmill, and the defendants, the Munising and Lac La Belle Companies, agreed that 40,000,000 feet of timber from their lands should be furnished and delivered to plaintiff for sawing, at $2.50 per M. The Munising Company sold its standing timber to C, with an agreement that it should be sawed at plaintiff's mill, and that the price for sawing should be reduced 2 per cent for cash. C had no negotiations or contract with plaintiff. The Munising Company notified plaintiff of the arrangement it had with C, and asked him to reduce the price for sawing Plaintiff refused, and insisted on the contract price. C paid plaintiff according to his agreement with the Munising Company. Plaintiff sued the Munising and Lac La Belle Companies to recover the unpaid balance. Held, that they were liable under the contract as interpreted by their own acts and conduct.—BURTIS v. MUNISING CO., Mich., 86 N. W. Rep. 124.

7. CONTRACT—Election of Remedies — Voidable for Fraud.—A contract tainted with fraud is ordinarily voidable and not void, and the party fraudulently induced to enter into the same has the election of two remedies: (1) He may, upon discovering the fraud, rescind and repudiate the contract, and demand to be placed *in statu quo*; or (2) he may affirm the contract and treat it as valid, and recover damages for the fraud. If he elect to stand by the contract and treat it as valid, he need not, as a condition precedent to his right of action to recover for the fraud, return or offer to return the consideration received by him.—MLNAZEK v. LIBERA, Minn., 86 N. W. Rep. 100.

8. CORPORATIONS — Liability of Stockholders — Gratuition Stock.—Where stock in a corporation is issued to, and received by, shareholders without payment on its insolvency, such shareholders are liable to the assignee and creditors for the par value of the stock so received by them, respectively, and also interest thereon from the time when they should have paid for their shares.—SHAW v. GILBERT, Wis., 86 N. W. Rep. 188.

9. CORPORATIONS—Mandamus to Foreign Corporation.—Mandamus will not lie to compel a foreign corporation to perform an act which is a prerequisite to its right to do business in this state. The proper remedy is *quo warranto*, or the imposition of the pen-

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alty for doing business without complying with the law.—SECRETARY OF STATE v. NATIONAL SALT CO., Mich., 86 N. W. Rep. 124.

10. CORPORATIONS—Officers—Acceptance of Service—Fraud—Suit to Vacate Decree.—Where, in a suit against a corporation, its secretary and acting president waived the issuance of process, and accepted service for it, and it appeared that such acting president was at that time and throughout the progress of the suit the agent of the plaintiff, and that it was through the persuasions and solicitations of an attorney retained by him that the secretary was induced to accept service, such waiver and acceptance were in fraud of the rights of the corporation, and a decree of foreclosure will be vacated.—FOX v. ROBBINS, Tex., 62 S. W. Rep. 816.

11. CORPORATIONS—Sale of Land—Fraud of Promoter.—Defendant sold a large tract of land to plaintiff, a corporation organized for its purchase, platting and resale. Fifteen months prior to the conveyance, defendant, through M, bought the land for $7,000 less than the price he received from plaintiff, and authorized M to find a purchaser for the land. The sale to plaintiff was brought about by M, who received $2,000 for his services, and who was a promoter of the corporation, which fact was not known to defendant. Defendant foreclosed the purchase-money mortgage given by plaintiff at the time of sale, obtaining a deficiency judgment thereon; and plaintiff sued to prevent the enforcement of such judgment, and to have the sale set aside for fraud. Held, that M's authority to find a purchaser for the land did not contemplate the organization of the corporation to effectuate the purchase, and hence his acts were not binding on defendant, so as to vitiate the sale for participation in the profits received by M.—FOREST LAND CO. v. BJORKQUIST, Wis., 86 N. W. Rep. 188.

12. COUNTY—Liability for Attorney's Fee—Ratification of Unauthorized Employment.—A sheriff has no authority to employ counsel to conduct litigation in behalf of his county. Such authority rests exclusively with the board of county commissioners. An unauthorized employment of counsel by such sheriff, though invalid and not binding on the county, may be ratified by the board of county commissioners, but no ratification can take place except by some official action taken by them with reference to such employment.—TRUE v. BOARD OF COMRS. OF CROW WING COUNTY, Minn., 86 N. W. Rep. 102.

13. COURTS—Probate Court—Partition.—The probate court has jurisdiction in the administration of an estate to partition the same among the heirs and wife of the deceased person.—CASE v. PENN, Tex., 62 S. W. Rep. 901.

14. CRIMINAL LAW—Homicide—Evidence.—On a trial for murder, it appeared that defendant had assumed to be a spiritualistic medium, and had induced deceased to make and wear a certain belt, containing gold coins, "for the purpose of developing power as a medium," and that deceased, when found, was without such belt and coins, and his clothing was in a condition indicating that the belt had been torn from his body. Evidence was introduced to show that prior thereto defendant had assumed to be a medium, and induced others to wear such belts and gold coins, and that on one occasion he had substituted nickels for such gold by sleight of hand. Held, that such evidence was admissible to show that defendant, in his dealings with deceased, was dishonest, and intended to obtain the money by false pretenses.—PEOPLE v. ASCHER, Mich., 86 N. W. Rep. 140.

15. CRIMINAL LAW—Keeping Open on Sunday—Evidence.—The only witness in a prosecution for keeping a place of business open on Sunday for the purpose of traffic testified that he, with others, went to the back door of a saloon on Sunday, where they met defendant, who, at their request, went in with them, opening and closing the door for them, and went behind the counter and waited on them, furnishing them with beer and cigars, at which time there were two other persons in the saloon. Held, sufficient to sustain a conviction.—CASKEY v. STATE, Tex., 62 S. W. Rep. 753.

16. DEEDS—Separate Deeds Construed Together.—Where E, his wife uniting with him, conveyed land to T, in trust "for the purpose and agreement," as recited in the deed, "that the said second party will reconvey the same to the said first parties," and simultaneously therewith T, as trustee, conveyed the land to E's wife, with right of survivorship in E and his heirs forever, the two deeds are to be construed together as one instrument; and, as the first deed does not state the interest which each of the grantors is to have in the reconveyance provided for, the second deed is to be accepted as evidence of what the agreement was as to that matter, and is therefore valid.—EARLY v. DOUGLASS, Ky., 62 S. W. Rep. 861.

17. EMINENT DOMAIN—Street Railroads—Right of Way.—The failure of a street railroad company, which occupies lands for tracks without procuring title thereto, to commence proceedings for condemnation thereof for a period of two and one-half years, is a sufficient time to authorize the land owner to commence such proceedings, as authorized by Rev. Stat. 1898, § 1852, which is made applicable to street railroads by Laws 1897, ch. 175.—STEWART v. MILWAUKEE ELECTRIC RY. & LIGHTING CO., Wis., 86 N. W. Rep. 162.

18. ESTOPPEL—Purchase of Land by one who Already had Title.—After a sale of land made in a bankruptcy proceeding at which M was the purchaser had been set aside on the ground that the land was exempt to A, the bankrupt, as a homestead, A procured D to take an assignment of M's bid, and executed to D his note for the amount which D paid M, agreeing to accept from D the title which he acquired by the assignment; D, who was illiterate, being ignorant of the fact that the sale to M had been set aside. Held, that A is estopped to plead want of consideration for his note on the ground that the title to the land was already in him.—DUNCAN v. ALLENDER, Ky., 62 S. W. Rep. 850.

19. EVIDENCE—Instrument Not Properly Stamped.—The omission to place upon a written instrument the proper internal revenue stamp, and cancel it, does not render it inadmissible in evidence in a state court, unless the omission was fraudulent.—SPOON v. FRAMBACH, Minn., 86 N. W. Rep. 106.

20. EXECUTION—Levy—Property.—Acts 20th Gen. Assem. ch. 198, provides that the sheriff of Pottawattamie county shall keep an office at Avoca, and perform all the duties of sheriff either by himself or deputy. Held, that the service of a notice of plaintiff's ownership of the goods taken on execution against plaintiff's husband on the deputy sheriff in charge of the Avoca office was sufficient.—RUST v. MORGAN, Iowa, 86 N. W. Rep. 209.

21. EXECUTION—Return—Sequestration Proceedings.—Rev. St. 1898, § 2970, provides that every execution shall be made returnable within 60 days after its receipt by the officer. Held, that the fact that an execution against a corporation was returned the same day it was issued, and sequestration proceedings were immediately commenced against the corporation, did not render the proceeding invalid, on the ground that the sheriff should have retained the execution the full 60 days, since he was entitled to return it at any time after he was satisfied that there was no property on which the execution could be properly levied.—DAVELAAR v. SCHNECK, Wis., 86 N. W. Rep. 185.

22. FRAUD—False Representation—Credit.—Plaintiff claimed that, for the purpose of procuring credit for an insolvent corporation of which defendant was president, defendant falsely stated that it was solvent, that none of its assets were incumbered, and that it was doing a profitable business. Defendant requested the court to instruct the jury that if they found that the corporation was in fact solvent the other representations were immaterial. Held, that

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the request should be refused, since the questions whether a corporation's assets were unincumbered and its business prosperous are important matters, affecting the desirability of extending credit to it.—SHAW v. GILBERT, Wis., 86 N. W. Rep. 188.

23. FRAUD—Undue Influence — Parent and Child.—A mother, about 77 years old, made a will 6 months before her death, disposing of her property among her children. Nine days before her death, when she was weak after long sickness, two of her sons, by threats and artifice, persuaded her to destroy the will, and deed them the property. The deed was so made and recorded. The sons had agreed to share the proceeds. On various occasions they prevented the other children, two of whom were attorneys at law, from seeing their mother in her last sickness. Held sufficient evidence to sustain a decree vacating and setting aside the mother's deed on the ground of fraud and undue influence.—SHAWVAN v. SHAWVAN, Wis., 86 N. W. Rep. 165.

24. FRAUDULENT CONVEYANCE — Knowledge of Grantee.—Where an insolvent debtor makes a voluntary transfer of his property for the purpose of hindering and defrauding his creditors, such transfer is void as to the creditors defrauded, even though the vendee has no notice of the fraudulent purpose of his vendor. The fact that the transfer is voluntary,—that is, without consideration,—and for the wrongful purpose by an insolvent debtor, stamps the transaction as fraudulent and void as a matter of law.—KNATVOLD v. WILKINSON, Minn., 86 N. W. Rep. 99.

25. GARNISHMENT—Husband and Wife—Title to Property.—The wife of a judgment debtor resided on a farm with her husband, the record title thereto having been in the wife for two years. She made inquiries of the garnishee defendant as to the price of certain beans, and the husband took them to market, and sold them to him, without saying anything as to the ownership. Held sufficient to show as a matter of law, in garnishment against the purchaser on a judgment against the husband, that the property belonged to the wife.—BULLARD v. AVERY, Mich., 86 N. W. Rep. 144.

26. GARNISHMENT — Summons—Jurisdiction.—Under Comp. Laws 1897, § 1017, providing that proceedings in garnishment before a justice of the peace shall be adjourned for not less than 10 nor more than 30 days after the return day of the garnishee summons, for the purpose of giving notice to claimants of the fund, a justice loses jurisdiction of a garnishment proceeding which he adjourns for a longer time than 30 days.—HAGEN v. JOHNSON, Mich., 86 N. W. Rep. 142.

27. GUARANTY—Payment—Application of Payments.—Where a creditor receives a guaranty only covering credit to be extended in the future to the debtor, and afterwards receives a payment from the debtor without an application thereof by the latter, the creditor may apply such payment to the indebtedness existing before the execution of the guaranty.—COXE BROS. & CO. v. MILBRATH, Wis., 86 N. W. Rep. 174.

28. HOMESTEAD—Exemption from Sale on Execution.—A married woman owned a house and lot, where she resided with her husband and family; that being the only home she or her husband possessed. The lot was condemned by the city, and the wife given an award. Before payment of the award she borrowed money with the judgment for award as security, and purchased another lot for a home, but afterwards disposed of it, and used the proceeds as part payment of a third lot, receiving a contract for a deed for the latter, which, however, was executed in favor of her husband. An execution was issued on a judgment against the husband, and levy made on the third lot. Subsequently the lot was improved, and a house moved onto it, to be used as a home. Held, that the house and lot was a homestead, entitled to exemption from sale on execution.—CORBY v. WALDO, Mich., 86 N. W. Rep. 122.

29. HUSBAND AND WIFE—Postnuptial Agreement—Suit to Enforce.—A husband left certain property to his wife by will, in pursuance of an antenuptial contract; and the wife accepted the property devised to her in full settlement of her claim, and thereafter commenced proceedings in the probate court for the statutory allowance, which was resisted by the executor,—the pleadings raising the question of the validity of the postnuptial agreement. Held, that the pendency of such proceedings did not prevent the executor from maintaining a suit in equity to enforce the antenuptial contract, and to require the wife to abide by her settlement, and to enjoin her from maintaining ejectment, since the probate court could not grant the relief asked for in the equitable proceedings, though it might consider the validity of the postnuptial settlement in passing on the question of the allowance.—CARR v. LYLE, Mich., 86 N. W. Rep. 145.

30. INDICTMENT—Date of Crime.—White's Ann. Code Cr. Proc. art. 489, subd. 6, provides that an indictment shall state the date of the commission of the offense anterior to the presentment of the indictment, and not so remote as to be barred by the statute of limitations. Held, that an indictment which charged that defendant, on or about "the —— day of ——, A. D. 1900," and anterior to the presentment of the indictment, committed certain acts, was fatally defective.—COLEMAN v. STATE, Tex., 62 S. W. Rep. 753.

31. INFANTS—Compromise and Settlement—Repudiation.—Where an infant injured in a railroad collision executed a settlement of her suit, in which no next friend or guardian had been appointed, at the alleged solicitation and by the fraudulent representations of her attorney, while she was a minor, such settlement was voidable only; and hence she was not entitled to repudiate the same and sue for her injuries before attaining majority.—LANSING v. MICHIGAN CENT. R. CO., Mich., 86 N. W. Rep. 147.

32. JUDGMENTS—Injunction.—Where plaintiff had obtained judgment against defendant, and seized property under a writ of sequestration which was sold for an amount not sufficient to satisfy the judgment, leaving a balance uncollectible because of defendant's insolvency, and subsequently defendant obtained a judgment against plaintiff for the wrongful suing out of the writ of sequestration, plaintiff was entitled, on paying the difference between the two judgments, to a perpetual injunction restraining defendant from any further attempts to collect her judgment.—KELLY FURNITURE, CARPET & HARDWARE CO. v. SHELTON, Tex., 62 S. W. Rep. 794.

33. JUDGMENT — Injunction — Payment.—Where the complainant in a suit to enjoin the collection of a judgment contends that he has not been given credit for a certain payment, but the answer alleges that the payment was made before the rendition of the judgment, and that credit was given therefor at such time, evidence showing such payment before judgment rendered, but failing to show that credit was not given therefor, is not sufficient to authorize the injunction.—MISSOURI, K. & T. RY. CO. OF TEXAS v. WADE, Tex., 62 S. W. Rep. 808.

34. LEASE—Assignment—Consent of Lessor.—Where a lease is non-transferable without the written assent of the lessor, and the lessees have transferred the lease and surrendered possession to the assignee, and the lessor has verbally assented to it, and has received advanced rent from the assignee through the lessees, and has rented the property to a third person, the assignee can recover the rent advanced.—HARRINGTON v. HALL, Mich., 86 N. W. Rep. 153.

35. LIMITATIONS—Part Payment.—Where defendant purchased a bean huller of plaintiff, giving a chattel mortgage thereon, together with his three notes, for the purchase price, an indorsement on the notes of an amount received at a sale of the huller on foreclosure of the mortgage does not operate as a part payment

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to take the notes out of the statute of limitations, as no new promise of payment was shown; the giving of the chattel mortgage with power of sale not being evidence of an intention that such payment should operate as a renewal.—WESTINGHOUSE CO. v. BOYLE, Mich., 86 N. W. Rep. 186.

33. MASTER AND SERVANT—Exposed Machinery—Assumption of Risk.—Plaintiff, a competent machinist, of 15 years' experience, and with 8 months' experience in operating defendant's sawing machine, was injured by reason of the exposed condition of certain gears. The uncovered gears were apparent to plaintiff, and he knew the machine thoroughly. Held, in an action for damages, that plaintiff had assumed the risk, though defendant might have been negligent in failing to protect the same as provided by Rev. St. 1898, § 1638j, and hence a verdict was properly directed for defendant.—WILLIAMS v. J. G. WAGNER CO., Wis., 86 N. W. Rep. 157.

37. MASTER AND SERVANT—Injury to Railroad Brakeman by Defective Railing on Bridge.—Where a brakeman, in alighting from a train in the discharge of his duty while crossing a bridge, stepped into a recess or pocket, which was surrounded by a railing, which broke, causing him to fall to the ground, the company was liable to him for the injuries which he received, if the recess was intended for the use of employees, and the railing was defective, and its defective condition was known, or might by the exercise of ordinary care have been known, to defendant, and was unknown to plaintiff, and could not, by the exercise of reasonable care, have been known to him, and the court properly so instructed the jury.—SOUTHERN RY. IN KENTUCKY v. COOPER, Ky., 62 S. W. Rep. 857.

38. MASTER AND SERVANT—Injury to Servant—Fellow-servants.—Plaintiff's intestate was employed in defendant's dock yard, and, while assisting in unloading a spar from a scow in the river, was injured by one of the skids over which the spar was being hauled flying up and striking him, which was caused by the improper construction of the skid. The skids, constructed by the workmen, were timbers placed on blocks, and the timbers and blocks used were not defective. Held that, as it was the duty of the deceased and his fellow-workmen to prepare the place in which they worked, defendant was not liable for the injury; materials furnished not being defective, and the negligence in construction being that of a fellow-servant, precluding recovery.—LIEBMANN v. MILWAUKEE DRY DOCK CO., Wis., 86 N. W. Rep. 182.

39. MASTER AND SERVANT—Unguarded Machinery—Injury to Employee.—Where an unguarded shafting was so located that an employee must necessarily go out of his ordinary course, or one which he might be reasonably expected to take, in order to reach it, the master is not required to guard the same, by Rev. Stat, § 1636j.—POWALSKE v. CREAM CITY BRICK CO., Wis., 86 N. W. Rep. 158.

40. MORTGAGES—Power of Sale—Foreclosure—Election of Remedies.—Where a creditor secured by a trust deed authorizing the trustee to sell the property on the grantor's default forecloses his lien by suit, and has the property sold at foreclosure sale, such suit is an election of remedies; and he has no power to have the property resold by the trustee, and by that means destroy the lien of a judgment creditor of the grantor, who was not made a party to the foreclosure suit.—B. F. AVERY & SONS v. TEXAS LOAN AGENCY, Tex., 62 S. W. Rep. 796.

41. MUNICIPAL CORPORATIONS—Defective Sidewalk—Injury.—Where a coal hole in the sidewalk had been propped partly open for several months to ventilate the space beneath, and plaintiff was injured by falling into it, the evidence was sufficient to support a verdict finding the city guilty of negligence.—STEGE v. CITY OF MILWAUKEE, Wis., 86 N. W. Rep. 161.

42. MUNICIPAL CORPORATIONS — Defects in Street — Evidence.—Where, in an action for injuries received by stepping into a depression in the street on alighting from a street car at a crossing which was much used, the undisputed evidence showed that the depression into which plaintiff stepped was not more than an inch and a half deep at any place, it did not constitute an actionable defect for which the city was liable.—BURROUGHS v. CITY OF MILWAUKEE, Wis., 86 N. W. Rep. 159.

43. MUNICIPAL CORPORATIONS—Injuries to Travelers on Highway.—Instructions that a city must maintain its streets in a reasonably safe condition for those who traveled thereon, and not for those who leave the highway or approach the same from outside the limits, are not objectionable, as requiring the city to keep its streets in repair to the whole width thereof.—JOHNSON v. CITY OF SIOUX CITY, Iowa, 86 N. W. Rep. 212.

44. MUNICIPAL CORPORATIONS — Recovery for Sheep Killed by Dogs.—Comp. Laws, § 5600, provides that, whenever any person shall sustain loss by the killing or wounding of his sheep by dogs, he may call on a justice of the peace, who shall proceed to view the sheep, and if, from such view, he shall be satisfied that the sheep were killed by dogs, he shall make a certificate thereof in writing, stating the damages sustained. Section 5601 authorizes the town board to examine all such certificates, and, if the damages are excessive, they may reduce the same to a just amount. Held, that the determination of the justice was not open to review by the courts, the provision for a reduction by the town board not implying power to increase the damages; and hence, in an action against the town board, a demurrer was properly sustained to a complaint seeking more damages than the justice allowed.—TITUS v. CHASE, Mich., 86 N. W. Rep. 187.

45. MUNICIPAL CORPORATIONS—Sidewalks—Defects—Liability of City.—Where the statute requires municipalities to keep their sidewalks in reasonable repair, and in conditions reasonably safe and fit for travel, it is error to instruct the jury that the municipality is required to keep its sidewalks in good repair, and safe and convenient for public travel.—PHALEN v. CITY OF DETROIT, Mich., 86 N. W. Rep. 126.

46. MUNICIPAL CORPORATIONS — Statute of Limitations—Title to Land.—The city charter of Ann Arbor (Loc. Acts 1869, No. 331, § 129), providing that no person shall be deemed to have gained any title, as against the city, by lapse of time, to any street, alley, common, or public square theretofore laid out or platted, or to any part thereof, by reason of any encroachment on or inclosure of the same, which provision was enacted before the last amendment to the statute of limitations, and has been re enacted several times since the general statute was last amended, is not inoperative, so as to make the statute of limitations a bar to such city's right to land situated in the street and inclosed by abutting property owners.—CRAWFORD v. ROSS, Mich., 86 N. W. Rep. 182.

47. MUNICIPAL CORPORATIONS — Streets — Icy Sidewalks.—Where a sidewalk along a much-traveled city street was so constructed that water flowing down a hill flowed across the walk, and the walk was so laid that the water and flowage from a garbage tank which was located near by flowed across the walk, and froze thereon, the question of the city's negligence in permitting such a condition so as to render it liable for an injury sustained by plaintiff from falling there on was for the jury.—NAVARRE v. CITY OF BENTON HARBOR, Mich., 86 N. W. Rep. 188.

48. PARTNERSHIP—Rights of Individual Creditors.—Creditors of a partner cannot, by levying attachments upon the partnership property, acquire priority over partnership creditors, or over their debtor's co-partners. A partner to whom the firm is indebted is entitled in the distribution of partnership assets to priority over the individual creditors of his co-partner.—WALTER v. HERMAN, Ky., 62 S. W. Rep. 857.

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49. PLEADING AND PRACTICE—Continuance—Affidavit—Sufficiency.—An affidavit for a continuance because of the absence of necessary witnesses which did not state that the affiant expected to procure the attendance of such witnesses at the next term or at any time was insufficient.—DOXEY v. WESTBROOK, Tex., 62 S. W. Rep. 787.

50. PLEADING AND PRACTICE—Exceptions to Report of Sale.—Where the right of a judgment creditor to file exceptions to a report of sale was questioned on the ground that he had assigned the judgment, the court was authorized to determine the validity of the assignment, which was filed, though it was not attacked by a pleading.—SMILEY v. UNITED STATES BUILDING & LOAN ASS'N'S ASSIGNEE, Ky., 62 S. W. Rep. 868.

51. PLEADING AND PRACTICE—Justices of the Peace—Pleadings—Oral Amendment.—Defendant pleaded the general denial in a justice's court, and on appeal to the county court pleaded, orally, special matter as a defense. Held, that error in striking out the special defense because not in writing was cured by allowing defendant to introduce proof of the matter so pleaded.—MERSHON v. BOSLEY, Tex., 62 S. W. Rep. 796.

52. PRINCIPAL AND AGENT — Authority of Agent—Lease of Land.—An agent clothed with authority to lease the lands of his principal is not authorized to lease the same to himself. Such authority extends to leasing to third persons, and a lease attempted to be made to himself, in reliance upon such agency, is wholly unauthorized, and without force or legal effect as a contract.—CLENDENNING v. HAWK, N. Dak., 86 N. W. Rep. 114.

53. PRINCIPAL AND AGENT—Disaffirmance of Contract.—Plaintiff claims to have sold a team of horses to defendant through defendant's agent. Defendant claimed a limited agency; that the horses were unsound, were not matched, and not of a color he had instructed his agent to buy. Held, under the facts and circumstances, the defendant acted promptly in disaffirming the contract. Plaintiff dealt with defendant's agent at his risk as to the authority of the agent. The statements made by the agent to plaintiff did not bind the defendant.—SCHOFIELD v. CONLEY, Mich., 86 N. W. Rep. 130.

54. PRINCIPAL AND AGENT — Ratification.—The rule that a principal may validate the unauthorized acts of his agent by ratification, so as to make them valid from their inception, is modified by the proviso that such ratification cannot affect the rights of third persons which have intervened prior to such ratification. CLENDENNING v. HAWK, N. Dak., 86 N. W. Rep. 114.

55. RAILROADS — Construction — Streets — Exclusive Use.—A land company platted land on both sides of W street, and sold lots with reference thereto, and before recording the plat executed a warranty deed to a railroad corporation conveying right to construct and operate a street railroad upon W street according to the plat thereof, with all the rights incident to the operation of railroads. The street, to the knowledge of the railroad company, had been laid out as a public street, and in consideration of being allowed to construct its road the railroad company agreed to grade and prepare the street for public use with a space on each side for vehicles and for the construction of sidewalks. Held, that the deed did not entitle

duced evidence that plaintiff feigned as to some of them, testimony as to plaintiff's reputation for truth and veracity was admissible in rebuttal.—TEX. CENT. & N. W. RY. CO. v. WEIDMAN, Tex., 62 S. W. Rep. 812.

57. RAILROADS—Negligence— Failing to Prevent Injury.—When empty freight cars, on which boys were playing, were moved by defendant's engine, and one of the boys, in trying to get off the cars, fell, and was killed, and after falling was seen by some of defendant's servants in time to have stopped the train, and possibly prevented his death, if immediate and proper steps had been taken, a judgment against defendant for negligently causing the death of the boy should be sustained, though there was evidence that deceased was guilty of contributory negligence.—MISSOURI, K. & T. RY. CO. OF TEXAS v. HALTOM, Tex., 62 S. W. Rep. 900.

58. SALE—Failure to Deliver—Damages—Bank Stock.—Section 5012, Rev. Codes, which provides that the value of a written instrument is presumed to be that of the property to which it entitles the owner, so far as it is applicable to certificates of stock in a national bank, fixes the presumptive value of such stock at its par or nominal value, and the evidence to show a greater value is upon the person asserting it.—PATTERSON v. PLUMMER, N. Dak., 86 N. W. Rep. 111.

59. SHIPPING—Freight—Voluntary Payment.—Where defendant contracted to deliver 400 cords of shipping wood to plaintiff, to be transported by them to Milwaukee, but no time was alleged within which delivery was to be made, and it appeared that on the vessel being tendered to defendant for loading 57 cords of inferior wood was found to be piled in front of the shipping wood, and, to save double handling, defendant contracted with the captain of the vessel to transport the inferior wood to defendant's dock in Milwaukee for a certain price per cord, and the captain, in violation of his contract, delivered the inferior wood to plaintiffs at their yard, which they refused to receive on the contract, but voluntarily paid the freight to the captain, they were not entitled to sue the defendant for the value of such transportation.—SANDERSON v. CREAM CITY BRICK CO., Wis., 86 N. W. Rep. 169.

60. TAXATION—Non-resident— Foreclosure of Lien—Notice.—Where a citation by publication of a non-resident defendant, in an action by the state to cover taxes and foreclose the tax lien on the land, stated that the action was for taxes for a certain sum for a certain year on certain described property, but did not state that the action was also to foreclose the tax lien, the citation did not contain a statement of the cause of action, as required by Sayles' Civ. St., art. 1285, so as to give the court jurisdiction, and therefore the owner may recover the land sold under a default judgment foreclosing the lien.—NETZORG v. GERER, Tex., 62 S. W. Rep. 789.

61. TAXATION—Review by District Court—Burden of Proof.—Where a taxpayer appeals to the district court from the action of the board of review in approving an assessment, the burden is on the appellant to show that the decision of the board is erroneous, since a contrary holding would impose on the district court the duty of making an original assessment of the property.—FROST v. BOARD OF REVIEW OF OSKALOOSA Iowa, 86 N. W. Rep. 218.

62. VERDICT—Conflicting Evidence.—Where a deed

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RICHMOND, VA.

Central Law Journal.

ST. LOUIS, MO., AUGUST 16, 1901.

One of the most recent and important advances in criminal trial and procedure is the inauguration in several of the larger cities of the United States of what is known as the probation system for the trial and custody of minor criminals. It is not seldom the case that the first offense of a child is done out of a spirit of mischief, rather than from any criminal intent, and when shown the seriousness of his act is usually very repentant and easily impressed either for good or evil. If tried, condemned and imprisoned as other criminals, his acquaintance with vice is widely extended and his heart gradually hardened in crime; and equally dangerous to society and to the child is the discharge of the juvenile offender with a simple reprimand, inculcating in him a feeling of disrespect for the courts and the dignity and authority of the state. To be compelled to choose between two such alternatives, either of which gave little promise of good results, was always, and is still, a serious embarrassment to magistrates having the public interest at heart. This embarrassment is quite completely relieved by the happy thought which originated the probation system. By the provisions of this system no child of tender years, usually under 12 years of age, may be sent to jail. When a child is arrested, charged with crime, instead of being detained until the day of trial with other criminals, he is given an immediate hearing by the court and put on parole in the care and custody of the probation officer, who is charged with the duty of returning the offender into court on the day set for trial. On that day none other than juvenile offenders are tried, or better still, as in the system in vogue in Chicago, a separate court, called the Juvenile Court, is used exclusively for that purpose, the object being to keep out every contaminating influence. The child is released in the care of the probation officer, generally for a few months or longer as the court may deem advisable. The child is advised that if his conduct is such as not to give offense during the time of his parole he will be brought back to the court and discharged, but that if his actions do not show such improvement the probation officer is charged with the duty to arrest and return him to the court, when more serious punishment will be meted out to him. The child is now a ward of the court. The probation officer, acting under the court's direction, looks after the paroled children and reports at stated intervals upon their behavior, and the character of their surroundings and of their care and keeping. These officers are friendly visitors with authority to enter the home and help parents and guardians to manage and control their refractory children, or, if such parents or guardians are not fit persons for such purpose, to take them from the home and its evil surroundings, and put them under different and more healthy influences during the time of their parole. Under the prudent care and advice of these officers many a child criminal is saved from the damning influences of the jail on the one hand, and, in many cases, of his home surroundings on the other, and his life turned into channels of usefulness to himself and to society. Such, in a few words, is the idea unfolding itself in the probation system. All of the provisions just suggested are not embodied in any one of the systems now in force, but are provisions selected from all the different experiments of the system in Boston, in Chicago and in St. Louis, which the writer believes shows forth the highest perfection of the system at the present time. This practical extension of the system, however, is still in its infancy, but its wonderful possibilities for good to society and the individual already suggesting themselves, bid fair to make this one of the most valuable legacies bequeathed to the new century by the one that has just closed.

NOTES OF IMPORTANT DECISIONS

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erty, real and personal, intended that a gift thereof should take effect immediately and irrevocably, the mere fact that the donor is *in extremis*, expects to die of his illness and does die within a short time, will not make it a gift *causa mortis*, and hence void as to the land. The court said: The evidence shows clearly that it was the intention of the donor that the gifts of property, both real and personal, should take effect immediately and irrevocably, and that the gifts were fully executed by a complete and unconditional delivery at the time. Whenever this is the case, the mere fact that the donor is *in extremis*, expects to die, and does die of that illness even, does not affect the validity of the gifts, because they were, in such case, gifts *inter vivos*, and not gifts *causa mortis*. To hold otherwise would be to declare that no one could make a deed to land when sick of his last illness, no matter how clear the intention to make a deed conveying a present interest absolutely and unconditionally. The test whether the gift is one *inter vivos* or one *causa mortis*, is not the mere fact that the donor is *in extremis*, and expects to die, and does die of that illness, but whether he intended the gift to take effect in *præsenti*, irrevocably and unconditionally, whether he lives or dies. This is the correct view set out in 14 Am. & Eng. Ency. Law, pp. 1014, 1015, par. 6. See, specially, Carty v. Connolly, 91 Cal. 15, 27 Pac. Rep. 599; Hatcher v. Buford, 60 Ark. 169, 29 S. W. Rep. 641, 27 L. R. A. 507; Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926; McCarty v. Kearnan, 86 Ill. 292. "The absence of any hope of recovery," says Judge Cassoday in the Wisconsin case, "is persuasive to show the intent that the deed should take effect in *præsenti;* and the same observation may be made where all is conveyed as here. Conveying all is evidence of absence of hope of recovery, but also evidence that because of it the party means the gift to take effect at once, unconditionally and irrevocably. The fallacy in the argument for appellee and cross appellant is the assumption that, wherever the facts show that the donor is *in extremis*, expects to die, and does die of that illness, then, necessarily, without more, and without regard to the real intent and actual delivery of the deed, the gift must be taken to be one *causa mortis*, and hence, as to land, void, since, of course, land is not the subject of a gift *causa mortis*. But, as shown, this denies to a donor *in extremis* the power under any circumstances to make a gift of land *inter vivos* by deed."

REAL PROPERTY—DRAINAGE OF OIL LANDS—DAMAGES.—Where A leased two adjoining tracts of oil land from different parties, B and C, agreeing to pay royalty on all the oil produced, and then sank a well on C's land only, intending to drain and in fact draining the oil from B's land, held, in equity, B is not entitled to the royalties on all the oil produced, on the theory of confusion of goods, but only on the proportion of oil, to the whole amount produced, which the area of his land so drained bears to the land drained in the other tract. Kleppner v. Lemon, 48 Atl. Rep. 483, Sup. Ct. Pa., March 25, 1901.

Cases relating to oil and natural gas necessarily involve difficult and uncertain points, for although both are minerals, because of their peculiar attributes, as the subject of property, they differ from other minerals, and the term "minerals *ferœ naturœ*," used by Mitchell, J., in Westmoreland Co. v. De Witt, 130 Pa. 235 (1890), illustrates their nature. Thus, until the owner of the land has actually reduced the oil into his possession he has no exclusive property right in it, and if an adjoining proprietor by sinking a well in his own land draws off the oil, the owner of the drained land has no remedy. Achison v. Stevenson, 146 Pa. 239 (1891); Brown v. Spilman, 155 U. S. 665 (1895). This result is in accord with the doctrine as to percolating water (Acton v. Blundell, 12 M. and W. 324), and has been followed in Vermont, even in the case of malicious interception. Chatfield v. Wilson, 28 Vt. 49 (1855). In view of this doctrine, where oil lands are leased in consideration of a royalty, the law implies a covenant on the part of the lessee to work the lands properly and with due diligence so that the lessor should not sustain loss by the operations of adjoining proprietors. Brown v. Vandergrift, 80 Pa. 142 (1875); Koch's Appeal, 93 Pa. 434 (1880). It seems from an earlier report, Kleppner v. Lemon, 176 Pa. 502 (Sup. Ct., 1896), that the lessee A, in the principal case had forfeited his lease; but it is not shown in the present report whether the lessor is trying to obtain damages for the breach of the implied covenant to work the lands properly and with due diligence, or is attempting to get satisfaction for the oil willfully drained from his land. If the lessor's action is on the implied covenant, the measure of damages ought to be determined in a more accurate way, for the relative areas of the two tracts show nothing as to the amount of oil lying under the surface. In a question of so uncertain a nature, the measure of damages laid down in Bradford Oil Co. v. Blair, 113 Pa. 83 (1886), seems preferable. The court there decreed that a master should ascertain how much more oil the plaintiff ought to receive, over and above what he had received, deducting from this the cost of producing what ought to have been produced. So here, an estimate of the amount of oil lying under the lessor's land should have been made and the royalties allowed on that quantity only. But if the lessor is attempting to get satisfaction for the oil drained from his land, it seems doubtful whether he has any right to recover. For the cases of Achison v. Stevenson and Brown v. Spilman hold that the owner of the soil has no such property right in oil, before it is reduced to possession as to be able to bring trover for it, if it is drained off through the land of another. As the action was in equity, the court might, however, have given damages for the fraud practiced on

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the plaintiff. See Law of Mines and Mining in the U. S. Barringer & Adams, Ed. (1897.)—*Columbia Law Review.*

CRIMINAL EVIDENCE—DYING DECLARATIONS.—In the opinions of many lawyers with wide experience of the criminal law, the rules as to the admissibility of dying declarations have become too rigidly defined, and the exclusion of such declarations on technical grounds leads not infrequently to the escape of the guilty and miscarriage of justice. We are far from saying that there was any miscarriage of justice in the recent case of Rex v. Smith at the Old Bailey, as there appears to have been a substantial defense to the charge on its merits, but it supplies a very good example of the somewhat mischievous strictness alluded to above. It was an indictment for murder by performing an unlawful operation on a woman, and there was no evidence upon which the defendant could be convicted if a declaration made by the woman on her deathbed were excluded. It appears that the deceased was informed that her life was in danger, and a magistrate was called in, in whose presence a statement from her was taken down in writing. Before this was done she said: "I am aware that I am seriously ill," and then her statement was taken down in narrative form, but induced by questions put to her. Of course the fact that the gentleman called in was a magistrate made no difference at all in law, for there was no pretense that the statement was a deposition. Under these circumstances Bruce, J., rejected the statement, closely following the authority of Reg. v. Mitchell, 17 Cox 503. He held that in order that the statement could be received it was necessary to show that there was a "settled hopeless expectation of impending death"—that is, of "immediate or almost immediate death;" and that the woman's words did not show such an expectation of immediate death. No doubt the learned judge was perfectly right, according to the reported cases. But to insist upon the necessity of the deceased person being absolutely devoid of hope is, it is submitted, going much too far. The reason for allowing this great exception to the rule against hearsay evidence was given by Eyre, C. B., in Woodcock's case, 1 Leach, 500. He said that dying declarations are received because they are made in extremity, when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. Now surely a person who knows that he will most probably die in a very short time is likely to be under just this motive to speak the truth and avoid falsehood. It ought to be sufficient to prove that the deceased when he made the declaration realized that his life was in serious and immediate danger. It may well be doubted whether a dying person ever quite abandons all hope. Especially where a strong man is struck down by the knife of the assassin, there is probably some hope of recovery present as long as consciousness lasts. But the motive described by the Chief Baron will surely exist where there is a realization of the great probability of approaching death, even though there be an atom of hope left. Probably it would work no injustice if the declarations of dying persons, who were aware of their danger, as to the cause of death were always allowed to go to the jury. The jury would then have to decide from the evidence what weight to give to the statement; and in order to arrive at a decision, would consider the state of mind of the deceased at the time, whether he really believed he was in great danger, whether he was sufficiently clear-headed to know the effect of his words, whether the statement was made, owing to suggestions by others, etc. There can be little doubt that, as human nature is constituted, a man who knows that his immediate death is probable, is most likely to speak what he believes to be true. He may tell a deliberate falsehood, but it is not probable. If, then, the judge is satisfied that the deceased man was aware that his life was in imminent danger, the declaration ought to be admitted, without going so far as to insist that he must have lost all hope. The weight to be given to the evidence, and the reliability of it, would always be open to comment, and a jury under proper direction might, it is submitted, be trusted not to give undue weight to the declaration of a dead man.—*Solicitors' Journal.*

REASONS AND SCOPE OF MUNICIPAL LIABILITY FOR DEFECTIVE HIGHWAYS.

Section 1. Reasons for Responsibility.—The management of highways may be characterized as municipal duties relating to governmental affairs. During the early periods of English history highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function. In this country the control of highways is primarily a state duty. They are everywhere maintained for the use of the public at large.[1] "To the commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of the municipal corporation are as much highways as are rivers, rail-

[1] Barney v. Keokuk, 94 U. S. 324; People v. Supervisors, 112 N. Y. 585; Davies v. Saginaw County, 8 Mich. 295.

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roads, canals or public roads laid out by authority of the quarter sessions. In England a public road is called the king's highway; and though it is not usually called the commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the commonwealth's authority."[2] In this country it is generally true that the construction, maintenance and repair, and almost exclusive control of highways, has been delegated by the state to its municipal corporations, and ordinarily they are invested with adequate power to properly perform such duties. Counties are generally given similar control and authority over highways within their limits, but in most states the rule is that, in the absence of express statute declaring the liability, such corporations are not subject to private action for neglect in this respect or for the negligent discharge of these duties. With few exceptions the rule is otherwise as to municipal corporations. Usually cities have conferred upon them extensive powers in the management of their highways, streets, bridges, alleys and sidewalks, and adequate means to keep them in a reasonably safe condition for use in the usual mode by travelers; and hence they are held liable to private action for special injuries resulting from omission to perform this duty, and for the negligent performance of it.[3] It is obvious that such obligation, so far as travelers are concerned, is one of a public character, fulfilled, not for pecuniary profit or private corporate advantage, but exercised as a purely governmental function. "The liability," remarked the Supreme Court of Missouri, "it is generally said, arises by implication from the nature of the subject and the vast powers conferred upon such corporations, including the exclusive control of the streets."[4] The New England commonwealths and a few other states deny all liability, unless imposed by statute, because it is regarded as merely "the neglect of a public duty imposed upon it (the city) by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage." This view is ably supported by Gray, C. J., in the leading case of Hill v. Boston,[5] where the cases are critically reviewed and the conclusion is adopted that at common law no private action would lie for injuries inflicted on account of failure to repair a highway or bridge, unless the right to such action was given by statute. But the decisive question involved in this case related to the liability of the municipal corporation for maintaining what was claimed to be a defectively constructed public school building; however, the case is always cited to support the common-law doctrine of non-liability. So in Michigan there is no common-law liability for injuries received by reason of defective highways and streets, and statutes giving such remedies are strictly construed in that state.[6] Mr. Jones endeavors to prove that "the best English cases favor the view that a private action can be maintained for injuries suffered from a breach of this duty by a public corporation," and he asserts that in this country "the decided weight of authority sustains the proposition that there is a common-law liability arising upon every chartered municipality for special damages occasioned by its neglect to repair a highway over which it has control."[7] Although the reason for municipal liability as given by the Supreme Court of Missouri may not be wholly satisfactory, it is usually advanced by the decisions. It should be observed that streets in cities have peculiar and local uses distinct from state highways.[8] Judge Dillon concludes that "this duty or burden must appear upon a fair view of the charter or statute to be imposed or rest upon the municipal corporation, as such, and not upon it, as an agency of the state, or upon its officers as independent public officers."[9] Mr. Jones con-

[2] Per Gibson, J., in O'Connor v. Pittsburg, 18 Pa. St. 187, 189.

[3] Blake v. St. Louis, 40 Mo. 570; Smith v. St. Joseph, 45 Mo. 449; Bowle v. Kansas City, 51 Mo. 454; Vogel-

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tends that the reason is found in the fact that "the duty to keep the streets in repair is a municipal duty in regard to property rights which rests upon the corporation as an independent member of society, and the rights of others are infringed if their action for damage for its breach is taken from them by the courts."[10] This reason can hardly be accepted. Courts everywhere decline to recognize that the city possesses any property rights in the streets, although they may be a source of profit to the municipality. The interest is exclusively *publici juris*, and is in any respect wholly unlike property of the private corporation which is held for its own benefit and used for its private gain and advantage.[11] In many states the fee of the street is in the abutting property owner, the public only possessing a mere easement therein, which is committed to the guardianship of the city as a public trust. Where, as in some states, the fee is vested in the municipality, it is so vested in trust for the public. If the control and preservation of the rights of the public in the street on the part of the municipal corporation is to be regarded as in the nature of managing property, municipal liability logically follows where damages result because of negligence in this respect. Although the courts have experienced much difficulty in ascertaining a logical ground upon which to base the doctrine of implied liability of chartered cities, when at the same time it is denied as respect counties, townships and towns without charters, and also denied in other matters wherein the municipal corporation proper is charged with duties relating to governmental affairs, yet whatever may be the true ground the law in the states generally established the liability. The fact alone that the doctrine may be conceded to be exceptional does not prove that it is unjust. It is fully vindicated by the decisions and has found a firm place as a sound and wholesome rule of law in American jurisprudence.[12]

Sec. 2. Ground of Liability.—The rule of law which imposes the obligation upon municipal corporations to keep their streets and public ways reasonably safe for travel in the ordinary modes, by night as well as by day, is a comprehensive one. Municipal liability may arise for any wrongful act which makes the use of the way unsafe, first, whether it is done by the city itself, its officers or servants, or by others under its authority, which would constitute misfeasance on the part of the corporation, or second, by third persons, which would constitute neglect of the corporation in omitting to put streets in repair or failure to remedy the causes of danger occasioned by the wrongful acts of others, as by removing obstructions therefrom, or dangerous excavations therein. In either case the proximate cause of the injury, in the language of the law, would be the want of due care or skill on the part of the corporation. In the first instance the city would be liable without establishing notice of the condition of the streets, whereas, in the second, either actual or presumptive notice, or its equivalent, is indispensable to constitute a cause of action.[13] It is also essential to a recovery that the plaintiff be free from such fault as in the law of negligence would constitute his act the proximate cause of the injury. In other words, he should have been using reasonable or ordinary care, or have been free from neglect, according to the circumstances, in order to avoid the injury.[14]

Sec. 3. Duty Belongs to City and Cannot be Shifted.—The obligation of keeping the streets in proper condition belongs to the city itself, and is a continuous one which cannot be shifted to another.[15] Thus, a city cannot relieve itself of the duty to put up sufficient barriers to warn or guard persons passing upon its streets by showing an agreement with an independent contractor to protect and guard an excavation made in its streets.[16] The act of a person making an excavation in the street by permission of the city is the act of the city, and no notice to

[10] Jones, Neg. Munic. Corp. § 58.

[11] People v. Kerr, 27 N. Y. 188, 192, 197 to 200.

[12] Jones, Neg. Munic. Corp. 51 *et seq.*; 2 Dillon, Munic. Corp. § 1000 *et seq.*; Elliott on Roads and Streets, pp. 444, 445.

[13] Carrington v. St. Louis, 89 Mo. 209; Garvin v. St. Louis, 151 Mo. 334; Atwater v. Baltimore, 31 Md. 462.

[14] New York Cent. R. R. v. Lockwood, 17 Wall. (U. S.) 357; Milwaukee Ry. Co. v. Arms, 91 U. S. 495; Vaughn v. Taff Valle Ry. Co., 5 H. & N. 679. 688; Gerdes v. Iron Foundry Co., 124 Mo. 347; Cohn v. Kansas City, 108 Mo. 387.

[15] St. Louis v. Conn. Mut. Life Ins. Co., 107 Mo. 92; Norton v. St. Louis, 97 Mo. 537; Franke v. St. Louis, 110 Mo. 516.

[16] Welch v. St. Louis, 73 Mo. 71; Russell v. Columbia, 74 Mo. 480; Britton v. St. Louis, 120 Mo. 437.

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the latter of such excavation is necessary to render it liable to the person sustaining injuries therefrom.[17] Nor can the city avoid the legal responsibility of keeping its streets in a reasonable safe condition by inserting a clause in the agreement with the contractor, making him liable for all injuries occasioned by his neglect in making repairs.[18] It is immaterial, as respects the primary liability of the city in such case, whether it is or is not inserted in its agreement with the contractor, for in no instance can the city surrender or abdicate the duty imposed upon it of keeping its streets and sidewalks in a proper condition.[19] In accordance with the principle stated the city cannot evade, suspend, or cast upon others, by any act of its own, even by ordinance, this duty to properly care for its streets and sidewalks.[20] Thus, the city by ordinance, requiring property owners immediately after any fall of snow to cause the same to be removed from the sidewalk, cannot create a civil liability for damages by a private individual against one who failed to discharge the city's duty in that behalf.[21] From what has been said it follows that municipal liability for defective sidewalks arises without regard as to who constructed them or whether the city ordered their construction. Thus, if instead of providing sidewalks as the public convenience may require, and putting them in a reasonably safe condition, the city permits the proprietors of adjoining property to construct sidewalks of their own in the street, it will be liable for all damages resulting from their unsafe condition.[22]

Sec. 4.—Responsibility is Limited to Highways Opened or in Use.—The cause of action grows out of the negligence of the city, or its failure to discharge the imposed duty relating to its streets; therefore, the city is not liable for injuries arising from defects in a street which has been laid out by it and the city to have prepared the street and to have thrown it open for travel prior to the accident.[23] As a general proposition, the city is bound to keep only such streets and such parts of streets in repair as are necessary for its convenience and use of the traveling public; however, when a street is opened for use it should be put in a reasonable safe condition.[24] But the city is not bound to furnish a safe means of reaching its streets from private property, or to protect those passing on private property from injury by falling into the street. Nor is the city liable for an injury sustained by reason of a defective walk, although such walk is within the actual limits of the street, where neither the city nor the owner of the property so recognized it.[25] It thus appears that the city is not necessarily required to open or put all its streets in a condition for public travel.[26] The mere acceptance of ground dedicated for a street does not impose the obligation to open it for use though the municipality has power to do so, and it is not liable for injuries resulting from such failure to open unless there is a public necessity therefor.[27] The responsibility of a city for the condition of a highway begins when it has actually opened it for public travel.[28]

Sec. 5. Liability Extends to Excavations, Dangerous Walls, etc., in Close Proximity to Street.—This obligation is not limited to defects, as obstructions and excavations existing within the lines of the streets proper, or parts thereof, as bridges, or other municipal ways, open to the public, but "dangerous ditches, and excavations by the sides of highways must be guarded, and after notice of such defects the city will be liable for injuries to travelers using ordinary care, caused by the neglect to put up barriers."[29] It is the duty of the city to guard and protect exca-

[23] Heckler v. St. Louis, 13 Mo. App. 277.

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vations made in the streets and sidewalks, or in such close proximity thereto as to endanger persons traveling on the street.[30] Here, it is well to remark, that there is no municipal liability for mere failure to enforce regulations, designed to safely guard the highways, as ordinances requiring depressions and excavations adjacent to the streets to be filled and fenced, unless, as above stated, such dangerous places are in such close proximity to the highway as to endanger the safety of travelers thereon.[31] Therefore, the city is not liable for the death of a child from drowning in a pond, on private property, not in dangerous proximity to the highway.[32] But it has been properly held that it is negligence for a city to leave a ditch filled with water five feet deep, bordering on a sidewalk in a public street without any guards; and where a child five years old left the house of its parents, and fell into the ditch and was drowned, the city was held liable.[33] The rule of municipal liability for defective highways also applies to an unsafe wall standing by the side of the street, or in such close proximity as to be dangerous to those who are properly on the street.[34] Wherever it is discovered by the officers of the city that a structure exists in the sides of one of its streets, so unsafe as to endanger the lives of those passing over and along the street, the duty, either to remove it or to make it safe and secure at once arises.[35] And the city cannot relieve itself of the duty by an ordinance providing that the mayor shall require the owner of the building to have the same secured or removed within a time fixed in the ordinance, and, on its failure to do so, that the city shall perform the duty.[36]

Sec. 6. Nuisances and Objects Calculated to Frighten Animals.—An exception to the general rule of non-liability for the non-exercise of legislative powers or failure to enforce ordinances is recognized by the law where the municipal authorities suffer streets to become unsafe by reason of failure to enforce by-laws and regulations designed to keep them free from obstructions and nuisances and damage results by reason thereof, for in such case responsibility cannot be evaded on the ground that the omitted duty is legislative or governmental in character. Thus, where a city, by license, authorizes a use to be made of a street, which rendered it dangerous or unsafe to travelers, for example, the exhibition of wild animals thereon, resulting in damage by reason of the team of a person properly using the street taking fright, the city was held liable.[37] A city possesses the right to use any proper implement run by steam, for the purpose of constructing or repairing the streets, and in the absence of carelessness or negligence in its management is not liable for damages occasioned by a horse becoming frightened thereat.[38] But in an Iowa case, in an action against a city to recover for personal injuries caused by the frightening of plaintiff's horse by a steam motor, used upon a street railway by permission of the city council, it was held that in the absence of express statutory authority a city has no power to authorize or permit the use of steam motors upon its streets, either upon ordinary railroads or street railways, and the grant of such authority or permission constitutes negligence which will render the city liable for damages caused thereby. The fact that the action of the city council in granting such right was without authority would not protect the city from liability, corporations being re-

[30] Beaudeau v. Cape Girardeau, 71 Mo. 392; Welsh v. St. Louis, 73 Mo. 71; Ball v. Independence, 41 Mo. App. 469; Bowle v. Kansas City, 51 Mo. 454; Kinney v. Springfield, 35 Mo. App. 97.

[31] Moran v. Pullman Pal. Car Co., 134 Mo. 641; Jelly v. Pieper, 44 Mo. App. 380; Norton v. St. Louis, 97 Mo. 537; Eisenberg v. Mo. Pac. Ry. Co., 33 Mo. App. 85.

[32] Moran v. Pullman Pal. Co., 134 Mo. 641, and cases cited. There is no liability although the city created the pond. Omaha v. Bowman, 52 Neb. 293, 66 Am. St. Rep. 506.

[33] Chicago v. Hesing, 83 Ill. 204. See Chicago v. Mayor, 18 Ill. 349; Niblett v. Nashville, 12 Heisk. (Tenn.) 684.

[34] Franke v. St. Louis, 110 Mo. 516, 14 Mo. App. 588; Grogan v. Broadway Foundry Co., 87 Mo. 321; Kiley v. Kansas City, 87 Mo. 103, 107, citing Parker v. Mason, 39 Ga. 729.

[35] Grogan v. Broadway Foundry Co., 87 Mo. 321, 14 Mo. App. 588; Franke v. St. Louis, 110 Mo. 516.

[36] Grogan v. Broadway Foundry Co., 87 Mo. 321, 14 Mo. App. 588.

[37] 2 Dillon Munic. Corp. § 1021, citing Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435, where a city licensed the exhibition of bears in one of the principal streets, thus authorizing a dangerous obstruction and nuisance. See, also, the "Sacred Ox Case," Cole v. Newberryport, 129 Mass. 594, 23 Alb. L. J. 3, where the city granted the right to erect a booth in one of its public squares for the use and exhibition of an animal. The city was held liable.

[38] Sparr v. St. Louis, 4 Mo. App. 572.

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sponsible for the acts of their officers and agents done within the apparent scope of their authority, and the streets of the city being under the control of the city council.[39] "An object in a public street calculated to frighten horses, such as a dead animal, is such an obstruction as may make the corporation liable in case of an accident resulting in injury, happening in consequence thereof, if it is allowed to remain in the street for an unreasonable time. * * * But objects outside the traveled way, and not near enough to the line of public travel to interfere with or incommode travelers, are not defects in the highways."[40] The rule is well illustrated and enforced in a Virginia case where the charter of a particular city imposed the duty to keep the streets in good condition. Under ordinance, persons building or excavating on lots adjoining the streets were allowed to deposit materials in that part of the street opposite their premises to the exent of one-half the width of the street, and, under special license, they might be authorized to occupy more than one-half of the street with such materials. Where a person lawfully riding in the street at night was damaged by falling over a pile of sand in the street, not occupying more than one-half of its width, the city was held liable on the ground that it might not abrogate nor dispense by ordinance with the duties and liabilities imposed by the charter; that "reason and public policy supplement the law in holding the city responsible for the neglect or omission of due diligence in the discharge of their charter duties."[41] The city may lawfully permit the use of its streets for coasting, but it cannot do so if such use amounts to the maintenance of a public nuisance, the determination of which question is controlled by the surrounding circumstances. In a Michigan case a city had set apart a particular street for coasting, and one making proper use of the street was injured by a coasting sled running into him. The court found that the use of the street for coasting was not necessarily a nuisance, therefore the city was held not liable. The court further found that the action of the counsel in setting aside the street for this use was within its discretionary and legislative powers, and however unwise it may have been exercised in the particular instance the courts should not interfere.[42]

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[39] Stanley v. Davenport, 54 Iowa, 463.

[40] 2 Dillon Munic. Corp. § 1021, where many illustrative cases are set out in the notes.

[41] Per Fauntleroy, J., in McCoull v. Manchester, 85 Va. 579, 589.

[42] Burford v. Grand Rapids, 53 Mich. 98, 51 Am. Rep. 105. See sections 7 and 8 of article on "Liability of Municipal Corporations for Torts in the Exercise or Non-Exercise of Public or Governmental Functions," 50 Cent. L. J. pp. 84 to 90.

WATERS AND WATER COURSES—IRRIGATION—RIPARIAN LAND.

JONES v. CONN.

Supreme Court of Oregon, April 29, 1901.

1. Where defendant's lands bordered on a stream, the fact that a part of it extended beyond the natural water shed of the stream did not prevent that part from being riparian land.

2. Where defendant owned land bordering on a stream, and subsequently acquired under different grants lands adjacent thereto, but which were not contiguous to the stream, the lands subsequently purchased were riparian.

3. Where defendant's use of the water of a stream for irrigating riparian land was not sufficient to materially injure plaintiffs, who were lower riparian owners, the fact that a part of the land irrigated by defendant was above the level of the water shed of the stream, and could not be irrigated by ditches situated entirely on his own land, did not entitle plaintiffs to an injunction restraining defendant's use of the water for irrigation, since defendant had the right to so use it so long as it did not materially injure the plaintiffs.

4. Where plaintiffs, who were lower riparian owners, sought to restrain defendant's use of the water of a stream for irrigating purposes on the ground that the land irrigated was non riparian, and defendant set up in his answer an absolute right to a sufficient amount of water to irrigate his land, plaintiffs, though not entitled to an injunction, should be awarded a decree limiting defendant's use to such quantities as would not materially injure plaintiffs, in order to prevent defendant's right from ripening into an adverse title.

5. Where plaintiffs, who were lower riparian owners, sought to restrain defendant's use of the water of a stream on the ground that the land irrigated was non-riparian, the court, on refusing an injunction, cannot ascertain and determine the respective rights of the parties to the water, since the question of the reasonable use to which each was entitled depended on the season, the volume of the water, the area and character of the land, and other circumstances not in evidence, and hence there was no basis on which such a decree could be framed.

This is a suit to enjoin the defendant, Conn, from diverting the waters of Chewaucan river through a ditch recently constructed by him. The plaintiffs are riparian proprietors on the

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river, and the owners in severalty of divers tracts of arid land, aggregating several thousand acres. These lands are level, and, when irrigated, very fertile, but valueless without. The defendant is an upper riparian proprietor, owning 875 acres, through which the river flows a distance of 1 3-4 to 2 miles, dividing on his premises into two main channels, flowing northeasterly and southeasterly, which in turn subdivide into numerous channels and sloughs, through each of which the waters of the river have been wont to flow from time immemorial. The greater portion of defendant's land is elevated from 75 to 80 feet above the river. Three hundred and twenty acres of it are contiguous to, but acquired by different conveyances from, land immediately bordering on the stream. In the fall of 1896 and spring of 1897 the defendant constructed the ditch in question for the purpose of irrigating his upland, and furnishing better power to a grist mill, situated on the river a short distance below its forks, which he had theretofore owned and operated with water conveyed through a ditch about half a mile long, located on his own premises. The new ditch taps the river 1 1-2 or 2 miles above his property, and has a carrying capacity of about 2,500 inches. The upland he proposes to so irrigate is somewhat lower than the bluff between it and the river, and slopes slightly away therefrom, so that it is contended that any water used thereon for irrigation cannot find its way by percolation back into the river. The object of this suit is to enjoin the defendant from using water through this ditch, on the theory that it is a wasteful and unnecessary means of supplying water to his mill, and that the land he proposes to irrigate is nonriparian. The defendant avers that all his lands are riparian, and that, as a riparian proprietor, he is entitled to 2,675 inches of water for domestic, stock, irrigating, and manufacturing purposes; that all of his land is arid, and capable of being irrigated from the river, which carries a large amount of water during the irrigating season; that the amount he proposes to take and consume therefrom is reasonably necessary for the purposes indicated, and will not be of any material injury to the plaintiffs, or any of them. The court below found that the defendant was entitled to take water through the ditch in question, but not to use it for the irrigation of lands contiguous to, but acquired by different conveyances from, land abutting directly on the stream, when such use will actually and sensibly affect the rights of the plaintiffs as riparian proprietors, and entered a decree perpetually enjoining and restraining him from diverting any of the waters of the river to irrigate such land, "to the actual and perceptible injury of the plaintiffs as riparian proprietors upon their riparian lands." From this decree both parties appeal.

BEAN, C. J. (after stating the facts): This is a controversy between riparian proprietors upon a natural water course. There is virtually but one question involved in the case, and that is whether the lands which the defendant seeks to irrigate are riparian in character. It is practically conceded that up to the commencement of the suit the plaintiffs had not been substantially injured or damaged on account of the use of the water by the defendant, and, as a consequence, are not entitled to an injunction if the lands are riparian; but the contention is that they are non-riparian, and therefore the plaintiffs are entitled to an injunction restraining the use of the water thereon without proof of damage. It is common learning that every person through whose premises a stream of water flows has a right to its use and enjoyment as it passes through his land; but, as all other proprietors have a similar right, it necessarily follows that one cannot use or divert the water to the injury of another. The right of each must be exercised in subordination to that of all the others. Within these limits, each proprietor is entitled to such use of the stream as may be conformable to the usages and wants of the community. It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality; and that, if an upper proprietor takes it from the stream, he must return substantially the same quantity again before it leaves his premises. This rule, however, is subject to the limitation now well established that each proprietor is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes, and such use is not to be denied him on account of the loss necessarily consequent upon its proper enjoyment. In short, he has a right, in the language of Vice Chancellor Bacon, in Earl of Sandwich v. Railway Co., 10 Ch. Div. 707, 712, "to make all the use he can—to derive every benefit he can—from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself;" or, as said by Lord Kingsdown in Miner v. Gilmour, 12 Moore P. C. 131, 156: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." The right of a riparian proprietor to the use of the water of a stream flowing through his premises, and its

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limitations, are well expressed in a Maryland case, where the court says: "The right of every riparian owner to the enjoyment of a stream of running water in its natural state in flow, quantity and quality is too well established to require the citation of authorities. It is a right, incident and appurtenant to the ownership of the land itself, and, being a common right, it follows that every proprietor is bound so to use the common right as not to interfere with an equally beneficial enjoyment of it by others. This is the necessary result of the equality of right among all the proprietors of that which is common to all. As such owner, he has the right to insist that the stream shall continue to run *uti currere solebat;* that it shall continue to flow through his land in its usual quantity, at its natural place, and at its usual height. Without a grant, either express or implied, no proprietor has the right to obstruct, diminish, or accelerate the impelling force of a stream of running water. Of course, we are not to be understood as meaning there can be no diminution or increase of the flow whatever, for that would be to deny any valuable use of it. There may be, and there must be allowed to all of that which is common, a reasonable use; and such a use, although it may, to some extent, diminish the quantity, or affect, in a measure, the flow, of the stream, is perfectly consistent with the common right. The limits which separate the lawful from the unlawful use of a stream it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others." Mayor, etc., of City of Baltimore v. Appold, 42 Md. 442, 456. It is accordingly now quite generally held in this country and in England that, after the natural wants of all the riparian proprietors have been supplied, each proprietor is entitled to a reasonable use of the water for irrigating purposes. Washb. Easem. (2d Ed.), *240; Gould, Waters (3d Ed.), § 217; Long, Irr. § 11; Black, Pom. Water Rights, § 154; Kin. Irr. § 273; 17 Am. & Eng. Enc. Law (2d. Ed.), 487; Coffman v. Robbins, 8 Oreg. 278; Low v. Schaffer, 24 Oreg. 239, 33 Pac. Rep. 678; Weston v. Alden, 8 Mass. 135; Lux v. Haggin, 69 Cal. 255, 394, 10 Pac. Rep. 674; Blanchard v. Baker, 8 Me. 253; Benton v. Johncox, 17 Wash. 277; Baker v. Brown, 55 Tex. 377; Davis v. Getchell, 79 Am. Dec. 636, 643, note. The doctrine, as applied to the arid regions of the West, is thus stated by Mr. Justice McFarland in Harris v. Harrison, 93 Cal. 676, 680, 29 Pac. Rep. 326: "According to the common-law doctrine of riparian ownership as generally declared in England and in most of the American states, upon the facts in the case at bar the plaintiffs would be entitled to have the waters of Harrison canon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has, by judicial decision, been modified, or, rather, enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor. * * * Of course, there will be great difficulty in many cases to determine what is such reasonable use; and 'what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.' * * * The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each,—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbor." For the protection of the rights of the several riparian proprietors it has even been held that a court of equity may, in a proper case, apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances. Harris v. Harrison, *supra;* Wiggins v. Water Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725.

The plaintiffs admit the rule that, after the natural wants of all the riparian proprietors have been supplied, each is entitled to a reasonable use of the water for irrigating purposes, but insist that the exercise of the right must be limited to the tract of land through which the stream flows as first segregated and sold by the government of the United States, and that, even in such a case, where there are natural barriers within the tract which would prevent a portion of the land from deriving any benefit from the flow of the stream, the portion lying beyond the barrier should be excluded. But, as we understand the law, lands bordering on a stream are riparian, without regard to their extent. After a considerable search, we are unable to find any rule determining when part of an entire tract owned by one person ceases to be riparian. The discussions in the books are restricted to a definition of riparian proprietors and their respective rights. A riparian proprietor is one whose land is bounded by a natural stream, or through whose land it flows, and riparian rights are those which he has to the

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use of the water of the stream. They are derived entirely from the ownership of the land, and not from its area or the source of its title. Mr. Angell remarks: "The owners of water courses are denominated by the civilians riparian proprietors, and the use of the same significant and convenient term is now fully introduced into the common law." Ang. Water Courses (6th Ed.) § 10. Gould says: "Riparian rights proper depend upon the ownership of land contiguous to the water." Gould, Waters (3d Ed.), § 148. And Kinney says that "the rights of riparian proprietors are such as grow out of, or are connected with, their ownership of the bank of the streams and rivers." Kin. Irr. § 57. And, again (section 58): "Whether riparian rights attach or not, the principal question depends upon the ownership of the land, which is contiguous to and touches upon the water. And as to whether the land is in actual contact with the flow of the stream, whether that contact be lateral or vertical, it is necessary that it should exist." Bouvier defines riparian proprietors as "those who own land bordering upon a water course." Mr. Long, in his recent work on Irrigation, in discussing this question, says: "Some questions have been raised as to what lands are to be considered riparian, within the sense of the preceding section. Literally, of course, riparian lands are lands bordering upon a stream, but it is sometimes a question as to how far back from the stream the land may be considered riparian. There is very little judicial authority on the question. It is plainly not possible to define the distance to which the riparian proprietor's right to use the water for irrigation or other purposes extends, but this will depend upon the circumstances of each case. The only general rule that can be laid down is that the distance and use should be reasonable." Long, Irr. § 14. It would seem, therefore, that any person owning land which abuts upon or through which a natural stream of water flows is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. The fact that he may have procured the particular tract washed by the stream at one time, and subsequently purchased land adjoining it, will not make him any the less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of land owned by him borders upon a stream. This being established, the law gives to him certain rights in the water, the extent of which is limited and controlled less by the area of his land than by the volume of water and the effect of its use upon the rights of other riparian proprietors. By virtue of the ownership of land in proximity to the stream, he is entitled to a reasonable use of the water, which is defined as "any use that does not work actual, material, and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor." Kin. Irr. § 276. In the determination of what will be considered such a use in a particular case, the character and extent of the land, its location, and the time of acquiring the title may all become, and are, no doubt, important factors to be considered; but they are not controlling, and each case must depend entirely upon its own facts and circumstances. The case of Boehmer v. Irrigation Dist., 117 Cal. 19, 48 Pac. Rep. 908, would seem to make the extent of riparian rights depend upon the source of title, rather than the fact of title; but in Water Co. v. Hanco[illegible]85 Cal. 219, 24 Pac. Rep. 645, it was expres[illegible] held that all land bordering upon a stream which is held by the same title—in that instance consisting of 1,280 acres—is riparian, and no distinction was made on account of the source of title. Again, in Wiggins v. Water Co., *supra*, and Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, the right of a riparian proprietor to use the waters of a stream for irrigation was limited to the water shed. But, as we understand these cases, the court in each instance was determining the rights of the parties then before it, and not attempting to lay down an inflexible rule as a guide in all cases. Nothing more was held or decided than that under the claim alone of riparian rights the owner of land cannot, to the injury of another riparian proprietor, take the water beyond the water shed, or onto lands held by a title different from the title of those through which the stream flows; and this all will concede. The right to make a reasonable use of the water of a stream is a right of property, depending on the ownership of the land abutting on or through which a stream flows; and whether a given use is reasonable or not is a question of fact, to be determined under the circumstances of each particular case. The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon other riparian proprietors.

A reference to a few of the adjudged cases will illustrate this principle. In Norbury v. Kitchin, 9 Jur. (N. S.) 132, the defendant, a riparian proprietor, erected pumps and conduit pipes to conduct the water of a stream across a hill into a reservoir, to await the use of a house built by him on property he had acquired subsequently to his riparian property. It was held that the question whether his use of the stream was reasonable under all the circumstances was properly left to the jury. In one of the opinions it is said: "The defendant has built himself a house on the side of a hill, and he formed a reservoir to supply his house with water from the stream. This exercise of his right seemed somewhat strong, and the plaintiff's counsel were at one time inclined to rely upon the distance of the house from the stream, but, probably, on reflection, they found it immaterial. The real question in the case is whether a man who has 321,000 gallons of water

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coming down to him, can complain if 10,000 are taken before." Elliot v. Railroad Co., 10 Cush. 191, was an action to recover damages for the diversion of water by a railroad company, an upper proprietor, for the use of its locomotives, engines, and other similar purposes. It was contended at the trial that, if the jury were satisfied of the existence of the stream and the diversion of the water by the defendant, plaintiff was entitled to a verdict for nominal damage, without proof of actual damage; but the presiding judge instructed the jury that, unless plaintiff suffered actual perceptible damage in consequence of the diversion, the defendant was not liable in the action, and this direction was held to be right by the entire court. In the course of the opinion, Mr. Chief Justice Shaw says: "The right to flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and, so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent, a question of degree. Still the rule is the same, that each proprietor has the right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes." In Garwood v. Railroad Co., 83 N. Y. 400, a riparian proprietor was allowed to maintain an action to recover damages against a railroad company for diverting the waters of a stream and conveying them by pipes to reservoirs where its locomotives were supplied with water, the proof showing that the water so diverted was sufficient "to perceptibly reduce the volume of water" in the stream, and to "materially reduce or diminish the grinding power of plaintiff's mill," in consequence of which he sustained damage to a substantial amount. In Gillis v. Chase, 67 N. H. 161, 31 Atl. Rep. 18, it is held that a riparian owner is not liable for a reasonable use of water passing his land—whether for his own purposes or for sale to others, and the reasonableness of his use is a question of fact. In this case it is said: "Each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact." In Fifield v. Waterworks (Cal.), 62 Pac. Rep. 1054, it was held by the Supreme Court of California that a lower riparian proprietor, who is not injured by the diversion of water by a corporation conducting and carrying on the business of supplying the inhabitants of a city with water, cannot restrain such diversion. In Ulbright v. Water Co., 86 Ala. 587, 6 South. Rep. 78, 4 L. R. A. 572, a riparian proprietor filed a bill to enjoin the diversion of water from the stream by an upper riparian proprietor, a water company, for the use of its waterworks, constructed to supply the inhabitants of a city with water. The testimony in the case established that the diversion of water for the purpose mentioned would result in a sensible diminution in the flow of the stream itself in the dry season or summer months, but that the complainant was making no particular use of the stream, and therefore suffered no special damage by the act of the defendant; and it was held that, as the defendant was taking the water for the purpose of supplying the wants of a neighboring town, and not returning it to its natural channel, the plaintiff was entitled to an injunction in vindication of his rights, without any special proof of damages; but, as he was not making any particular use of the water, the injunction should be so framed as only to restrain its use "to the sensible injury or damage of the complainant for any purpose for which he may now or in the future have use for it."

It is apparent, therefore, that the rule, so often stated and reiterated in the books, that a riparian proprietor is entitled to have the entire flow of the stream to come down to his premises, is subject to the important limitation that an upper riparian proprietor may make such a use thereof as does not work any actual, material, and substantial damage to the common right which each proprietor has; and, whether a proposed use is of the character referred to, and therefore reasonable, does not depend so much upon the area of the land of the offending proprietor, or the place of the use, as upon the effect it has upon the correlative rights of the other proprietors. Under this doctrine the defendant was not a wrongdoer when he used the waters of the stream for the purpose of irrigation, nor does the fact that his land lies above the level thereof, so that it cannot be irrigated by means of ditches wholly on his

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own premises, affect his right to the use of the water (Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190), although it might have a material bearing upon the reasonableness of the use, if that question was here for decision. Gould, Waters (3d Ed.), § 217. But there is no reason shown by this record why the defendant should be confined in the use of the water to any particular portion of his land. The amount of water taken and used by him before the trial was not sufficient to materially injure the plaintiffs, or to interfere in any substantial way with their rights as riparian proprietors. There seems to have been abundant water left in the stream after his diversion for the use of all the other riparian proprietors. There is some conflict in the authorities as to whether a riparian proprietor can enjoin the use of water for the irrigation of non-riparian lands without showing damage (Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Fifield v. Waterworks, *supra*); but it is clear that a court of equity will not restrain the use of water by a riparian proprietor to irrigate his lands unless it is shown that such use will injure the other riparian proprietors. Gould, Waters (3d Ed.), § 214. The plaintiffs, therefore, were not entitled to an injunction restraining the defendant from using the waters of the stream for the purpose of irrigation, because such use was no injury to them. But, as the defendant has set up in his answer, and attempted to maintain by his testimony, the absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon the other proprietors, the plaintiffs are entitled to such a decree as will prevent his use from ripening into an adverse title. Gould, Waters (3d Ed.), § 214; Kin. Irr. § 229; Ulbricht v. Water Co., *supra;* Newhall v. Ireson, 8 Cush. 595.

It is suggested that the court ought to ascertain and determine the rights of the respective parties, and fix them in the decree, so that hereafter there may be no controversy concerning the matter. In the very nature of things, however, it is impossible in a case of this character to make such a decree. The rights of the several riparian proprietors are equal, each being entitled to but a reasonable use of the water for irrigating purposes, and what constitutes such use must necessarily depend upon the season, the volume of water in the stream, the area and character of the land which each riparian proprietor proposes to irrigate, and many other circumstances; so that it seems to us there is no basis upon which the

on Waters, "upon both navigable and unnavigable streams, are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration." The right of a riparian owner to use the water of a stream is divided into the right to use it for *ordinary* purposes, such as cooking, washing and drinking and for his stock, and the right to use it for *extraordinary* purposes, such as irrigation and manufacturing. In the former use the riparian proprietor may practically consume all the water of the stream. In the latter use he may only use so much as will not materially injure the right of a lower riparian owner to use the stream either for ordinary or extraordinary purposes. In other words, the use of each riparian proprietor must be reasonably taken into consideration, the number and necessities of other riparian owners, together with the size of the stream and the quantity of water usually flowing therein. These are general rules of the common law which need no citation of authority. But the use and diversion of a stream for irrigation purposes is a subject of quite modern origin, at least so far as its legal aspect is concerned.

Irrigation may be said to be the application of water to lands for agricultural purposes. Platte Water Co. v. Irrigation Co., 12 Colo. 525. The right of a riparian proprietor to use the water of a stream for that purpose being an extraordinary use of the stream, is limited, and can be exercised only with a reasonable regard to similar rights of other proprietors. Gillett v. Johnson, 30 Conn. 180. A riparian owner may therefore be enjoined from diverting the water of a stream for irrigation purposes, so as to interfere with the right of lower proprietors to use the water for supplying their natural wants and for domestic use. Mastenbrook v. Alger (Mich.), 68 N. W. Rep. 213. The fact that the land of a lower riparian owner is made less productive does not deprive the upper riparian proprietor of the reasonable use of the stream for irrigation purposes. Weston v. Alden, 8 Mass. 136. What constitutes a reasonable and what an unreasonable use, however, is a question sometimes difficult of determination, and must rest for decision upon the facts of each particular case. Of course the use of a stream for irrigation purposes must not unreasonably injure the lower riparian proprietors. Thus one riparian owner cannot dam up a stream for irrigation purposes, so as to stop the running of a mill of a lower riparian proprietor. Colborn v. Richards, 13 Mass. 420. But in an action by a mill owner against an upper riparian proprietor for diverting the water of a stream for irrigation, it was held that the defendant was entitled to a reasonable use of the water and that its use at intermittent periods, when the stream was full, and without damage to the working of the mill or sensible diminuition of the water was a reasonable use. Embrey v. Owen, 6 Exch. 353. The total consumption of the water of a stream by one riparian

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Nevada the common-law doctrine of riparian rights has been abrogated and the water of natural streams declared to be public property. In California, Nebraska, Idaho, North Dakota, Montana, Oregon and Washington the doctrine of riparian rights is recognized although it is declared by constitutional provisions in some of these states that the use of water for irrigation purposes is a public use. In the states that follow the lead of Colorado, therefore the use of water for irrigation purposes is recognized as a natural use and one proprietor may use as much as he needs for that purpose without regard to its effect upon lower riparian owners. In the states that follow the lead of California, the doctrine of riparian rights is the same as at common law, except that the decisions evidence a more liberal construction of what is meant by a reasonable use of water for irrigation purposes.

The case of Lux v. Haggin, 69 Cal. 255, is one of the leading and most thoroughly considered cases on this important subject. The entire subject in many of its phases is exhaustively discussed by McKistry, J., in an able and interesting argument covering one hundred pages of the California Reports. One of the first points decided was that a riparian owner is not estopped from objecting to the unlawful diversion of the waters of a stream flowing through his land, by reason of the mere fact that the ditches used in diverting the water were constructed at great expense, with his knowledge and without objection by him. The court then states the common law on the question of riparian rights as relating to irrigation to be as follows: "By the common law, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it. Use does not create the right, and disuse cannot destroy nor suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners." This statement of the common-law rule will be observed to be slightly more liberal than the same rule as it is stated in cases cited from the Eastern states and from England. But the doctrine as stated in that case is practically the rule in all the Western states where the common law on the subject has not been abrogated. Thus, in Oregon, where water flows in a well defined channel through the lands of several persons, each riparian owner has a right to have it continue to flow in its natural course, without diminution except so far as it may be legally used by the others, while passing through their respective premises, for irrigation and other purposes. Coffman v. Robbins, 8 Oreg. 244.

It is of course the rule that an upper riparian owner cannot use the water to irrigate non-riparian lands. Chauvet v. Hill, 93 Cal. 407. And the mere contiguity cannot extend a riparian right which is appurtenant to one tract of land to another, although both are owned by the same person. Thus, where a purchaser of riparian lands subsequently acquires other land contiguous thereto, but not on the stream, and held under a different patent from the original tract, the second tract does not become riparian be cause contiguous to riparian lands belonging to the same owner. Boehmer v. Irrigation District, 117 Cal. 19.

The only case which the writer could find which states a rule defining how far riparian lands may extend from the bank of the stream, is that of Bathgate v. Irvine, 126 Cal. 135, which holds that lands beyond the water shed of a stream are not riparian.

JETSAM AND FLOTSAM.

CONTRACTS—A CRITICISM.

The title, Contract, embraces a very important branch of the law. Hence the necessity to both the practicing lawyer and the student, of having a clear conception of the term in its legal and proper sense. The idea or element of mutuality is of the very essence of a contract. A must promise B, and B must promise A, before A and B can be said to have formed a contract. It is this element of mutuality of promise or agreement that is the source of all the obligations or legal consequences that flow from the contractual relation. When two or more parties mutually promise or agree with one another that each shall do or not do a specified act or acts, and intend thereby to affect their legal relations toward one another, the law steps in, seals the agreement, and says to each, "what thou hast promised thou shalt perform." In other words, the law attaches obligations of performance to agreements of this kind, and calls them contracts. Properly speaking, all contracts are executory; by which I mean that the parties thereto always contemplate the performanee of their respective promises as a matter lying wholly within the future. Upon this point there is much confusion in the text books. Matter that pertains wholly to the discharge or performance of a contract is treated as if it fell within the scope of the information of a contract; and senseless distinctions are made in the books, based upon this jumbling together of things that ought to be kept separate. The formation of a contract is one thing, the performance of a contract is another, and quite a different thing. A contract is a perfect contract, perfectly formed, weighed with all its obligations, before a single act is done by either party to it, toward the performance of their respective promises. Let me illustrate what I am trying to make clear. Mr. Anson in his very able work on Contracts, in speaking of the manner in which a contract may be formed, says: "Before a contract can be formed there must be a distinct offer on the one hand and an acceptance of the same on the other. This offer may consist of an act, or a promise. In other words, a contract may be formed in the following three ways: 1. A promise for an act. 2. An act for a promise. 3. A promise for a promise." I respectfully inisist that a contract may be formed in but one way, viz.: A promise for a promise. Here is an example of what Mr. Anson terms a "promise for an act." A tells B he will pay him a certain sum of money for a day's work. B accepts the offer by doing the work. Now, according to the theory of this writer there is no contract formed, that is, there is no acceptance of the proposal or offer of A until after B has performed the day's work. I submit that the contract is formed, necessarily, before B commences the day's work. B does the work in fulfillment of his promise (express or implied) to do it. The doing of the work by B is clearly the performance or discharge of his part of a contract previously entered into or formed. To form a contract and perform it at the same time, and by the same act is a logical absurdity. The contract is formed when A says "for a day's work I promise to pay you so much money," and B says "for so much money I promise to

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do the work." B's promise may not be express, but in contemplation of law the promise is made, and it is made, anterior in point of time to the doing of the work. So it is with all contracts. A contract is completely formed when mutual promises have been given and accepted. Subsequent events may discharge the parties from the performance of their respective promises, but the original perfection or validity of the contract is in no way impaired thereby. So the promise of one party to a contract may condition his performance thereof by requiring the other party to perform his promise in a certain way, or at a certain time, before the former shall be required to perform his. All such conditions relate to the discharge of a contract and not its formation.

C. L. V. MULKEY.

BOOK REVIEWS.

BRANDENBURG ON BANKRUPTCY, SECOND EDITION.

This is a very timely publication which the profession will welcome, especially those engaged in bankruptcy practice. The first edition of this work met with the very favorable reception which it deserved. While the first edition was intended merely as a guide to the construction of the law by the aid of decisions rendered under the act of 1867, the present edition is based on the law of 1898 as interpreted by the federal and state courts, and the author has also in this volume undertaken to elucidate questions yet undecided by the courts which have arisen in his mind. Such opinions coming from one so eminently qualified by long experience as an instructor and author to investigate them will be highly appreciated by lawyers seeking information on subjects not yet passed upon by the courts. These questions, including many difficult ones, the author has discussed thoroughly and ably, sustaining his conclusions by numerous citations to decisions under the act of 1867, and he has reason to feel complimented from the fact that the Supreme Court of the United States has recently rendered several decisions on bankruptcy questions, the conclusions of which arrived at by the court being the same as arrived at by Professor Brandenburg in his discussion of the question decided; among which may be mentioned the subjects of preferential payments on account under section 57c (Carson, Pirie & Scott v. Chicago Title & Trust Co.), and on the question of provability of alimony in *Re* Schufaldt. The author has treated each section and subdivision of the law separately, and paralleled his discussion of its provisions with the decisions under the act of 1867, and wherever applicable has also made reference to rules of the supreme court. The rules, forms and orders of the supreme court and the state exemption laws are printed in full in the back of the book. The chapter on definitions as construed by the courts will be found especially useful. Chapter three on acts of bankruptcy is very full and complete. We commend this treatise on bankruptcy as being the most full and complete that has yet been offered to the profession. The table of cases contains about 3,000 citations. The index is very full and complete. The book contains 1,040 pages, printed on excellent paper, bound in law sheep. The author is Edwin C. Brandenburg, L. L. M., author of the digest of bankruptcy decisions; professor of procedure in bankruptcy in Columbia University and in charge of bankruptcy matters in the department of justice. Published by Callaghan & Company, Chicago.

HUMORS OF THE LAW.

THE LAST STAMP.

And so, mi senor, you're the last—
The one long sought, so long in vain.
'Tis joy to know your days are past
And we have done with licking Spain.

The number must be billions, quite,
Now gone before until the string
Would reach in rainbow colors bright
Around the world, an endless ring.

We've licked the red, the brown, the blue,
The halves, the quarters, twos and ones;
And sadly have we licked a few
That cost a plunk to wad the guns.

We've licked until our taste is spoiled
And comes in streaks of green and brown,
But still we have the tyrant foiled—
We've helped to put the Spaniard down.

We've always had to stop and think
With every policy we wrote,
If we should use a blue or pink
Or brown to make the blamed thing float.

We've had to learn much we'd forgot
About the ways of fractions strange;
And really we have lost a lot
Of time and been close run for change.

How glad I am I cannot tell
You are the last one I must stick;
I'm pleased to bid you now farewell
With one last long and lingering lick.

—*Rough Notes.*

A SWISS YANKEE.

In Constance, Switzerland, is a tailor smart enough to have been born in Connecticut. He advertised, not to get good customers, but to be warned against bad ones. To this end he published the following:

"A young lady, good looking and very wealthy, wishes to meet with a gentleman of good family; view marriage; age no object. The lady will not object to pay the debts (amount of which should be stated) of her future husband. Inclose photo and reply to X. Z., care of this paper."

Every bachelor for miles around, who was hard up, replied. The tailor had copies made of the photographs and pasted them in a book, with the written name and addresses. Then he returned the originals with profuse apologies. He probably has as few debts as any tradesman in Constance.

Judge—How old are you?

Witness (a lady)—Thirty.

Judge—Thirty? I have heard you give the same age in this court for the past three years.

Witness—Yes; I am not one of those people who say one thing to-day and another thing to morrrow.

Arkansaw Justice (to spectator who has just entered)—Huck Buckley, fine you ten dollars for contempt of court!

Buckley—Huh, 'squire! I hain't said a word yet!

Arkansaw Justice—I know it, but that thar hos you traded to me last week has got a spavin, and this is probably the only chance I'll have to git even with you. Fork over, or go to jail!

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WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADVERSE POSSESSION—Permission.—A prescriptive title cannot be founded upon use and occupation which is not adverese to the title of the owner, but which is under permission of such owner.—DAVIS v. DEVANNEY, Idaho, 65 Pac. Rep. 500.

2. ADVERSE POSSESSION—Passways — Title by Prescription.—To acquire the right to a passway by prescription, it must appear that it has been claimed as a matter of right, and not by permission merely, for at least 15 years.—ABELL v. PAYNE, Ky., 62 S. W. Rep. 880.

3. ADVERSE POSSESSION—Passways — Title by Prescription.—As a guardian cannot acquire an interest hostile to his wards in their estate, it will be conclusively presumed that a passway which he opened over their lands for his and their convenience was permissive, merely, and that it so continued throughout the term of the guardianship.—PATTERSON v. GRIFFITH, Ky., 62 S. W. Rep. 884.

4. ADVERSE POSSESSION—Passways — Title by Prescription.—Where the right of the public to the use of a passway has become complete by adverse use, that right is not defeated by erecting obstructions which are removed by the public whenever it becomes necessary to use the passway; but there must, to defeat the right, be an adverse holding for 15 years, or a voluntary abandonment of the use by the public.—POTTS v. CLARK, Ky., 62 S. W. Rep. 884.

5. ASSIGNMENTS FOR CREDITORS—Refusal of Assignee to Sue.—The fact that the assignee refuses to sue for a debt due the assignor does not entitle a creditor to subject the debt, the remedy being an action to compel the assignee to execute the trust.—WEST v. GRIBBEN, Ky., 62 S. W. Rep. 669.

6. ATTORNEY AND CLIENT—Fees. — Where a claim was assigned to a bank on an agreement reserving one-fourth the amount of recovery thereon for an attorney to be employed by the assignor, the bank was liable to other attorneys employed with its consent to assist the original under an agreement fixing their compensation at one-eighth the amount of recovery; the original attorney, by agreement, receiving the same amount. — FIRST NAT. BANK OF DENISON v. HODGES, Tex., 62 S. W. Rep. 827.

7. ATTORNEY AND CLIENT — Services — Value —Evidence—Admissibility.—Where the attorney who opposed plaintiff's assignor in the trial of a case stated to the jury all the facts on which he based the value of the assignor's legal services, but testified that he could not state their value without looking into his mind, an answer, after consideration, fixing the value was not objectionable as based on what was in the witness' mind, and not on the evidence.—ROCHE v. BALDWIN, Cal., 65 Pac. Rep. 459.

8. BILLS AND NOTES—Holder for Value—Burden of Proof.—A suit on a promissory note payable to A B, agent, and by him sold, indorsed and delivered, before maturity and for a valuable consideration, can be maintained by the holder, and where the answer admits the execution of the note, but denies that plaintiff is the owner by purchase before maturity for a consideration, and alleges want of consideration in the holder, the burden of proving such allegations is on him.—YATES v. SPOFFORD, Idaho, 65 Pac. Rep. 501.

9. BRIDGES—Injuries—Measure of Damages.—Plaintiff built a bridge under a contract with the county obligating him to keep same in repair for a period of five years. The bridge having been injured by logs driven by defendant's servants, the county ordered plaintiff to rebuild and repair the same, on penalty of forfeiture of his bond, which he did. Held, that the injury resulting from the negligent driving of the logs was an injury to plaintiff, and not to the county, and hence plaintiff was entitled to maintain the suit against defendant for the damages so sustained.—CUE v. BRELAND, Miss., 29 South. Rep. 850.

10. CARRIERS—Injury to Passenger—Negligence—Res Ipsa Loquitur.—Where it is shown that an injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without any negligence on his part; and hence a verdict for plaintiff for injuries against a street railroad will not be reversed because the evidence fails to show that the rate of speed of the car at the time of the accident was excessive, or that the excessive rate of speed or other negligence of defendant was the proximate cause of the injury, since it is sufficient that it fails to show that it was not so.—BASSETT v. LOS ANGELES TRACTION CO., Cal., 65 Pac. Rep. 471.

11. CARRIERS OF PASSENGERS — Collisions — Passengers—Expert Witnesses and Testimony.—A physician, after testifying to his professional qualifications, testified, without objection, respecting the plaintiff's injuries, disease, and condition, it was not an abuse of discretion to permit him to give his opinion as to what percentage of patients with such affliction ultimately recover their health. Such evidence was admissible, since it had a direct bearing on the permanency of the disease which plaintiff claimed resulted from the injuries.—BUDD v. SALT LAKE CITY R. CO., Utah, 65 Pac. Rep. 486.

12. CONFLICT OF LAWS—Liability of Wife—Law of Domicile.—If by Missouri law a wife may bind herself for a debt of her husband, and if a wife while residing in Missouri does so bind herself, the obligation will be enforced against her after she becomes a resident of this state. Capacity to become obligated on promissory notes is tested by the law of the domicile, not by the law of the place where the notes are payable.—BAER v. TERRY, La., 29 South. Rep. 886.

13. CONTRACT—Building—Damages for Failure to Complete Building by Time Fixed.—Where a building contract stipulated that the building should be completed by January 1st, and that the contractors should pay $20 per day for each day it might remain unfinished after that time, and the building was not fully completed until the 1st of July, the owners were not entitled to the stipulated damages for the full time, as part of the building was completed, and was occupied

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by the tenants of the owners, long before the 1st of July; and, under all the circumstances, the damages will be fixed at a little more than one-third of the stipulated amount.—WHITEHEAD v. BROTHERS LODGE, I. O. O. F., NO. 32, Ky., 62 S. W. Rep. 873.

14. COUNTIES—County Warrants—Validity—Interest.—Sess. Laws 1896, p. 178, ch. 64, validated debts which counties had contracted in excess of the limit of indebtedness. Chapter 131, § 59, provided that county warrants should bear 5 per cent. interest from the time of presentation till paid. Held, that a county warrant issued prior to 1896, and void as in excess of the debt limit, and also containing an invalid provision for the payment of 8 per cent. interest, though interest on county warrants was not then authorized, was only validated by chapter 64 as to the principal, and not as to the interest, and hence the holder thereof was only entitled to 5 per cent. interest from the time chapter 131 went into effect.—MCINTOSH v. SALT LAKE CO., Utah, 65 Pac. Rep. 483.

15. COUNTIES—Removal of County Commissioner from Office.—When proceedings under section 7459, Rev. St., are brought to remove a county officer, and the court finds that such officer acted honestly in making such charges against his county, and honestly believed at the time he presented his claim for allowance, and when he collected the same, that such charges were legal, it is error to remove him from office, and enter judgment against him for the penalty provided by said section.—PONTING v. ISAMAN, Idaho, 65 Pac. Rep. 434.

16. CRIMINAL LAW—Contempt—Right to Make Explanation before Infliction of Punishment.—Code, § 4465, allows one accused of contempt to make, at his option, a written explanation thereof under oath. Held, that where one's guilt is unquestioned, and where he advised the court in unmistakable language that he was ready for punishment if the judge was disposed to inflict it, it is not necessary that an opportunity be given for such written explanation before punishment was inflicted.—HARDIN v. SILVARI, Iowa, 86 N. W. Rep. 223.

17. CRIMINAL LAW—Information—Amendment—Surprise.—Where, pending a trial of a person for larceny, the information is amended by substituting therein the name of a husband for that of his wife as the owner of the property stolen, and both before and after the amendment both husband and wife were examined as witnesses, and the accused made no effort to have the trial postponed, nor availed himself of the presence of the spouses on the stand as witnesses to negative the ownership as laid in the amended information, he is properly refused a new trial, based upon a claim that he was surprised by the amendment, and that he could disprove by the wife, as newly-discovered testimony, that the property was her paraphernal property.—STATE v. BRIGHT, La., 29 South. Rep. 998.

18. CRIMINAL LAW—Instructions—Credibility of Defendant.—An instruction to the jury in a criminal prosecution in the following language is held erroneous and prejudicial to defendant, viz.: "You will not allow yourselves to be imposed upon, nor led into the belief of unreasonable stories on the part of either the prosecution or of the defense. You must bear in mind the tendency on the part of the guilty, when accused of crime, to fabricate some story or stories which they think may effect their acquittal."—STATE v. HOY, Minn., 86 N. W. Rep. 98.

19. CRIMINAL LAW—Sentence—Validity.—In a prosecution upon an information containing a number of counts, and where the verdict returned finds the defendant guilty of several of the offenses charged, the court should pronounce a single judgment, imposing the full measure of punishment to be imposed for all such offenses. A judgment regularly rendered on one of the offenses included in the verdict, and which has been executed in part by the imprisonment of the defendant, is the end of the prosecution, and exhausts the power of the court in the case; and the action of the court in bringing in the defendant several years after the rendition of the judgment, and sentencing him again upon the remaining offenses embraced in the verdict, is wholly without authority.—IN RE BECK, Kan., 64 Pac. Rep. 971.

20. DEED—Description—Extrinsic Evidence to Explain Latent Ambiguity.—Where the description of land in a title bond called for "the point" of a cliff as a corner, and "thence with the cliff," it appearing that the cliff forked at the point indicated, extrinsic evidence was admissible to show which fork of the cliff was intended; the ambiguity being a latent one.—HALL v. CONLEE, Ky., 62 S. W. Rep. 899.

21. DETINUE—Claim of Third Party—Time of Making.—Under the statute authorizing the interposition of a claim and the trial to the right of property by claimant in actions of detinue (Code 1896, § 1484), such claim can be interposed only where there has been a preliminary seizure of the property before trial and judgment in such detinue suit, and after the rendition of judgment no claim to the property can be interposed under the statute.—MCGLATHERY v. WILLIAMS, Ala., 29 South. Rep. 858.

22. ELECTIONS—Qualifications of Voters.—A constitutional provision which provides that "for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while kept at any almshouse or other asylum at public expense," preserves the voting *status* of the inmates of a soldiers' home at the time of the entry thereto, and such inmates cannot acquire, by reason of their presence in such soldiers' home, and while kept at public expense, the right to vote in the county and precinct in which such institution is located.—POWELL v. SPACKMAN, Idaho, 65 Pac. Rep. 503.

23. EMINENT DOMAIN—Condemnation of Property—Failure of Statute to Prescribe Course of Procedure.—Ky. St. § 2852, part of charter of cities of the first class, which provides that the board of park commissioners may order the condemnation of, properly, is valid, though the course of procedure is not prescribed further than to require that the proceeding shall be instituted by the filing of a petition; the court having power to regulate the additional procedure according to the course of the common law.—BOARD OF PARK COMRS. OF LOUISVILLE v. DU PONT, Ky., 62 S. W. Rep. 891.

24. EQUITY—Deeds — Unauthorized Clause — Correction.—Where a contract of exchange provided that a warranty deed given thereunder was to be subject to an incumbrance, and the notary, without the knowledge or authority of the grantee, added in the deed, "which the grantee assumes and agrees to pay," the deed will be corrected in so far as it imposes on the grantee the assumption to pay said indebtedness.—JONES v. PRICE, Iowa, 86 N. W. Rep. 219.

25. EXECUTORS AND ADMINISTRATORS—Distribution by Executor Under Judgment Subsequently Reversed.—Where the mother of illegitimate children allowed the father to have their services until they reached their majority, in consideration of his agreement to bring them up, and to provide a home for her at his death, neither her claim under the contract nor the claims of the children under an agreement by which they worked for the father after arriving at age and permitting him to hold their wages for them are preferred claims against his estate after his death.—STORY v. STORY, Ky., 62 S. W. Rep. 865.

26. EXECUTORS AND ADMINISTRATORS — Executor's Commissions—Attorney's Fees.—The widow of a testor, as executrix and life-tenant, made a contract with a corporation which was entitled to the estate as devisee in remainder, by which she transferred to it the estate in consideration of its agreement to pay her an annuity; the contract stipulating that she was to first pay off all existing debts of the estate, and make

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a full statement of her accounts by a certain time, and that the transfer was made subject to "attorney's fees and costs of settlements." A disagreement having arisen as to the amount to be turned over, the executrix brought suit for a settlement of that matter. Held, that plaintiff is entitled to commissions as executrix, and also to a reasonable attorney's fee for bringing the suit.—CRUTCHER'S EXECUTRIX v. BOARD OF MISSIONS OF METHODIST EPISCOPAL CHURCH SOUTH, Ky., 62 S. W. Rep. 895.

27. FIRE INSURANCE—Forfeiture—Subsequent Legislation.—A fire policy being already forfeited under a condition thereof by occupation by a tenant, the rights of the parties are not affected by the subsequent enactment of Code, § 1748, providing that a condition in a policy making it void before the loss occurs shall not prevent a recovery thereon, if it be shown that the failure to observe the condition did not contribute to the loss.—ELLIOTT v. FARMERS' INS. CO., Iowa, 96 N. W. Rep. 224.

28. FRAUDULENT CONVEYANCE — Husband's Declarations as Evidence Against Wife.—Where the husband's creditors were seeking, in an action against the husband and wife jointly, to subject property in the wife's name on the ground that it had been paid for by the husband, the husband's declarations tending to show his interest were competent as evidence against the wife.—PULLINS v. PULLINS, Ky., 62 S. W. Rep. 865.

29. GUARDIAN AND WARD—Mortgage of Ward's Property—Purpose.—Under Code Civ. Proc. § 1578, providing that the property of a minor may be mortgaged to pay or renew a lien thereon, where there are several minors owning undivided interests in the same property, each subject to a lien, the interest of each minor cannot be mortgaged to secure the aggregate of all their debts, but each must be bound only for his part thereof.—HOWARD v. BRYAN, Cal., 63 Pac. Rep. 462.

30. HIGHWAYS—Collision—Bicycles.—Plaintiff, while crossing a street at a crossing was injured by being run into by defendant on a bicycle. The accident occurred at night, and plaintiff, who was carrying an open umbrella, did not look up and down the street before attempting to cross. A witness testified that he was 75 or 100 feet away, but saw both plaintiff and defendant just before the accident; and defendant testified that a arc light was at the place, and that he saw the plaintiff when within 60 or 65 feet of him. Held, in an action for the injuries received, that a special finding that the plaintiff could not, by the exercise of ordinary care, under the circumstances, have seen the defendant in time to have avoided the collision, was not supported.—MILLS v. CONLEY, Wis., 86 N. W. Rep. 208.

31. HOMESTEAD—Liens—Validity.— Where the purchaser of realty pays the purchase price, and then borrows from the vendor, who retains a lien in the deed for the borrowed money, the purchaser does not acquire title by such payment, and by making slight and inconsiderable improvements, so as to defeat such lien by a claim of homestead.—JONES v. MALE, Tex., 62 S. W. Rep. 827.

32. HUSBAND AND WIFE—Community Estate—Rights of Widow.—One who occupies the position of widow in community and sole heir *ab intestato* has such an interest in the property of the community which had existed between her deceased husband and herself as to entitle her in default of the appointment of any one charged with that duty, to invoke the aid of the court for its preservation.— BARBER v. WATSON, La., 29 South. Rep. 889.

33. HUSBAND AND WIFE—Necessaries — Payment of Interest on Mortgage Debt at Wife's Request.—Under Gen. Stat. ch. 52, art. 2, § 2, declaring that the wife's real estate shall be liable for debts contracted on account of "necessaries," the wife's real estate cannot be subjected to the payment of a note executed by her and her husband for money advanced by plaintiff at their request to pay interest on a debt secured by mortgage on a dwelling house owned by the wife, as it does not appear that the wife owed the mortgage debt, or that she or her family occupied or intended to occupy the mortgaged dwelling house; she having ample estate outside of that for their support.—WATTS v. TURNER, Ky., 62 S. W. Rep. 878.

34. HUSBAND AND WIFE—Property Rights—Dation en Paiement—Simulation.—The wife received amounts, made crops, and realized revenues on her separate property, for which her husband, by using same, became liable. The testimony does not prove that the husband made no revenues, and that the result of his exertions did not go to the support of the family. In the absence of that proof, the amount required is not deducted from her separate right, in order thereby to reduce them to nil, and give rise to the conclusion that the wife has no separate right, as the whole amount went to the support of the family.—LEHMAN v. COULON, La., 29 South. Rep. 879.

35. INJUNCTION—Pendente Lite.—A court of equity can, in the proper exercise of its jurisdiction, enforce and preserve property or rights in issue *in statu quo* until the hearing on the merits, and, in order to sustain an injunction for the protection of property *pendente lite*, it is not necessary for the court to decide in favor of the complainants upon the merits, or that he should present such a case as will certainly entitle him to a decree upon the final hearing; but, in order to support such an injunction, the court must be satisfied that the complainant certainly has a right as to the existence of which there is a substantial question to be decided, and that without the interim interference, such right would probably be lost or destroyed.—COXE v. HUNTSVILLE GASLIGHT CO., Ala., 29 South. Rep. 868.

36. INJUNCTION—Title to Realty—Right of Possession Under Contract.—Where a complaint in an application for an injunction stated that plaintiff was the owner of a right to pump water from a certain well, and that defendants had prevented, and threatened to continue to prevent, plaintiff from so pumping water, but there was no allegation that plaintiff was, or defendant was not, in possession of the property, plaintiff was not entitled to an *ex parte* injunction enforcing its alleged right to the property since it would operate to change the possession of property, which is not the proper function of a preliminary injunction. —SAN ANTONIO WATER CO. v. BODENHAMER & SIERRA WATER & POWER CO., Cal., 65 Pac. Rep. 471.

37. INSURANCE—Separate Contracts — Void as to Realty and Valid as to Personalty.—Where the insurance of personal property was evidenced by a paper attached to a policy previously issued on real estate, a breach of condition as to title, rendering void the original policy, did not affect the insurance on the personal estate, the contracts being separate.—CONTINENTAL INS. CO. v. GARDNER, Ky., 62 S. W. Rep. 886.

38. INTOXICATING LIQUORS — Illegal Sale—Evidence. —On a trial under an indictment for selling spirituous, vinous, or malt liquors without a license, and contrary to law, where the evidence for the state connecting the defendant with the commission of the offense was circumstantial, and tended to show that the sale was made in the room of another person, testimony going to show that in said room liquors were kept and controlled by the defendant, and jointly with said other person, and that on the occasion when whisky was being sold by said other person in the defendant's presence the defendant was assisting him, and was personally concerned in the disposition of the liquor, is competent and admissible in evidence. In such a case it is not prejudicial to the defendant to allow a witness, upon his examination, to deny that he testified before the grand jury to having seen whisky bought in the house where the defendant was arrested, and where the evidence for the state tended to show the selling of the whisky complained of occurred.—WRIGHT v. STATE, Ala., 29 South. Rep. 864.

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39. INVESTMENT BY GUARDIAN — Order of Court.—A guardian, without authority of the court, purchased real estate with the money of his ward. The value of the real estate had somewhat depreciated when the ward became of age, and it was shown that during the ward's infancy money could be safely loaned at 10 per cent. per annum. Held, that the ward was entitled to recover from the guardian the amount invested by him in the house, with 10 per cent. interest, compounded annually.—SCHEIB v. THOMPSON, Utah, 65 Pac. Rep. 499.

40. JUDGMENT—Action to Set Aside—Laches.—Where defendants, against whom judgment was obtained without service of the summons, and who did not learn of the action until some time after their property was sold thereunder, commenced an action to set aside the return of service of the summons and subsequent proceedings within 10 months after the sale, and before any subsequent change in the property occurred, they were not guilty of laches. Where property was sold under a judgment obtained without jurisdiction, the fact that the purchaser redeemed the property from a tax sale is no defense to an action to set aside such judgment and proceedings.—KEELY v. EAST SIDE IMP. CO., Colo., 65 Pac. Rep. 457.

41. LANDLORD AND TENANT — Forcible Entry and Detainer—Tenants in Common.—H and plaintiff owned land as tenants in common, which adjoined the defendant's right of way, and H gave defendant an option to purchase his interest. Defendant entered on the land, and began removing dirt to build a track on its adjoining right of way, and plaintiff brought forcible entry and detainer against both H and defendant. Subsequently H deeded his interest to defendant. The court entered an order compelling defendant to remove not only from the land in controversy, but also from its original right of way. Held, that it was not error to modify the order by confining it to the land in controversy.—CAGWIN v. CHICAGO & N. W. RY. CO., Iowa, 86 N. W. Rep. 220.

42. LIFE INSURANCE — Assignment — Husband and Wife.—An insurance policy was issued in favor of the wife of the insured if living at the time of his death, and, if not living, then to his children. The insured and his wife assigned the policy to plaintiff as collateral. The wife died before her husband. After the wife's death, a tontine dividend accrued on the policy. Held, that the wife's death defeated the assignment and all rights predicated thereon, including the dividend.—STEVENS v. GERMANIA LIFE INS. CO., Tex., 62 S. W. Rep. 824.

43. MASTER AND SERVANT — Dangerous Machinery.—Where the evidence in an action for an injury to a servant alleged to have been caused by a defective machine shows that defendant was not negligent, unless he had actual knowledge of the alleged defect, and there is a finding in a special verdict that the defendant did not have such knowledge, judgment should be rendered in favor of the defendant.—GROTH v. THOMANN, Wis., 86 N. W. Rep. 178.

44. MASTER AND SERVANT—Fellow-Servants.—Where, in an action against a railroad company for injury to a brakeman by being thrown from a car by the engineer negligently and suddenly stopping the train, the injury happened in a state where the common law relating to fellow-servants had not been changed by constructed and operated as to render it reasonably safe for those whose employment necessitates their going upon such road and performing service in connection with the same.—LYNN v. ANTRIM LUMBER CO., La., 29 South. Rep. 874.

46. MASTER AND SERVANT — Servant's Acts—Master's Liability.—Plaintiff was arrested by the captain of defendant's steamboat, and chained to a post on the lower deck, and ejected before he reached his destination. The court charged that plaintiff could recover only the actual damages suffered by him, unless defendant authorized the acts complained of, or participated therein or ratified them; and that the jury should not allow anything by way of punishing the defendant, unless it authorized the captain's acts or ratified them; and that, unless defendant participated in or authorized the captain's acts or ratified them, the measure of damages would be the amount which would compensate the plaintiff for all detriment proximately caused by the wrongful acts. Held, that the instructions were not erroneous as contradictory and too general.—TRABING v. CALIFORNIA NAV. & IMP. CO., Cal., 65 Pac. Rep. 478.

47. MORTGAGE—Foreclosure — Assignment.—Where, during the pendency of foreclosure proceedings, the mortgage was assigned, and the assignee was substituted as plaintiff by order of court, but the original mortgagee was retained as a party plaintiff, the decree of foreclosure providing that the original mortgagee take nothing, but that the amount recovered was due the assignee, the retention of the original mortgagee as a party plaintiff, though erroneous, was harmless, and not cause for reversal.—ORANGE GROWERS' BANK v. DUNCAN, Cal., 65 Pac. Rep. 469.

48. MUNICIPAL CORPORATIONS—City Treasurer—Payment of Claim—Effect of Judgment.—Where judgment had been rendered for plaintiff in an action against a city treasurer and board of trustees to compel payment of a claim against the city, such judgment was sufficient to justify the treasurer in paying the claim, though the trustees refused to approve it, or issue a warrant thereon.—FRESNO CANAL & IRRIGATION CO. v. MCKENZIE, Cal., 65 Pac. Rep. 473.

49. PARTNERSHIP—Compensation of Partner for Personal Service.—The surviving partner cannot complain of the refusal of the court to allow him more than $2,000 for his personal services for the three years he continued the business, the general rule being that neither partner is entitled to compensation for his services unless the articles so provide; and whether this case is an exceptional one it is not necessary to decide, and the administrator and heirs of the deceased partner do not complain of the allowance made.—BARBER'S ADMX. v. MURPHY'S ADMR., Ky., 62 S. W. Rep. 894.

50. PARTNERSHIP—Settlement—Surviving Partner.—A deceased partner's will provided that the business of the firm should be settled gradually, so as to not injure the estate or prejudice the surviving partner. There was no evidence that the deceased's executors or legatees were dissatisfied with the management of the estate. Held, that a delay of five years in the settlement of the firm affairs by the surviving partner did not justify an order directing the deceased's executors to sell the deceased's interest in the firm. The fact that a surviving partner bid on the deceased part-

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payments were applied on unguarantied bills, and a suit instituted on a balance due on those guarantied. Held, that the evidence was not sufficient to justify the direction of a verdict for defendant, since the question whether there was an application of payments as claimed by defendant was for the jury.—BISHOP v. HART, Iowa, 86 N. W. Rep. 218.

52. PLEADING AND PRACTICE—Amendment—Conversion.—In an action brought for a conversion of certain cattle, and in the trial of which it appears that the defendant did not in fact sell the cattle in question, but that they were sold by another under the direction of defendant, who knowingly received the proceeds of sale, and converted the same, it is not error for the district court, before another trial of the cause is had, to permit the plaintiff to so amend his petition as to charge defendant with a conversion of the proceeds of such sale.—EMPORIA NAT. BANK v. LAYFETH, Kan., 64 Pac. Rep. 973.

53. PLEADING AND PRACTICE—Bill of Review—Newly-Discovered Evidence.—To sustain a bill of review on the ground of newly-discovered evidence, it must not only appear that the additional evidence was not known at the time of the former hearing, and could not have been ascertained by the exercise of proper diligence, but the newly-discovered evidence, with the other evidence already in the case, must entitle the complainant to a decree different from, and more beneficial to the complainant in the bill of review than the one rendered in the original case.—ALLGOOD v. BANK OF PIEDMONT, Ala., 29 South. Rep. 855.

54. PRINCIPAL AND AGENT—Accounting—Illegality.—An agent intrusted with money to purchase property at a judicial sale under an agreement which had for one of its objects the suppression of competition at the sale, and who executes the agreement by making the purchase, cannot withhold a surplus portion of the fund placed in his hands on the ground that the agreement by which he obtained it was illegal, as against public policy, but must account for it to his principal.—HARDY v. JONES, Kan., 64 Pac. Rep. 969.

55. PRINCIPAL AND SURETY—Joint Bond Executed by Separate Purchasers.—Where the several purchasers of horses sold by a commissioner executed a joint bond for the aggregate price, each sale being reported by the commissioner as a separate sale, each purchaser was a principal in the bond for the amount of his purchase, but only a surety for the other purchasers as to the remainder of the bond.—BRIDGEWATER v. ENGLAND, Ky., 62 S. W. Rep. 882.

56. REAL PROPERTY—Land Grants—Swamp Lands.—Acting under the acts of the general assembly of Iowa granting swamp lands to the respective counties wherein situate, a county claiming a tract as a swamp land under the act of congress of September 28, 1850, granting swamp land to the several states, sold the land to a purchaser, who, after paying taxes thereon for several years, abandoned it; and plaintiff afterwards purchased it at a sale for delinquent taxes. A railroad company claimed the tract as indemnity land under the act of congress of 1856 granting lands to aid the construction of certain railroads, and after plaintiff took possession of the land the selection of the railroad was approved by the secretary of the interior. Held, that the railroad company, having failed to take possession of the land, or to assert any claim thereto, for 30 years after the selection was approved, and plaintiff having acquired a tax title, the railroad company's claim was barred by the statute of limitations.—CHICAGO, R. I. & P. R. CO. v. HOUSTON, Iowa, 86 N. W. Rep. 224.

57. REMOVAL OF OFFICERS—Jurisdiction.—A board of county commissioners, in removing a county treasurer taken from another district, acts in a judicial or quasi-judicial capacity. After an award has been made by him, and the amount thereof paid by the old district, his power is exhausted, and an allowance increasing the original award, made 15 months after the first determination, is void.—ROBINET v. SCHOOL DIST., Kan., 64 Pac. Rep. 970.

58. SUBROGATION—Payment of Mortgage Note.—One who, without interest as creditor, co-debtor, or heir, pays the mortgage note of another, acquires no subrogation to the rights of the creditor, unless it be expressed and made at the same time as the payment. He has a claim for reimbursement against the party for whose benefit the payment was made, but only as ordinary creditor.—HUTCHINSON v. RICE, La., 29 South. Rep. 898.

59. SURETIES AND SURETYSHIP—Assignment of Debt to Surety.—A surety may purchase the debt for which he is bound, and take an assignment thereof and of a mortgage by which it is secured, and maintain an action thereon against the principal.—WILKERSON v. TICHENOR, Ky., 62 S. W. Rep. 869.

60. TAXATION—Local Assessment—Rights of Purchaser.—Where property is pursued in enforcement of a local assessment, to secure which the statute grants the first lien, it suffices to proceed contradictorily with the man in possession as owner, under recorded title translative of ownership. And the purchaser at the sale which follows acquires a good title by the adjudication; for it is a proceeding *in rem*,—one to enforce a real charge, a debt on the property, irrespective of the person owning.—KELLY v. MENDELSOHN, La., 29 South. Rep. 894.

61. TITLE IN GOODS SOLD—Assignment for Creditors.—Where defendant, prior to the making of an assignment by a brewing company for the benefit of creditors, had purchased from the company and paid for $200 worth of beer, to be delivered to him in the usual course of business, but no packages had been set apart for him, the title to all the beer on hand at the time of the assignment passed to the assignee as between him and defendant.—STEIN BREWING CO.'S ASSIGNEE v. EBERHARD, Ky., 62 S. W. Rep. 881.

62. VENDOR AND PURCHASER—Immovable Property—Redeemable Sales.—Redeemable sales of immovable property, unaccompanied by delivery of the thing sold, will be considered, as between the parties, in the absence of evidence to the contrary, as mere contracts of security, and the vendee out of possession may take his position equally with the vendor.—MARBURY v. COLBERT, La., 29 South. Rep. 871.

63. VENDOR AND PURCHASER—Vendor's Lien—Purchase of Property.—The purchase, as such, of a sugar-refinery outfit and plant, who assumes payment of claims secured by vendor's lien upon the machinery, has no greater right to contest and repudiate such claims than his vendors had.—WOODS v. CARENCRO SUGAR-MFG. CO., La., 29 South. Rep. 888.

64. WILL—Mental Capacity.—A person who is rational may dispose of his property according to a fixed purpose of his own, although such purpose, according to the notions of other persons, might be irrational; and therefore it was error to instruct the

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Central Law Journal.

ST. LOUIS, MO., AUGUST 23, 1901.

On Wednesday morning, August 21st, in the city of Denver, Colorado, Hon. Edmund Wetmore, of New York, will open the twenty-fourth annual meeting of the American Bar Association. This is the first time this association has crossed the Mississippi, and in this respect is a noteworthy recognition of the western lawyer. There was a time when lawyers and laymen of the east deceived themselves with the idea, that in the vast empire lying between the Father of Waters and the Pacific Ocean, law and order were pilgrims and strangers in the land, and that in all disputes, whether civil or otherwise, the gun or the bowie knife was the arbitrament of last resort. In a few instances, the eastern imagination in some wild range of flight would insist that in such cities as St. Louis, Denver and Kansas City, indians with their squaws and papooses impeded traffic in the streets and laid in wait upon the highway. Gradually, in the natural course of events, this has all been changed. The vigorous young blood of the west, overcoming its environment, asserted its superiority, not only in the sterner arts of husbandry and manufacture, but also in the refinements of civilization. In jurisprudence her advance has been remarkable. Throwing off the obsolete and unreasonable exactions of the common law with such rash abandon as to amaze the eastern jurist, who could conceive of no larger horizon, she applied herself to the solution of new and difficult problems, with some of which the common law had never grappled, and many of which it was not competent to solve. With a mind absolutely free from prejudice, she took from both the civil and common law those principles which experience had proven to be suitable to her condition, but where neither source of jurisprudence had anything satisfactory to offer, with remarkable independence she cut a more direct and satisfactory path, and thus gradually developed those great code and statutory systems of the west, of which the States of Colorado and California are the most worthy examples. Is it to be wondered, therefore, that the lawyers of the west who were the leaders of her successful advancement and who assisted her in cutting the Gordian Knot of many a legal difficulty which her statesmen had failed to solve by code or statute, should have caught her independent spirit and finally forged their way into the very forefront of the profession—men like Stephen J. Field, David J. Brewer and John F. Dillon, the first editor of the CENTRAL LAW JOURNAL, who for clearness of perception and originality of thought have had no superiors, and whom the country has delighted to honor, and in whose sagacity and knowledge of the law it never hesitated to confide.

We repeat, therefore, that the holding of the American Bar Association in the city of Denver is a memorable recognition of western advancement in jurisprudence, and one which the members of the profession from that great section of our country should not fail to acknowledge by their large and enthusiastic attendance.

NOTES OF IMPORTANT DECISIONS.

SURETIES—CONTRACT OF INDEMNITY.—Suppose A replevies goods in the hands of B. A obtains two sureties to go on his bond, who, however, are led to sign the bond on the written promise of C, a third person having no interest in the suit, that he will indemnify them against all loss, on account of their contract of suretyship. B, the defendant, recovers judgment for $3,000. A and his two sureties, however, are insolvent. Can B be subrogated to the position of the sureties and enforce the contract of indemnity against C? That was the question for decision in the case of Henderson-Achert Lithographing Co. v. John Shillito Co. (Ohio), 60 N. E. Rep. 295, where it was held that since the sureties on an undertaking in replevin have no remedy at law or in equity upon a contract to indemnify them against loss on account of their suretyship, until such loss has occurred, the defendant himself in the replevin suit, after recovery of judgment, has no such remedy, even though the sureties and judgment debtor be absolutely insolvent and the judgment be not otherwise collectible. The defendant in this action was the indemnitor C and the plaintiff was B, the judgment debtor in the replevin suit. The obligation expressed in the defendant's obligation of indemnity to the sureties on the replevin bond, was "to guaranty the sureties against any loss by being a party to the bond." The court said:

"The defendant is a stranger to the debt, and its agreement is one strictly of indemnity to the

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sureties; so that its individual liability on the agreement to enforce which this action was brought is in no sense a property right of the plaintiff's debtor, and satisfaction of the judgment obtained therefrom would not be payment out of the debtor's estate, but out of the estate of a stranger. Confessedly, therefore, the liability of the defendant on its covenant to indemnify the sureties against loss can be reached by the creditor, if at all, only through some right or remedy that belongs to the sureties. And it should be borne in mind that the defendant's obligation does not arise out of any principle of equity, but is created by special agreement of the parties. Except for his express agreement, the defendant would have nothing to do with the liability of the sureties. That agreement, therefore, which alone created must determine the extent of the defendant's liability, both at law and equity; for there is no principle upon which a court of equity or law can enlarge the legal effect of the agreement. It seems self-evident that the rights of the creditor, through subrogation to the remedies of the sureties, can, in no case, exceed those of the latter, and that, until the indemnitor's covenant has been broken, or there has been some failure to perform it, no action can be maintained thereon by either. This was declared in Trust Co. v. Reeder, 18 Ohio, 35, 47, and there is no diversity of authority on that subject. There is an essential difference, in legal effect, between covenants of indemnity, strictly,—that is, of indemnity against loss,—and covenants to pay or assume or stand for the debt, or a surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of the covenant; while those of the former class are not broken, and no right of action accrues until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the express terms of the contract, and is well established by authority. It is expressed by Mr. Justice Swayne in Wicker v. Hoppock, 6 Wall. 94-99, 18 L. Ed. 752, 753, as follows: 'In that class of cases (contracts of indemnity) the obligee cannot recover until he is actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid.' That the distinction obtains at law counsel concedes. But it is insisted that a different rule prevails in equity, which, it is claimed, will entertain a suit for the specific performance of indemnifying covenants before a loss has been sustained, by compelling the payment or discharge of the surety's obligation, for his better and more complete exoneration. There is[] both] reason and authority to sustain the proposition that a covenant, though by a stranger, founded upon a sufficient consideration, to pay or to assume or to stand for a debt on which a surety is bound, may be specifically enforced in chancery, after the maturity of the debt, if it be not then paid by the covenantor. The reason is, as has already been stated, that by his failure to pay he has failed to perform his covenant, and the remedy is within its express terms. The courts have many times so held. But on no sound principle can a court of chancery, any more than a court of law, compel an indemnitor to perform his covenant in advance of the happening of the contingency or event upon which, by its terms, it is to be performed. Such a remedy would necessarily involve, not the enforcement of the contract made by the party, but its modification by the court, and its enforcement in that modified form."

JURISDICTION OVER THE MAIN BODY OF THE OHIO RIVER.

Although one hundred years have elapsed since the compact between Kentucky and Virginia was approved, the latter portion of one section, has never been construed by the Supreme Court of the United States, and as that tribunal may at no distant day be called upon to construe it, I presume that it will not be inappropriate for me to offer some suggestions as to the construction of the section in question. As there has been a great deal of contention over the construction of the later portion of section 11 of the compact, I made an investigation of the matter merely for historical information, and after a careful examination, I have written a few suggestions, as to how the later portion of the section should be construed. Section 11 of the compact between Kentucky and Virginia says: "Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction of this commonwealth and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river." The question to be discussed is: By the clause "and the respective jurisdictions of this commonwealth, and of the proposed state on the river as aforesaid, shall be concurrent only

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with the states which may possess the opposite shores of the said river" did Virginia mean to give concurrent jurisdiction with herself and Kentucky, over the main body of the Ohio river, both civil and criminal, to the states, which are now Ohio, Indiana and Illinois? As this exact question is now pending before the Court of Appeals of Kentucky, and being a public question, in which the people of the six states of West Virginia, Virginia and Kentucky; and Ohio, Indiana and Illinois are interested, for the readers of this journal, I have prepared the following suggestions for the construction of this clause: "And the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

1. All statutes relating to the same subject must be construed in *pari materia*. So, therefore, all resolutions of the Virginia legislature, relating to the cession of the northwestern territory, the deed of cession of the northwestern territory, the ordinance of 1787, by congress accepting the grant of the same, the act of 1788, by the legislature of Virginia amending the deed of cession, at the request of congress, and the acts of congress admitting Kentucky, Indiana, Illinois and Ohio into the Union as states, the compact between Kentucky and Virginia must be all construed as a whole. The statutes can be found as follows: (History of the northwestern grant, 10 Henning's Statutes, page 547; Acts of General Assembly of Virginia, authorizing the deed of cession of the northwestern territory to the United States, 11 Henning's Statutes, page 326. Deed of cession, *Ibid.*, page 571; act admitting Kentucky into the Union, 1 U. S. Stat. at Large, page 189; act admitting Ohio into the Union, 2 Statutes at Large, page 173; act admitting Indiana, 2 Statutes at Large, page 103; act admitting Illinois into the Union, 3 Statutes at Large, page 428).[1] In none of these statutes, except the compact between Virginia and Kentucky, is there any language that could possibly be construed that Virginia wished to confer on the states north of the Ohio river, concurrent jurisdiction over that river. Virginia retained all jurisdiction of the river in herself in the deed of cession. And the deed of cession plainly shows that Virginia wished to retain the jurisdiction of the Ohio river in herself.

2. All right of soil or jurisdiction Virginia had in the river was transferred to Kentucky opposite the shore of the latter state.[2]

3. The doctrine of contemporaneous construction is applicable. The construction placed upon section 11 by the statutes passed nearly at the same time, as the clause in question can be restored to for the purpose of construing it. This rule especially applies where the clause, as the one in question is, is ambiguous. The compact between Kentucky and Virginia was approved December 18, 1789, by both states. Congress enacted laws admitting Kentucky into the Union as a state in 1791, 1792, according to the provisions of this compact. In April, 1802, the state of Ohio was admitted into the Union, and its boundary was fixed at the Ohio river, but nothing was said in the act of congress admitting Ohio into the Union, about Ohio having concurrent jurisdiction over the Ohio river. On April 19, 1816, congress passed an act authorizing the inhabitants of the territory of Indiana to form a State. It fixed the boundary of Indiana on the west, at the middle of the Wabash river, and on the south by the Ohio river. Notice the distinction. The boundary is fixed in the middle of one river, and on the north of the other river. But further in this act it is said: "That the said state shall have concurrent jurisdiction on the river Wabash, with the state to be formed west thereof, so far as the said river shall form a common boundary to both." But the act does not give Indiana concurrent jurisdiction with the state of Kentucky over the Ohio river. This omission shows that the federal government never assumed that the "proposed states" (Ohio, Indiana and Illinois), had concurrent jurisdiction with the state of Kentucky over the Ohio river. Two years later (1818) Illinois was admitted into the Union and its boundary was fixed at the Indiana line of the Wabash river (the middle of the river), and the middle of the Mississippi river, and on the Ohio river. Illinois is given concurrent jurisdiction over the Wa-

[1] Handley v. Anthony, 6 Wheat. 385; Shanks v. Dupoint, 3 Pet. 255; Keyser v. Coe, Fed. Cas. No. 7,750.

[2] Act of Congress admitting Kentucky into the Union, 1 U. S. Stat. at Large, p. 189; Missouri v. Kentucky, 11 Wall. 401.

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bash river, with the state opposite it, but the act omits to give the state concurrent jurisdiction over the Ohio river. This omission is significant. It shows that congress did not regard the compact of Virginia and Kentucky, as surrendering the right of exclusive jurisdiction in the Ohio river with any states or proposed state. In 1820, Virginia declared the Ohio river lying opposite her was to be considered as compounded, and is declared to be compounded within the bodies of several of her counties subject to the provisions contained in the article of compact between Kentucky and herself.[3] This would seem to exclude the idea that the states on the opposite shore of the Ohio river had concurrent jurisdiction over the main body of the river. Kentucky had ten years prior to that time, enacted a statute to the same effect.[4] Even if the federal government which owned the northwestern territory, at the time of the compact between Kentucky and Virginia, had acquired concurrent jurisdiction with those states over the main body of the Ohio river, it waived it by the acts admitting Ohio, Indiana and Illinois as states into the Union, and not giving them concurrent jurisdiction over the Ohio river.

4. Even if the federal government had acquired concurrent jurisdiction over the Ohio river, it did not surrender it to Indiana as the act which admitted Indiana into the Union as a state did not give it. Could Indiana acquire any right not given her by the federal government? She derived her whole existence from the federal government, and she can claim no right from any source, except that government.

5. Ohio has never enacted any legislation claiming concurrent jurisdiction over the main body of the Ohio river, that I can find after an earnest and painstaking investigation. Nor has its supreme court ever expressly claimed jurisdiction over the Ohio river, although there is some *obiter dictum* in one case claiming that the state of Ohio owned the Ohio to the middle of the river. I understand that the executive officers of Ohio have never claimed jurisdiction over any part of the Ohio river above low-water mark on the Ohio shore.

6. Illinois never claimed any jurisdiction over the Ohio river until the constitution of 1848, sixty years after the compact between Kentucky and Virginia, if she has ever claimed it at all. The constitution of Illinois of 1818, fixed the boundaries of that state according to the act admitting Illinois into the Union, but in the constitution of 1848 it is provided: "This state shall exercise such jurisdiction upon the Ohio as she is now entitled to, or such as may be agreed upon by this state and the state of Kentucky." It is conceded by this provision of the Illinois constitution, that Kentucky has jurisdiction over the Ohio river except the jurisdiction that Illinois had already acquired, namely, jurisdiction above the low-water mark on the northern shore. Prior to 1848 Illinois had never claimed concurrent jurisdiction over the Ohio river with Kentucky, and she only claimed in the constitution of 1848 to the low-water mark on the northern shore, and conceded to Kentucky the jurisdiction beyond the low-water mark on the northern shore. The same provision as to the jurisdiction of Illinois over the Ohio river that was in the constitution of that state of 1848, is in the constitution of 1870. Illinois, therefore, has never claimed concurrent jurisdiction with Kentucky over the main body of the Ohio.

7. In the constitution of Indiana of 1816, the preamble states that the constitution is formed consistent to the law of congress entitled: "An act to enable the people of Indiana territory to form a state." That act fixed the limits of the state as stated in number 3 of this article on the Ohio river, and it did not give Indiana concurrent jurisdiction over the Ohio river, and so consequently Indiana never claimed concurrent jurisdiction over the Ohio river in the first constitution of that state. There was also an ordinance passed by the first constitutional convention of Indiana, accepting the boundaries of the state as fixed by congress, in the act to enable the people of Indiana territory to form a state. Also in the first constitution of Indiana (article 5, section 2) the jurisdiction of the Supreme Court of Indiana is fixed "with the limits of the state;" these limits did not include concurrent jurisdiction over the main body of the Ohio river, neither by the act of congress admitting Indiana, nor by the ordinance of the constitu-

[3] Code of Virginia, p. 50.
[4] Morehead & Brown, vol. 1, page 268.

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tional convention of Indiana, accepting the act of congress defining the boundaries of the state. In the constitution of 1851, Indiana, after the lapse of over sixty years from the date of the compact between Kentucky and Virginia asserted by legislative action the claim that she had concurrent jurisdiction with Kentucky over the Ohio river for the first time.

If the compact between Kentucky and Virginia gave Indiana jurisdiction, which was concurrent in those states, did not Indiana abandon that concurrent jurisdiction by waiting for sixty years, after the compact, and thirty-five years after she became a state before she enacted legislation asserting her claim? The first case on this question, andwhere the supreme court first claimed jurisdiction is one of Carlisle v. State.[6] That case has been followed in a number of subsequent cases by that court. They are all cited in Packet Company v. Mickey.[6]

8. The fact that Indiana has assumed jurisdiction over the Ohio river for forty years, does not confer it, if the jurisdiction has been wrongfully assumed.[7]

9. The clause of the compact between Kentucky and Virginia in question was for the purpose of giving free navigation to the citizens of the United States.[8]

10. The only grant meant in this clause was concurrent jurisdiction over the northern shores.[9]

11. Indiana, not being a party to the compact between Kentucky and Virginia can take no advantage under the compact.[10]

12. The construction of the clause in question has been argued before the Supreme Court of the United States, several times, but in every instance that court has declined to pass upon the question as to whether or not concurrent jurisdiction, was conferred over the main body of the Ohio river, by the clause in question. In Handley v. Anthony,[11] the question was presented but not passed upon, although Chief Justice Marshall, intimated that the clause was simply a repetition of the deed of cession of the Northwestern territory. In Penn v. Bridge Co.,[12] the supreme court decided that under section 11 of the compact between Kentucky and Virginia the navigation of the Ohio, was for the citizens of the United States. In Sherlock v. Alling,[13] the exact question as to whether Indiana has concurrent jurisdiction with Kentucky over the main body of the Ohio was presented. The Supreme Court of Indiana had rested its decision upon that ground alone. The supreme court declined to pass upon the question as it decided that the collision between the two steamboats, out of which the action grew, took place above the low water mark of the Indiana shore. But there is an intimation that had the collision taken place below the low water mark, that the laws of Kentucky, governing the right of an administrator to sue, would have controlled. Again, in Indiana v. Kentucky,[14] the question was argued by the late senator Joseph E. McDonald, but the court did not pass upon it.

13. The title to the land under the Ohio river belongs to Kentucky, Virginia and West Virginia, and they claim and exercise the power to grant title thereto to their citizens as patentees.[15] This goes to low water mark on the north bank under the original deed of cession from Virginia to the federal government. The laws of state have no extra territorial force. The power of a state law ends at the territorial line. If one state claims jurisdiction over the land of another state she must show some grant to her, from the state within which the land is situated. Failing in this, the claim fails. Kentucky has never granted to Indiana any jurisdiction over the Ohio river, concurrent or otherwise. When congress defined the boundary of Indiana, in her enabling act, it was done in accordance with the act of cession. Congress was the sovereign power on this subject. In defining the north bank of the

[6] 3 Ind. 55 (1869).
[7] 10 Ind. 310.
[8] Coffee v. Grover, 1-23 U. S. 29, and the authorities
[12] 13 How. 518.

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Ohio river as the southern boundary of the proposed states of Ohio, Indiana and Illinois, in accordance with the deed of cession to the United States, and Ohio and Illinois, have never claimed jurisdiction beyond this boundary for any purpose, nor did Indiana for thirty-five years after she became a state. The compact between Virginia and Kentucky, creates no claim for Indiana as shown by Garner's case, above cited. "There must be accurate and express treaty stipulation between the contracting parties to confer extra territorial jurisdiction."[16]

Conclusion.—In my humble judgment the states of Ohio, Indiana and Illinois, have no concurrent jurisdiction, over the main body of the Ohio river, with the states of West Virginia, Virginia and Kentucky for the foregoing reasons.

Louisville, Ky. HARDIN H. HERR.

[16] Vattel, Law of Nations, 120 (6th Amer. Ed.) "Sovereignty united with domain establishes jurisdiction." Vattel, p. 165.

Since the above article was written the Kentucky Court of Appeals has decided the question discussed in it. The court holds that Indiana has not concurrent jurisdiction with Kentucky over the Ohio river. Meyler v. Wedding, 53 S. W. Rep. 808, 60 S. W. Rep. 20. The opinion was delivered by Judge White; Judge Du Relle delivered a separate and concurring opinion; Judge Hobson (Judge Burnam concurring with him), delivered a dissenting opinion. Judge Hobson argues strenuously, that by section 11 of the compact between Kentucky and Virginia, that it was meant to confer concurrent jurisdiction over the main body with the proposed states (Illinois, Indiana and Ohio). The learned judge, in his dissenting opinion, presents the view opposite to my conclusion. If any one desires to further examine the question, and read the other side of the controversy, it will be well to read the dissenting opinion. H. H. H.

HUSBAND AND WIFE — AGREEMENT FOR SEPARATION—VALIDITY.

FOOTE V. NICKERSON.

Supreme Court of New Hampshire, Merrimack, March 15, 1901.

1. A contract between husband and wife, in which they agree to live separately, is void.

2. A contract between a husband and wife, which provides that they shall live separately, and which releases their claims on the property of each other both before and after death, is an entire contract, and being void as to the separation, does not bar the interest of the husband in the estate of the wife.

3. Pub. St. ch. 195, § 18, providing that the willful desertion of a wife by a husband, and a continued absence and failure to support the wife for the term of three years preceding her death, shall defeat all claims of the husband in her estate, does not apply to a separation and continued absence and failure to support in pursuance of an agreement between the parties.

4. Pub. St. ch. 176, § 8, authorizing a married woman living separate from a non resident husband to manage, sell and convey her property as if unmarried, does not defeat the interest of the husband in the estate of the wife on the death of the latter, so as to render the will of the wife disinheriting the husband valid.

The defendant, Stephen D. Nickerson, and the plaintiff's testatrix, Martha J. Nickerson, were married in Maine in 1891, and lived together there until April, 1892, when the testatrix informed her husband that she intended to leave him. Thereupon they agreed to separate, and he executed a writing as follows: "This is to certify that I, Stephen D. Nickerson, husband of Martha J. Nickerson, do mutually agree to separate on friendly terms, and to make no demand (neither me nor my heirs) on her, nor her property, after this date." At the same time she executed a similar writing, left him, and came to Bow, in this county, where she resided until her decease in 1897. Each party had some property. There was no legal cause for divorce or separation. He continued to reside in Maine, and in no way aided in her support. By the will the testatrix provided as follows: "I will give and bequeath unto my husband, Stephen D. Nickerson, of Orrington, Maine, the sum of one dollar. I make this small bequest because of his agreement to live separate from me, and to make no claim upon my estate in any way." The defendant seasonably waived this provision, and upon his petition the executor was ordered to file an inventory and give bonds. From this decree the executor appealed, for the reasons that the defendant had no such interest in the estate as to entitle him to maintain his petition, and that he was estopped by the writing above set out to claim his distributive share in her estate.

PEASLEE, J.: One question presented for decision is, whether the relation of husband and wife is one that the parties can dissolve or modify; whether the married *status* is so far within the control of the parties that its alteration is a result they can themselves effect, provided they agree upon the terms. It may fairly be said that the question is not settled by the decisions in this state. It has been touched upon incidentally, but in no case has it been directly involved. It therefore becomes necessary to examine the law on the subject elsewhere. Turning to other jurisdictions it will be found that the question has been the subject of much litigation, and with varied results. Not only do the cases in one state conflict with those in other states, but in the same jurisdiction the views of one generation have often been held to be erroneous in later times. There is disagreement not only as to what the law is and what the policy on this subject should be, but also as to the history of the law, and how it was held to be in former times. In order, then, to reach a satisfactory solution of

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the question, it is essential to examine with some minuteness the historical aspect of the law applicable in this case.

The English cases decided before the Revolutionary War are conflicting, and many of them apparently imperfectly reported. The precise question here involved did not then come directly before the so-called "law courts." All causes concerning marriage and the marital *status* were tried in the ecclesiastical courts, which also had jurisdiction of the probate of wills and the administration of estates. 2 Bl. Comm. 496. While, in a narrow sense, these were not common-law courts, they administered the unwritten law of the realm upon these subjects. Although the inferior judges were appointed by the ecclesiastics, the bishops themselves were nominated by the king. 1 Bl. Comm. 280. In all causes an appeal might be taken to the king, who was represented by the court of delegates, appointed by him for that purpose. "This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster and doctors of the civil law." 3 Bl. Comm. 66. The law thus administered is a part of the common law of England. Reg. v. Millis, 10 Clark & F. 534, 671. To ascertain the state of the English common law as to divorce, suits for nullity, and other matters directly concerning the marital relation, recourse must be had to the decisions of those courts. The doctrine of either total or partial divorce, by agreement of the parties, found no favor there. They were not permitted "to release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient and sufficiently proved." Mortimer v. Mortimer, 2 Hagg. Consist. 310, 318; 2 Rop. Husb. & Wife, 267. The rule that separation agreements are wholly void, seems to have been adhered to from the earliest times until the court was abolished, in 1857, by the statute of 20 & 21 Vict. ch. 85. Smith v. Smith, 2 Hagg. Ecc. Supp. 44, note; Westmeath v. Westmeath, *Id.* 1; *Id.*, 4 Eng. Ecc. R. 258; Barlee v. Barlee 1 Addams, Ecc. 301. 305; Nash v. Nash, 1 Hagg. Consist. 140.

The English common law relating to this subject (which became the common law of this state, so far as applicable to conditions here) was that as to the settlement of estates, suits of nullity of marriage, and such limited divorce as was then granted, a separation agreement was wholly void. It was refused recognition in chancery, and even in the law courts its efficacy was denied by the later cases. The only case actually deciding that such an agreement was a valid modification of the marriage contract was Rex v. Mead, 1 Burrows, 542, and this was not followed in the cases in 2 W. Bl. Contemporary judges and text writers understood this to be the state of the law. It was so laid down by Lord Mansfield, who had been chief justice of the king's bench since 1756, and who, shortly after the decision of these cases, thought that the law should be held otherwise, because of changed conditions. Ringsted v. Butler, 3 Doug. 197, 203; Barwell v. Brooks, *Id.* 371, 373: Corbett v. Poelnitz, 1 Term R. 5. The modern English doctrine differs widely from this, and an examination of its origin and development shows that it is a departure from the old law, and not merely an adaptation of recognized principles to changed conditions. It was immediately after the rendition of the decisions reported by Blackstone that changes in the law began to be made. In 1783, Lord Mansfield, while admitting that the common law was otherwise, held that an agreement for separation bound both parties as though they were sole. The point at issue was whether the wife could be sued alone. The fact that these agreements had come into use, and by them separate estates had been given to wives, who, for that reason, ought to be liable to suit, was considered to be of controlling importance. The question of the effect of the decision upon the marital *status* was not discussed. Ringsted v. Butler, 3 Doug. 197. The object of the decision plainly was to accomplish what has been done here by legislation. It gave married women a limited power to contract and sue and be sued. A similar result was reached the following year. Lord Mansfield said: "The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated and possess separate property, —a practice unknown to the old law." Barwell v. Brooks, 3 Doug. 371, 373. In 1794 the new doctrine was affirmed in the leading case of Corbett v. Poelnitz, 1 Term R. 5. Lord Mansfield again justified the result by reasoning similar to that just quoted. These cases "introduced a new principle into the English law, respecting the relations of husband and wife; but a principle that was familiar to the Roman law, and to the municipal law of most of the nations of Europe." 2 Kent, Comm. 159. It was natural that this principle should appeal to Lord Mansfield, whose work is so distinguished for its up-building of commercial law. So long as he remained upon the bench these cases were followed. Accordingly, in 1788, Mr. Justice Buller said that separation deeds were valid when fairly entered into, and that courts of equity had jurisdiction to enforce them. Fletcher v. Fletcher, 2 Cox, Ch. 99. In another case he said that it had been decided that by agreement the parties could make the wife a *feme sole* as to everything but the right of remarriage. Compton v. Collinson, 2 Brown, Ch. 377. The case went off upon another point, and the cases upon this question are not cited. Acquiescence in the doctrine of Corbett v. Poelnitz was by no means uniform. The case "gave rise to great scrutiny and criticism. It was considered as a deep and dangerous innovation upon the ancient law." 2 Kent, Comm. 159. Lord Mansfield retired in 1788. His successor, Lord Kenyon, had passed most of his life as a law writer for more successful practitioners, and as a judge of an inferior court in a remote part of the

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kingdom. His reverence for the law was as great as Mansfield's devotion to progressive ideas. The effect of the change is plainly traceable in the decisions upon this subject. In 1790 the case of Compton v. Collinson, *supra*, having been sent out from chancery for the opinion of the court of common pleas upon the law, Lord Loughborough said that the question of a separated wife's liability to suit was still an open one. Compton v. Collinson, 1 H. Bl. 334. In the same year the ecclesiastical court again declared its adherence to the doctrine heretofore noticed. Nash v. Nash, 1 Hagg. Consist. 140. In 1792 the chancery court, following the *dictum* of Justice Buller in Fletcher v. Fletcher, decreed specific performance of articles of separation, in the face of the husband's offer to return and live with his wife. Guth v. Guth, 3 Brown, Ch. 614. This case was never considered sound. Soon after its decision Lord Loughborough denied equity jurisdiction of suits involving the marital relation. Legard v. Johnson, 3 Ves. 352, decided in 1797. Again in 1792, Justice Buller expressed his adherence to the law as held by Lord Mansfield. A writ of *habeas corpus* was directed, at the instance of J. Greygoose, to bring up the body of his wife. It was alleged that she was detained by the defendant, and living with him in adultery. One defense set up, but not fully pleaded, was a separation contract, and Rex v. Mead, 1 Burrows, 542, was relied upon. Justice Buller said: "If this case turn out on further examination to be like that in Burrows, I am strongly inclined to think that would be an answer to the writ. But that is not at present made out." Rex. v. Winton, 5 Term R. 89. The chief justice was absent when this decision was rendered. The question was first considered by Lord Kenyon in 1794, when he declared that, if changes in the law were needed, they must be made by the legislature. The authority of Corbett v. Poelnitz was doubted, but the non-liability of the defendant was finally put upon other grounds. Ellah v. Leigh, 5 Term. R. 679. This was after Justice Buller had retired from the king's bench, to accept a seat upon the common bench. Two years later, when speaking of the same subject, Lord Kenyon said: "We must not, by any whimsical conceits, supposed to be adapted to the altering fashions of the times, overturn the established law of the land. It descended to us as a sacred charge, and it is our duty to preserve it." Clayton v. Adams, 6 Term R. 604. A decision of his in 1793 has sometimes been referred to as inconsistent with the views expressed in the cases just cited. In a suit for the seduction of a wife, the defense was set up that before the commission of the acts complained of the husband and wife had voluntarily separated. It was decided that this went to the merits of the action. Weedon v. Timbrell, 5 Term R. 357. The real ground of the decision was that this action is not maintainable by one who has abandoned the right upon which the action is founded. It does not decide that rights had been acquired under a valid contract. In harmony with this view, the same judge held that the fact that the husband was living in adultery was a bar to his suit. Wyndham v. Wycombe, 4 Esp. 16. While this decision was erroneous (Cross v. Grant, 62 N. H. 675, and cases cited), it is of importance as showing that Weedon v. Timbrell was not based upon the proposition that a separation agreement is a valid contract. In 1800 the question involved in Corbett v. Poelnitz came before Lord Eldon. He refrained from deciding it, because it was then pending in a case which was soon to be argued before all 12 judges; but he reviewed the cases, and manifestly was of the opinion that the decision of Lord Mansfield was unsound, and that Rex v. Mead, 1 Burrows, 542, was not an authority for the validity of separation agreements. Beard v. Webb, 2 Bos. & P. 93. In the case there referred to the question was fairly presented for decision. It was twice argued before all the judges, except Justice Buller, who was incapacitated by the illness of which he died shortly thereafter. All concurred in the opinion of the chief justice, overruling Corbett v. Poelnitz. Lord Kenyon said: "If * * * the parties were competent to contract at all, it would then become material to consider how far a compact can be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out, and it was asked whether, after such an agreement as this, the temporal courts could prohibit it if either were to sue in the ecclesiastical court for the restitution of conjugal rights; whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction; whether they could be witnesses for or against each other; whether they could sue and take each other in execution? And many other questions will occur to every one, to which it will be impossible to give a satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage while it subsists, and from thence to infer rights of action and legal responsibilities, as consequences following from such alteration of character and condition; or how any power, short of that of the legislature can change that which, by the common law of the land, is established as the course of judicial proceedings." Marshall v. Rutton, 8 Term. R. 545. Chief Justice Eyre of the common pleas, who retired shortly after the first argument of the case, also concurred in this opinion.

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It was thus that the law stood until the death of Lord Kenyon, in 1802. During that year a case arose, involving the validity of an agreement between George Chambers, his wife, and certain trustees. The husband agreed that in case of a future separation the wife might live where she chose, without molestation from him, and that he would make certain payments to the trustees for her. A separation took place. The payments were not made, and the trustees sued on the covenant. The case was argued upon the general invalidity of separation agreements, and especially upon the point that an agreement looking to a future separation is illegal. Lord Ellenborough, C. J., held the contract to be valid, upon the ground that "the question which has been agitated appears to have been laid at rest for a long period by repeated decisions and the uniform practice of the courts." So far as the agreement related to a future separation, he declared it was no worse than others which had been upheld. Rodney v. Chambers, 2 East, 283. The case of Nicholls v. Danvers, 2 Vern. 671, was relied upon as authority for the proposition. It is true that, taking that case as reported by Vernon, such a holding might, perhaps, be inferred. There was such an agreement between the parties, but the court did not enforce it. Proceedings for cruelty had been had in the ecclesiastical court (1 Fonbl. Eq. 97, note), and this was merely an application for alimony, in accordance with the practice in the chancery courts after the Restoration. Thus, in two years' time, at the first term presided over by Lord Ellenborough, the conservative doctrines laid down by Lord Kenyon were disapproved of, and a decision was rendered of so radical a nature that it finds no support in the cases preceding it, and has not since been followed as an authority. A side light upon this case is seen in the reference to the wife as "the Honorable Jane Rodney," and to the husband as "George Chambers." In the following year Lord Eldon expressed a strong disapproval of Rodney v. Chambers, and of the whole doctrine of separation agreements. He suggested, however, that the practice of upholding them to a limited extent (that is, as to property rights might have become too firmly established to be overturned. The case went off upon a question of pleading, and was then settled by the parties. St. John v. St. John, 11 Ves. 526. In 1804 the master of the rolls recognized the validity of an agreement to pay an annuity to a separated wife, without discussion of the question. Cooke v. Wiggins, 10 Ves. 191. In 1806 the common pleas, by a divided court, held that an unfulfilled agreement to pay a separate allowance did not free the husband from liability for necessaries thereafter furnished to his separated wife. Nurse v. Craig, 2 Bos. & P. (N. R.) 148. Sir James Mansfield, C. J., dissented, following the reasoning of Lord Mansfield in the earlier cases. In Worrall v. Jacob, 3 Mer. 256, 268 (decided in 1817), Sir William Grant, master of the rolls, said: "I apprehend it to be now settled that this court will not carry into execution articles of separation between husband and wife. It recognizes in them no power to vary the rights and duties growing out of the marriage contract, or to affect, at their pleasure, a partial dissolution of that contract. It should seem to follow that the court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenant between the husband and the trustee is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law." He also quotes from Lord Eldon, as follows: "If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if *dicta* have followed *dicta* or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject." St. John v. St. John, 11 Ves. 526. Accordingly, effect was given to an appointment by a separated wife of property, deeded by the husband to trustees in consideration of their agreement to save him harmless from his wife's debts, etc. Shortly thereafter the ecclesiastical court again reiterated its adherence to the view that these agreements are void. "These courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants as insignificant in a plea of bar, and leave it to other courts to enforce them, so far as they may deem proper upon a more favorable view (if they entertain it) of their consistency with the principles of the matrimonial contract." Mortimer v. Mortimer, 2 Hagg. Consist. 310, 318. In 1821 a bill in equity was brought for the cancellation of separation deeds upon the ground that they were contrary to the policy of the law and void. The bill was dismissed for the reason that, if the plaintiff's contention was sound, it was as good a defense to the deed at law as in equity. Lord Eldon, again considering the question at some length, said: "I perceive that it seems to have struck every one as extraordinary that such deeds should ever have been supported. * * * It has always seemed to me very difficult to hold these deeds legal. It seems to be admitted that a mere agreement to live separate is one that would not be deemed valid; and it seems strange, as Sir William Grant observes, that, if the primary object be vicious, these auxiliary provisions should be held good, and thereby the objects which the law objects to should be carried into effect." Westmeath v. Westmeath, Jac. 126, 141, 142. Other chancery judges entertained different views. Upon demurrer to a bill brought to recover arrears of an annuity due under a separation agreement, Richards, lord chief baron of the

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exchequer, said: "The question is not what the law ought to be, but what it is; and the opinions of judges, however great and learned, are not to be put in competition with decisions determining the point and settling the law." Baron Graham said: "The language of regret is certainly found to be used by many of the judges; but the law is clearly established, and such demands have been constantly enforced." Notwithstanding this declared confidence in the settled state of the law, the chief baron also said that the case involved "a grave question, of too great importance to be disposed of on demurrer." Ros v. Willoughby, 10 Price, 2, decided in 1822. Cases following soon after this held that separation deeds are valid, so far as they relate to an annuity for the wife (Jee v. Thurlow [1824], 2 Barn. & C. 547; Wilson v. Mushett [1832], 3 Barn. & Adol. 743); but invalid if the separation does not take place until a future day. Hindley v. Westmeath (1827), 6 Barn. & C. 200. In 1835 the question first came before the house of lords. A Scotch nobleman had obtained a divorce from his wife in the courts of that country, and one question was whether the wife was within the jurisdiction of the court, and duly served with process. The decision turned upon the fact as to her residence, and, as she was living apart from her husband under a separation agreement, it was argued that she was no longer domiciled where he was. In speaking of the agreement, Lord Brougham said: "What is the legal value or force of this kind of agreement in our law? Absolutely none whatever, in any court whatever, for any purpose whatever, save and except only one,—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach; no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common-law courts that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the wife's living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife,—nay, even when he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him,—all is utterly insufficient to repel the claim which he makes for the loss of her society, without doing any act either in court or *in pais* to determine the separation agreement." Lord Lyndehurst said: "The strongest articles of separation may be drawn up and signed with full acquiescence of the husband and wife, yet he may sue her and she may sue him notwithstanding." Warrender v. Warrender, 2 Clark & F. 488, 527, 561. In the same year the case of Waite v. Jones, 1 Bing. N. C. 656, was decided in the court of common pleas. The plaintiff sued for money agreed to be paid in consideration of his executing a deed of separation from his wife. The defense was that the promise to execute the deed was illegal, and vitiated the whole agreement. The court held that agreements for future separation, or promises of payments to induce the same, are illegal; but that an agreement for a present separation may be valid. It was admitted that a promise to separate, in consideration of a sum of money, was not binding; but this agreement was upheld because it might be inferred that the separation had already taken place, and it did not affirmatively appear that this promise induced such action. Upon appeal to the exchequer chamber, the decision was affirmed by a divided court. Lord Denman, C. J., dissenting, disapproved of separation deeds, and said: "If I could venture to lay down the principle which alone seems to be safely deducible from all these cases, it is this: That when a husband has by his deed acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant." Jones v. Waite, 5 Bing. N. C. 341. The judgment was affirmed in the house of lords, and the contract was upheld in a brief opinion. Jones v. Waite (1842), 4 Man. & G. 1104.

From this time on it seems to have been the law of England that such contracts are enforceable except as to the one provision, which is of their essence. Courts accepted the rule, while acknowledging the lack of reason for it. "It is in vain to regret the perplexities in which courts have found themselves involved by enforcing the minor and auxiliary parts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of it." Frampton v. Frampton (1841), 4 Beav. 287, 293. In 1848 the house of lords held unequivocally that a separation agreement is a valid contract, and specific performance of the covenants of the deed was decreed. Wilson v. Wilson, 1 H. L. Cas. 538. The case goes solely upon the ground of recent decisions, admitting that the holding is opposed to earlier precedents. The deed was made to settle the wife's suit for nullity in the ecclesiastical court, and the case might have been distinguished on that ground. Shortly after this Lord Romilly, master of the rolls, enjoined the breach of a covenant not to interfere with the wife, who was living separate. The upholding of separation deeds "in a great number of cases" is the only reason assigned for the decision. Sanders v. Rodway (1852), 16 Beav. 207. The doctrine of these later cases was not wholly approved of, and in 1858 the court declared that the very basis of the contract was an agreement which could not be enforced in any court. Vansittart v. Vansittart, 2 De Gex

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& J. 249. In most cases, however, the general tendency towards upholding the agreement was followed. Webster v. Webster, 1 Smale & G. 489; Randle v. Gould, 8 El. & Bl. 457; Williams v. Baily, L. R. 2 Eq. 731; Rowley v. Rowley, L. R. 1 H. L. Sc. 63; Gibbs v. Harding, L. R. 8 Eq. 492. Lord Chancellor Westbury, in 1862, enjoined a suit for restitution which had been begun in the divorce court, contrary to the stipulation of a separation deed. The divorce court had succeeded to the jurisdiction of the ecclesiastical court in 1857 (20 & 21 Vict. ch. 85), and administered the law in a similar manner. *Id.* § 22. The chancellor justified the decision by reasoning that separation deeds were valid, although the ecclesiastical doctrine was different, because by a statute of Henry VIII. the ecclesiastical law was subordinated to the common law; that the decision of the house of lords in Wilson v. Wilson, 1 H. L. Cas. 538, overruling the earlier cases, must be treated like a statute, and that while a voluntary separation was an offense against the ecclesiastical law, it was not one against the common law, and therefore the rights in controversy were only private, and public policy was not involved. Hunt v. Hunt, 4 De Gex, F. & J. 221. The case was appealed to the house of lords, but no decision was rendered, as Mrs. Hunt died *pendente lite*. See Brown v. Brown, L. R. 7 Eq. 185, 191. The reasoning of this case does not seem to have been followed, but its conclusions have been adopted. In 1879 Sir William Jessell, master of the rolls, treated the question as settled by the later cases. "For a great number of years both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that husband and wife should agree to live separate; and it was supposed that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy, and other considerations arose, and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately; and that was the view carried out by the courts when it became once decided that separation deeds were not *per se* against public policy." Besant v. Wood, 12 Ch. Div. 605. In that case the agreement provided that each party should have the custody of one child. Afterwards the father sued for and obtained custody of the one with the mother, the court treating the agreement touching that subject as void. Thereupon the wife sought to renew cohabitation, "but the court deemed that the policy of the law made her agreement for separation controlling over her, and the consideration for it void as to him. This exquisitely refined principle of high honor does not pertain to the laws of so young a people as we are." 1 Bish. Mar. & Div. § 634a, note. In the same year it was again decided that an agreement not to demand restitution of conjugal rights is a valid contract, and that, since by the judicature act of 1873 all defenses are made available in the divorce courts that would be available in equity, the covenant is a bar to proceedings for restitution. Marshall v. Marshall, 5 Prob. Div. 19. Finally, in 1888, it was decided that a trustee is no longer necessary, and that the parties may make the contract directly with each other. McGregor v. McGregor, L. R. 20 Q. B. 529. This decision is expressly put upon common-law grounds, and in no way depends upon statutes enlarging the powers of married women.

It appears that the present position of the English courts has been reached by means of a gradual abandonment of common-law doctrines. It originated in the undoubted proposition that an agreement by the husband to support his wife is not in violation of marital obligation, but a part performance of the duties thereby imposed. From this has come the whole elaborate system of annuities and other property arrangements, each finding its real, if not ostensible, consideration in an agreement to live separate. For a time some other consideration was always shown, as, for example, the promise of a third person to furnish support to the wife. Later this concession to the old law was abandoned, and while courts acknowledged the inconsistency of their position, they enforced property arrangements that depended solely upon a principal agreement which was declared to be invalid. Nor did fallacious reasoning stop here. The argument next advanced was, that while it was true courts in words denied the validity of these agreements, by judgments enforcing provisions dependent upon them, the judges really decided that separation agreements were good contracts. It was not without some vigorous protest that this line of argument was accepted as sound, but it finally prevailed. In one phase after another it was adopted, until now it seems to be held that as to everything but the right to remarry, the parties may divorce themselves. This wide departure from the common law has been induced by conditions which do not exist here. The arrangement of property matters through trustees, which forms so large a part of English conveyancing that half of the property in England is vested in nominal owners (2 Kent, Comm. 182), is practically unknown in this state. It is to the conveyancers, and their eagerness in seizing upon each new opportunity for arranging property matters, that the present results are largely due. Running through many of the opinions is found the idea that these conveyances are now so common that the titles to large amounts of property depend upon them, and therefore they cannot safely be disturbed. Another fruitful source of such agreements was that there was practically no divorce from the bonds of matrimony in England. These causes do not exist here. The decisions which

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were in part induced by such conditions, and in part by the notions of the times as to "social policy" (Wennhak v. Morgan, 20 Q. B. Div. 635), are not authority here when in conflict with the common law. The doctrine adhered to by Lord Kenyon, that if changes in the law are needed, they must be made by the legislature, still prevails in this state. The modern English rule has not been generally adopted in this country. Few, if any, American courts have ever gone so far as to enforce an agreement to live in separation, or have even sustained covenants incident to such an agreement, except upon facts assumed to be sufficient to avoid a holding that the promise to live apart is valid. In a few states it is declared that these agreements are wholly void. Collins v. Collins, 62 N. Car. 153; Simpson v. Simpson, 4 Dana, 140, 142. The general doctrine of these cases does not seem to differ materially from that of most of the American authorities, but the application of the rule to contracts in part dependent upon an illegal covenant is more logical and satisfactory. Some of the late decisions in New York approach more nearly to the modern English theory than those in other states. The great number of reported cases in which these agreements are involved in one way or another, shows that they have come to be in common use there. As in England, the law supporting them has developed from small beginnings. In 1811, in the case of Baker v. Barney, 8 Johns. 72, it was decided that a husband who had provided suitably for a separated wife, was not liable for goods thereafter furnished to her, but that in the absence of such provision he was liable for necessaries, in spite of her agreement to the contrary. There was no discussion of the validity of agreements to live separate, and the case is disposed of in a brief *per curiam* opinion. Two years later it was relied upon as an authority for the proposition that upon the execution of a separation agreement the marriage union "essentially ceased," and therefore the husband and wife were competent witnesses for or against each other. Fenner v. Lewis, 10 Johns. 38. The weight of this case is much lessened by the later opinion of the then chief justice. "The general principle is established that the law does not authorize or sanction a voluntary agreement for a separation between husband and wife. * * * A private separation is an illegal contract, a renunciation of stipulated duties from which the parties cannot release themselves by any private act of their own. * * * Nothing can be clearer or more sound than this conjugal doctrine." 2 Kent, Comm. 176, note "b." It was next held that a bond for separate maintenance, which was assumed to be based upon a contract to continue to live apart, was valid and enforceable so long as the separation continued. Baker v. Barney, 8 Johns. 72, was relied upon, and no distinction was noted between agreements which do and those which do not depend upon a covenant to live apart. Shelthar v. Gregory (1829), 2 Wend. 422. Relying upon these cases, Chancellor Walworth, although joining in Lord Eldon's expressions of regret at the state of the law, held that an agreement for an immediate separation was valid if made through a trustee. Carson v. Murray (1832), 3 Paige, 483. The opinion also stated that a return to cohabitation would restore the husband to all his marital rights. The logic by which it is held that the mere agreement to live apart is invalid, and that the covenant as to maintenance can be sustained only through a trustee, leads inevitably to the conclusion that the covenant does not in any way affect marital rights. When it is also held that a return to cohabitation restores such rights, and puts an end to the contract with the trustee, it becomes evident that the true reason which led the court to sustain the agreement in the first instance was not given. If the covenant did not affect marital rights, its rescission could not restore them. If the rescission of the covenant was a necessary accompaniment of the restoration of marital rights, its original execution must have had to do with taking them away. This decision fairly illustrates the course taken in other cases in the court of chancery. Rogers v. Rogers, 4 Paige, 516; Heyer v. Burger, Hoff. Ch. 1; Champlin v. Champlin, *Id.* 55; Anderson v. Anderson, 1 Edw. Ch. 380; People v. Mercein, 8 Paige, 47. These cases were not always approved of. In Mercein v. People, 25 Wend. 64, 77, Justice Bronson said: "It is well worthy of consideration whether all agreements based on the voluntary separation of husband and wife are not contrary to law, and absolutely void." Chief Justice Nelson, in delivering the opinion of the court denying to such an agreement the effect of placing the wife on the footing of a *feme sole* as to suits at law, said that in courts of law the agreement was "condemned as waste paper by the soundest principles of policy, morality and law." Beach v. Beach, 2 Hill, 260. In many of the later cases agreements for support and as to property have been upheld, apparently without much regard as to whether they in fact depended upon a covenant to continue to live separate (Carpenter v. Osborn, 102 N. Y. 552, 7 N. E. Rep. 823; Pettit v. Pettit, 107 N. Y. 677, 14 N. E. Rep. 500; Galusha v. Galusha, 116 N. Y. 635, 22 N. E. Rep. 1114, 6 L. R. A. 487; Clark v. Fosdick, 118 N. Y. 7, 22 N. E. Rep. 1111, 6 L. R. A. 132), until the court declared in terms that "it is settled in this state that a contract between a husband and wife who have separated, to thereafter live apart, is not void on the ground of public policy." Duryea v. Bliven, 122 N. Y. 567, 25 N. E. Rep. 908. This proposition is perhaps modified or explained by the very recent opinion in which the court said that "it must be borne in mind that a contract between husband and wife is void at law, and upheld solely in equity, and then not in every case, but only when the provision for the maintenance of the wife or children is suitable and equitable." Hungerford v. Hungerford, 161 N. Y. 550, 553, 56 N. E. Rep. 117, 118. In some other

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late cases agreements of this sort are disproved of. Poillon v. Poillon, 49 App. Div. 341, 63 N. Y. Supp. 301; Whitney v. Whitney, 4 App. Div. 597, 36 N. Y. Supp. 891, 39 N. Y. Supp. 1136; Friedman v. Bierman, 43 Hun, 387.

In Massachusetts, actions to enforce the husband's agreement to pay money to or for a separated wife have been sustained. Page v. Trufant, 2 Mass. 159; Holbrook v. Comstock, 16 Gray, 109; Fox v. Davis, 113 Mass. 255. The question of the validity of such an agreement when inseparable from a covenant to continue to live apart arose in Albee v. Wyman, 10 Gray, 222. The court considered the English rule to be open to grave objections, and disposed of the case upon other grounds. In a recent case the agreement was sustained because the covenant to pay money for support was separable from others which were objectionable. Grime v. Borden, 166 Mass. 198, 44 N. E. Rep. 216.

In the United States courts agreements for a separate maintenance are upheld. Whether they would be if they depended upon an agreement to continue to live apart is a question the court was not called upon to consider, and it declined to discuss the subject in any aspect the case did not present. Walker v. Walker. 9 Wall. 743, 19 L. Ed. 814.

The question was early before the Connecticut court, and gave rise to much discussion. It was finally decided, by a vote of five to four, that a contract for separate maintenance was valid if made for what the court termed "proper cause"; and that, while "there may be cases of separation by agreement, attended with such circumstances and resting on such foul principles that good policy will not support them, * * * when a case is claimed to be of that description it is incumbent on those who claim it so to show it." Nichols v. Palmer, 5 Day, 47, 52, 53. A discretionary power of this kind is broad, and somewhat novel. The practical result of exercising it would be what is set forth in one of the dissenting opinions: "It is true, it has been said, that such separations should be admitted only in cases of the most urgent necessity, and for the strongest reasons; but no line of demarcation can be drawn. This decision proclaims to all who are married that they have the right to separate by mutual consent, as to whim, fancy, or passion may dictate." *Id.* 60. The true rule is stated in the dissenting opinion of Judge Ingersoll: "The marriage contract cannot, *ad libitum*, be dissolved by the parties. Nay, I presume in every case application must be made to a forum appointed by law for the purpose, to effect a dissolution. It follows, then, of course, that every agreement the consideration of which is the dissolution, or the intended dissolution, of the marriage contract, is void, and cannot be enforced in a court of justice. What, then, is a dissolution of it? I should suppose an agreement to live separately, and to perform none of the duties to each other, which they solemnly promised to perform when the marriage took place, is a dissolution of the contract, so far as the parties can dissolve it. If this be a just position, every agreement to carry into effect such separation must be against the law. The agreement in question, being made to carry into effect such separation, by fair logical deduction, is against law and void." *Id.* 61. In a recent case the court of that state said of these contracts: "The principle upon which they are sustained is, not that the separation should be enforced, nor that it is lawful for the parties to contract to separate, but that when they are living apart for causes rendering such separation reasonably necessary the agreement of the husband to perform his duty to furnish support for his wife should be carried out." Boland v. O'Neil, 72 Conn. 217, 44 Atl. Rep. 15. "After a marriage is entered into, the relation becomes a *status*, and is no longer one resting merely on contract. It is the relation fixed by law in which the married parties stand to each other, toward all other persons, and to the state. And it is a relation from which the persons cannot separate themselves by their own agreement, or by their own misconduct. This *status* can only be dissolved between living parties by the assent of the state, which is ordinarily indicated by the judgment of a competent court. When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage ties, which neither the collusion nor the negligence of the parties can impair." Andrews, C. J., Allen v. Allen (Conn.), 46 Atl. Rep. 242, 49 L. R. A. 142. According to these decisions, the present law of that state is more nearly expressed in the dissenting opinions in Nichols v. Palmer, 5 Day, 47, than in the prevailing ones.

That a contract simply for separate maintenance is valid may be said to be the general American rule. Randall v. Randall, 37 Mich. 563; Henderson v. Henderson (Oreg.), 60 Pac. Rep. 597, 48 L. R. A. 766; Emery v. Neighbour, 7 N. J. Law, 142; Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 Atl. Rep. 926; Phillips v. Meyers, 82 Ill. 67; Luttrell v. Boggs, 168 Ill. 361, 48 N. E. Rep. 171; Dutton v. Dutton, 30 Ind. 452; Robertson v. Robertson, 25 Iowa, 350; Carey v. Mackey, 82 Me. 516, 20 Atl. Rep. 84, 9 L. R. A. 113; Roll v. Roll, 51 Minn. 353, 53 N. W. Rep. 716; Helms v. Franciscus, 2 Bland, 544; Squires v. Squires, 53 Vt. 208; Gaines' Admx. v. Poor, 3 Metc. (Ky.) 503; Chapman v. Gray, 8 Ga. 341; McLaren v. Bradford, 52 Ga. 648; Garver v. Miller, 16 Ohio St. 527; Hutton v. Hutton's Admr., 3 Pa. 100; Buckner v. Ruth, 13 Rich. Law, 157; Goodrich v. Bryant, 5 Sneed, 325; Bowers v. Hutchinson, 67

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Ark. 15, 53 S. W. Rep. 399. In most of the cases where the question has been discussed the decisions have been put upon grounds other than that of upholding an agreement to live separate. In a few cases courts have been misled by the fact that an agreement to maintain is valid into supposing that one to live separate is equally so. Even these courts agree that, if there be a covenant for future separation, the whole deed is void. Yet this has no more tendency to promote a method of living not approved by law than an agreement to continue a present separation. The distinction, so far as one exists, originated from the rule that a mere agreement to maintain a separated wife was all that was at first recognized. This was put upon the ground that the husband's agreement was one to do what was a part of his duty. It was not the fact that the agreement depended upon an existing separation, but that it neither depended upon nor induced separation of any kind, either present or prospective, that made it a valid contract. When there was an existing separation, conveyancers were skillful enough to so draw the agreement that it appeared free from objectionable features, and so it would be upheld; but, when there was only a contemplation of separation, this was not so easily accomplished. The real motive and consideration then appeared in the contract, and for this cause it would be condemned by the court. Hence it came to be thought that, if the parties had actually separated, they might make a legal contract to continue to live apart. "Out of these propositions, namely, that married parties cannot validly contract to live in separation, yet the husband can obligate himself to render her a maintenance wherever she resides, comes the entire doctrine of separation under articles. When we look at the cases we find that they are sometimes discordant, and sometimes the particular decision proceeded on a misapprehension of true legal distinction; but, on the whole, the law as adjudicated is plainly so in our country, and it was so in England until of late, however it may be there now." 1 Bish. Mar. & Div. § 633. This doctrine is the only one which can be sustained if it be conceded that the marital *status* is one in which the state has an interest, and over which it may exercise a control. No intermediate rule ever has been or can be justified by any process of reasoning. If it be true that the rights involved are only private, why stop at the right of remarriage, or object to decrees of divorce by agreement? If it is good law that by their own act husband and wife may cease to sustain that relation, and may thus become as strangers, what is the principle that forbids one of them to remarry? No answer to these questions has been vouchsafed. The courts which have announced the extreme decisions have thus far refrained from considering the end to which their logic leads. In avoidance of these questions and similar ones asked long ago by Lord Kenyon, it is said that public sentiment has changed, social policy is different, and courts must fashion the law to the demand of the times. However satisfactory this line of argument may be in England, it cannot be followed here. "To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative. One of the fundamental principles of all our government is that the legislative power shall be separate from the judicial." Dash v. Van Kleeck, 7 Johns. 477, 498. The authorities in this state, so far as they have touched upon the question, follow the common law. In Pidgin v. Cram, 8 N. H. 350, the husband and wife had separated, and the wife was living with her father, who had covenanted with the husband to support her. It was decided that this agreement did not free the husband from his obligation to support his wife. So long as its covenants were performed, he would not be liable for goods furnished to her, because he was in this way performing his duty. If, however, she should be driven from her father's house by the inmates thereof, the husband would be liable to one who thereafter supplied her with necessaries. Unless she leaves his house against his will, he is bound to support her, and she takes his credit with her. Town of Rummey v. Keyes, 7 N. H. 571; Allen v. Aldrich, 29 N. H. 63. Sayles v. Sayles, 21 N. H. 312, was a suit upon a note given in consideration of a promise not to contest a libel for divorce. Justice Wood said: "No such agreement, even if executed, can form a valid consideration for either a verbal or written promise. The great and principal object of the agreement made between the parties was to bring about a dissolution of the marriage contract, and to put an end to the various duties and relations resulting from it. Any contract having any such purpose, object, and tendency cannot be, in law, sustained, but must be regarded as being against sound public policy, and consequently illegal and void. The marriage relation is one to be encouraged and maintained when formed. Such is the well-settled policy of the law; and its dissolution or determination is not to be left to depend upon the caprice of the parties. If determined, it must be done in accordance with some positive enactment of law, and in due course of judicial proceedings. The good order and well-being of society require this." The then recent cases upholding separation agreements were reviewed, but no opinion of their soundness was expressed beyond the suggestive statement that "in this state, at least, a separation *a vinculo* can only be effected through a decree of the courts of law." From this it may well be inferred that the court did not consider those cases as in harmony with the law here. Similar views of the nature of the *status* have been expressed in other cases. Clark v. Clark, 10 N. H. 380; Cross v. Cross, 58 N. H. 373; Cross v. Grant, 62 N. H. 675. So far as the English ideas are outgrowths of the early form of divorce *a mensa et thoro*, they are not applicable here. Limited divorces were never granted

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in this state. Parsons v. Parsons, 9 N. H. 309, 317. As early as 1791 absolute divorces were here granted for the causes for which limited divorces were granted under the English practice. Act Feb. 17, 1791; Laws, 1805, p. 280. In no reported case in this state has an agreement to live separate been passed upon favorably. What has been said upon the subject has uniformly been opposed to the validity of such a contract. The theory that marriage is only a civil contract is also disapproved of. "It is an institution of society, having its foundation in civil contract." Cross v. Grant, 62 N. H. 675, 684. The whole doctrine is summed up by Chief Justice Doe in a single sentence: "The marriage contract may be broken by either party, with or without the consent of the other; but it cannot be rescinded or modified by them." Ferren v. Moore, 59 N. H. 106. It is not necessary to now consider how far the statutory power of husband and wife to contract as to property matters extends, or whether their agreement to release prospective rights in each other's estates could, in any event, be enforced. Compare Shute v. Sargent, 67 N. H. 305, 36 Atl. Rep. 282, with Reed v. Blaisdell, 16 N. H. 194; Cutter v. Butler, 25 N. H. 343; and Hayes v. Seavey, 69 N. H. 308, 46 Atl. Rep. 189. Conceding that the right extends to the release of every property interest, present and prospective, it cannot avail this plaintiff. Modern legislation enlarging the rights of married women as to contracts and torts has not destroyed the marital *status*, as defined by the common law. "There is nothing in the series of statutes by which her rights and privileges have gradually approximated an equality with those of her husband that abrogates the marital rights of trust and confidence incident to the relation in all stages of society. * * * The obligations, the disabilities, and the privileges inherently consequent upon the married union remain unchanged. * * * While unjust disabilities of the wife have been removed, there are implied stipulations of the contract which each party remains justly disable to violate." Laton v. Balcom, 64 N. H. 92, 95, 96, 6 Atl. Rep. 37, 39, 40. "The incidental changes of conjugal rights and duties are such only as are reasonably and necessarily implied." Gross v. Grant, 62 N. H. 675, 685. "These statutes have not taken away the right of either party to the marital contract to have the affection, society, and aid of the other." Ott v. Hentall (N. H.), 47 Atl. Rep. 80. An agreement renouncing marital rights is void. An agreement touching property rights may be valid. If covenants of each kind occur in the same agreement, its validity must be determined by the ordinary rules. If the promises are separate, and the consideration divisible, the legal part of the contract is upheld; but if the consideration is entire the whole must fail. Bixby v. Moor, 51 N. H. 402. Applying this test to the agreement in the present case, the result is at once apparent. The husband agreed to separate on friendly terms, and to make no demand on the wife nor her property after that date. The wife made a similar agreement on her part. The agreement to live separate is not distinct from that as to property. There is no separate promise, upon separate consideration, as to the legal and illegal parts. They are blended together without discrimination. The wording of the writing and the facts surrounding the separation all tend to show that the dissolution of the marriage relation was the object the parties had in view. All other matters were merely incidental to this main purpose. The agreement was an attempt by a husband and wife to do that which the court could not have done, either upon the application of one of the parties or with the consent of both. They were desirous of dissolving the marital relation; and, although no cause for divorce existed, they entered into this agreement, whereby each attempted not only to release all the rights then held as against the other, but also to absolve the other from all duties attendant upon the married state. It is not an agreement made up of distinct parts, but a harmonious whole, the main object of which is the dissolution of the marriage tie. It had its inception in the wife's declaration of her intention to leave her husband's house. The agreement as to property is merely incidental, while anything in the nature of a provision for the support of the wife is wholly lacking. It is hardly open to doubt that if they had intended to continue to live as husband and wife, they would not have contracted as to property rights. In any event, it does not appear that there would have been such a contract, or that the agreement on that subject is independent of the illegal promise to separate. "Whether the illegality extends to the whole or only a part of the consideration is immaterial. The contract was entire, and in such case the whole is void if tainted with illegality in any part." Weeks v. Hill, 38 N. H. 199, 203; Hinds v. Chamberlin, 6 N. H. 225, 227. The executor also contends that his first reason for appeal that the defendant has no interest in the estate is well-founded, because the husband "willingly abandoned his wife, and has absented himself from her, or has willfully neglected to support her * * * for the term of three years next preceding her death." Pub. Stat. ch. 185, § 18. The object of this statue is to deprive a wrongdoer of certain rights which he would otherwise possess. It applies to a "deserting husband," (Martin v. Swanton, 65 N. H. 10, 11, 18 Atl. Rep. 170, 171), and there is no desertion where there is a separation by agreement. Moores v. Moores, 16 N. J. Eq. 275, 280; 1 Bish. Mar. Div. & Sep. § 1662. There was here no abandonment and no willful neglect to support, in the sense in which those terms are used in the statute. There was do denial by the husband of any right which the wife desired to enjoy. She was not abandoned, but merely permitted to go the way of her own choosing. She was not willfully neglected, but was left to her own resources at her own request.

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NOTE.—The opinion of Justice Peaslee in the principal case is so exhaustive, both of American and English authorities, that an annotation is hardly necessary. The question of the the right of husband and wife to contract to live separately, and the validity of other provisions in the contract relating to property rights has been often discussed and the value of this opinion lies, not so much in the extended citation of authorities, but in the strong reasoning of the court in showing the fallacy on which many of the earlier cases were decided, and in announcing what it believes to be the rule commended by the wisest public policy. It is seldom that such a painstaking and learned opinion is delivered by the courts of the present day, and we assert our belief that it will repay the most careful study.

JETSAM AND FLOTSAM.

THE MEANING OF "HUMPH."

The case Powell v. M'Glynn and Bradlaw, which was recently passed upon by the Irish court of appeal, turned principally upon the question whether the word "humph," used in answer to a question, was a term of assent or dissent. The action was for damages caused by the negligence of M'Glynn in driving a horse and trap belonging to Bradlaw. The plaintiff sought to fix liability on Bradlaw by showing that M'Glynn, who was Bradlaw's servant, was at the time of the accident acting as a servant within the scope of his authority. Evidence was introduced to the effect that in response to the question put by the plaintiff's sister, "I believe you lent your pony and trap (to M'Glynn)?" Bradlaw said "Humph." On the trial below the jury rendered a verdict holding Bradlaw liable for the act of his servant. On a motion for a new trial the judges of the king's bench division were divided, two of them, Lord O'Brien and Mr. Justice Barton, holding that no liability attached to Bradlaw, while Mr. Justice Madden and Mr. Justice Boyd refused to disturb the jury's verdict. Mr. Justice Barton, in speaking of the meaning of the word "humph," said: "I do not think it has yet gained such an established meaning in our language as to enable us to rest a judicial decision in a serious case upon its signification. I can hardly conceive any witness being indicted for perjury for having falsely sworn that any one had said 'Humph.'" Mr. Justice Madden in his opinion said: "If it were necessary to interpret it, I should not feel sufficient confidence in my literary judgment to push aside the authority of the New English dictionary, which describes the word 'humph' as an expression of doubt or dissatisfaction. But the question is not what 'humph' means, but what it does not mean. And it is no more an expression of assent, or an adoption of the statements or sentiments by which it is elicited than was Mr. Burchell's 'Fudge.'" The court of appeal sustained the position of Lord O'Brien and Mr. Justice Barton.

BOOK REVIEWS.

ruary 8. The same well classified index appears as alluded to in our review of volume 4, subdivided under the following heads: acts of bankruptcy, appeals and reviews, arrest, assets, assignment, assignee, attachments, attorney, bankruptcy and bankrupts, claims, set-off, composition, concealment of assets, contempt, corporations, costs, creditors, creditors' bill, creditors' meetings, discharge, evidence, exemptions, false oaths, fixtures, fraud, insolvency, insurance policy, jurisdiction, laborer, liens, limitations, mercantile agency, notice, partners and partnerships, perjury, pleading and practice, pledge, preference, priorities, receiver, sales, state insolvency laws, stay, trustee, witness. This index is very full, and is really a digest of the contents of this volume. This volume contains the usual number of annotations to the cases published, which are very full, also a table of cases. The authors are William Miller Collier and James W. Eaton. This book contains 985 pages, bound in law sheep. Published by Matthew Bender, Albany, N. Y.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCIDENT INSURANCE—Hazardous Employment—Increased Risk.—Where an answer to a suit on an accident policy insuring plaintiff's decedent as a roundhouseman alleged that the policy provided that, if assured was injured in any occupation classed by the company as more hazardous than a roundhouseman, the company's liability should be for such principal sum or weekly indemnity as the premium paid by defendant would purchase at the rate fixed for such increased hazard, and averred that the premium per $1,000 for roundhousemen was $15, and that for firemen, the duties of which deceased was exercising when injured, was double that charged for roundhousemen, and that no part of decedent's duties as a roundhouseman required him to act as a fireman, such plea sufficiently pleaded that defendant classed

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ITY & CASUALTY CO. OF NEW YORK v. JONES, Tex., 62 S. W. Rep. 927.

2. ADMIRALTY—Seaman's Wages—Lien—Minor Son of Master.—A 16 year-old son of the captain of a schooner, employed thereon, is not entitled to a lien on the vessel for seaman's wages.—THE JOHN T. WILLIAMS, U. S. D. C. (Conn.), 107 Fed. Rep. 750.

3. ADVERSE POSSESSION.—What defendant said with reference to giving the right to others to enter upon the land in dispute and cut trees upon it was admissible in his favor as a part of the *res gestæ* the conversations having occurred within the disputed boundary.—MANN v. CAVANAUGH, Ky., 62 S. W. Rep. 884.

4. ARSON—Indictment—Sufficiency—Malice.—Rev. St. 1899, § 1875, provides that every person who shall willfully set fire to or burn any public building belonging to any county, not the subject of arson in the first or second degree, shall on conviction be adjudged guilty of arson in the third degree. Held, that an indictment that defendants did then and there willfully and feloniously set fire to and burn a public building belonging to the county was sufficient, without averring that burning was malicious.—STATE v. MCCOY, Mo., 62 S. W. Rep. 991.

5. ATTORNEY AND CLIENT—Claims Against Government—Fees.—Under the Indian depredation act (Acts Cong. March 3, 1891, ch. 538, p. 854), providing that the court shall fix the amount of fees to be paid attorneys of claimants, and make them part of the judgment, an agreement of a claimant to pay his attorney a certain per cent. of the amount of recovery above the fee which the court was prayed to allow violates the policy of the act, and is void.—LYNCH v. POLLARD, Tex., 62 S. W. Rep. 945.

6. BANKRUPTCY—Insolvent Firm—Exemptions of Personalty.—Const. N.Car. art. 10, § 1, allowing exemptions of personalty to an insolvent debtor in that state, does not contemplate that the same shall be duplicated by allowing him the exemption both from his individual estate as well as from his interest in an insolvent partnership; and hence in voluntary bankruptcy proceedings by the firm he should not be allowed the exemption out of the firm assets, unless it appears that he has no individual personal property exemption exclusive thereof.—IN RE STEED, U. S. D. C., E. D. (N.Car.), 107 Fed. Rep. 682.

7. BANKRUPTCY—Insolvent Lunatic—Guardian Ad Litem—Appointment—Publication of Process.—In bankruptcy proceedings by involuntary petition against the estate of an absent lunatic, an application for the appointment of a guardian *ad litem* will not be delayed because of the omission to publish process, since Bankr. Act 1898, § 18a, requires publication only "in case personal service cannot be made," and the appointment would be necessary notwithstanding.—IN RE BURKA, U. S. D. C., W. D. (Tenn.), 107 Fed. Rep. 674.

8. BUILDING AND LOAN ASSOCIATION—Usury.—Where an applicant for a loan from a building company subscribes for stock to be paid in monthly installments, not as an investment, but as a means to obtain a loan, and the officers know it, such subscription does not make the loon usurious, though the loan bears the full legal rate of interest.—COTTON STATES BLDG. CO. v. RAWLIN, Tex., 62 S. W. Rep. 805.

9. CARRIERS—Injuries to Goods in Transit—Vegetables—Failure to Ice Car.—In an action for damages to a car of vegetables caused by not keeping them sufficiently iced, evidence by the consignor that all the vegetables were fresh from farm wagons, and accepted by his foreman as being in first-class condition, was not hearsay.—FT. WORTH & D. C. RY. CO. v. HARLAN, Tex., 62 S. W. Rep. 971.

10. CHATTEL MORTGAGES—Cattle—Bona Fide Purchasers.—Where defendant's assignors purchased cattle, which they mortgaged to plaintiff and intervener, and defendant thereafter purchased the cattle, the only consideration being his agreement to substitute his obligation and mortgage for those of his assignors, which agreement was not assented to by intervener at the time plaintiff's suit to foreclose was brought, neither defendant nor intervener, whose mortgage was given for a pre-existing debt, was a purchaser for value without notice, so as to entitle either to superior rights over plaintiff's mortgage.—BELCHER v. CASSIDY BROS. LIVE STOCK COMMISSION CO., Tex., 62 S. W. Rep. 924.

11. CHATTEL MORTGAGE—Confusion—Partition.—Where, by reason of the confusion of mortgaged cattle, it was impossible to identify the precise stock covered by each mortgage, it was error for the court to direct the sheriff to partition the herd by seizure and sale as under execution of a certain number of head, the fair average of all the cattle, since the power thus conferred on the sheriff as a ministerial officer was judicial, and one for the court, and not the sheriff, to exercise.—BELCHER v. CASSIDY BROS. LIVE STOCK COMMISSION CO., Tex., 62 S. W. Rep. 924.

12. CONTRACT—Action for Services.—Plaintiff alleged that defendant agreed to pay him certain sums for serving summonses and executions in actions by defendant, to collect poll taxes. Held, that it was error to refuse to allow defendant to file an amended answer setting up the contract between the parties, which was void as against public policy, on the ground that the answer set up no defense.—HADDOCK v. CITY OF SALT LAKE, Utah, 65 Pac. Rep. 491.

13. CONTRACTS—General Denial—Evidence.—Where plaintiffs, who had sold ties to one to whom defendant had sublet a portion of its contract to deliver ties to a railway company, alleged a contractual relation between plaintiffs and defendant, it was proper under a general denial to show that no such relation existed, and that defendant had paid the subcontractor in full for the ties.—HARALSON v. ST. LOUIS S. W. RY. CO., Tex., 62 S. W. Rep. 788.

14. CONTRACTS—Specific Performance—Equity.—A contract agreed that the claimants to the waters of a certain stream should own and use them equally, one-third each, and that a party thereto violating the same should pay the party injured the sum of $1,000. One of the parties sold the land to which his water right was appurtenant to J, who did not assume the obligations of said contract. Held, that specific performance of said contract could not be decreed.—DALY v. JOSSLYN, Idaho, 65 Pac. Rep. 442.

15. CORPORATION—Right to Examine Books—Citation.—In proceedirgs instituted to enable one interested to examine the books of the company, the defendant excepted, and averred that it had not been cited. The citation was addressed to the manager. The citation should have been addressed to the defendant, and not to its manager.—STATE v. NORTH AMERICAN LAND & TIMBER CO., La., 29 South. Rep. 910.

16. CORPORATIONS—Suit by Stockholder—Mismanagement by Directors.—Where a bill is filed by a stockholder of a corporation to have redress alleged corporate wrongs, without having made a request of the managing body of the defendant corporation to have corrected the grievances complained of, the complainant must aver in his bill the facts constituting his excuse for not making such request with particularity and definiteness, and the averment of conclusions will not suffice, but the facts upon which these conclusions are based must be averred.—LOUISVILLE & N. R. CO. v. NEAL, Ala., 29 South. Rep. 865.

17. CRIMINAL EVIDENCE—Rape—Introduction of Child.—The child of the prosecutrix may be brought into court, in a prosecution for rape, to corroborate the testimony of the prosecutrix, and its birth and identity as the result of the illicit intercourse may be shown, but it cannot be introduced to show a resemblance to defendant.—STATE v. NEEL, Utah, 65 Pac. Rep. 454.

18. CRIMINAL LAW—Animals—Malicious Killing.—Defendant, who had ill feeling toward the owner of a

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herd of goats, approached the herd on horseback, and, after frightening the boy in charge into the brush, chased the goats around for some time; and, after he left, the herder found one of them dead, evidently killed by dogs, and dragged into the brush after being killed. Defendant was not shown to have set dogs on the goats, but he was the only person seen about them; and while he was chasing them dogs were heard barking at a residence near by, and a woman was heard setting them on the goats. Held sufficient to justify defendant's conviction of maliciously killing the goat, with intent to injure the owner.—GARZA v. STATE, Tex., 62 S. W. Rep. 751.

19. CRIMINAL LAW — Assault — Instructions.—Where prosecutor and his brother had accused defendant of sending a scurrilous valentine, which mentioned their sisters' names in an offensive manner, and, in the quarrel ensuing, the prosecutor was wounded and his brother killed,—the evidence being conflicting as to defendant's connection with the valentine,—an instruction that the valentine could not be considered by the jury against defendant, unless they found beyond reasonable doubt that he was connected with its production, was erroneous, since it was on the weight of evidence, and authorized the jury to take the valentine as a criminative fact against defendant.—KELLY v. STATE, Tex., 62 S. W. Rep. 915.

20. CRIMINAL LAW—Assault—Right to Seize Property—Mortgage.—Where defendant had a mortgage on certain rugs, authorizing him to take possession of them on default in payment of the purchase money, and, acting on this authority, he entered the house of prosecutrix without her consent, took possession of the rugs, and, when prosecutrix stood in the doorway to prevent him from leaving with them, pushed her forcibly away, he was guilty of an assault; and the provision of the mortgage was no defense, since it only entitled him to take peaceable possession of the rugs.—CULVER v. STATE, Tex., 62 S. W. Rep. 922.

21. CRIMINAL LAW—Concealed Weapons—Evidence.—Defendant testified that he was carrying a pistol for the purpose of selling it to C, and that, after failing to make a sale, he carried it with him to a dance that night. C testified that he saw defendant in the evening before the dance, and that defendant made no mention of any pistol. Held sufficient to support a verdict finding defendant guilty of unlawfully carrying a pistol.—MORALES v. STATE, Tex., 62 S. W. Rep. 751.

22. CRIMINAL LAW — Homicide — Accomplices — Circumstantial Evidence.—Where defendant was accused of being an accomplice to a homicide, and the alleged principal testified that defendant advised him to kill deceased, and gave him a gun for that purpose, there was sufficient direct evidence, so that the case was not wholly based on circumstantial evidence, and the refusal to charge the law applicable to circumstantial evidence was not error.—THOMAS v. STATE, Tex., 62 S. W. Rep. 919.

23. CRIMINAL LAW—Homicide—Provoking Assault.—Accused and his father walked up within 75 yards of deceased, when accused dropped on his knees, leveled his gun at deceased, and called to him to get out from behind a wagon. Accused then ran behind some trees a short distance away, and deceased fired at him, when a general shooting occurred, in which deceased was killed. Held, that an instruction on the law of provoking a difficulty was not warranted.—CASNER v. STATE, Tex., 62 S. W. Rep. 914.

24. CRIMINAL LAW — Murder.—Defendant's husband was shot at night while in bed. They and three small children were the only persons in the house. Defendant claimed it was suicide. On her trial for murder in the first degree, the court instructed the jury that, if they found defendant not guilty as charged they should determine whether she was guilty of a crime included in the one charged; that it was possible to find one of four verdicts, viz., murder in the first degree, murder in the second degree, manslaughter, or not guilty. Held, that such charge was not objectionable as an instruction that there was evidence to support a verdict of murder in either degree or of manslaughter, but, the evidence being purely circumstantial, it was a proper instruction as to the crimes which might be included under the indictment and evidence.—STATE v. CROCKETT, Oreg., 65 Pac. Rep. 447.

25. CRIMINAL LAW—Placing Obstruction on Railroad Track — Instructions.—Where defendants were accused of willfully placing an obstruction on a railroad track, and the court charged that "the meaning of the term 'willfully' is that the obstruction was, by defendants, placed upon said railroad track with an evil intent," such instruction was erroneous, because apt to lead the jury to believe that the court thought defendants did place the obstruction on the track.—STANFIELD v. STATE, Tex., 62 S. W. Rep. 917.

26. CRIMINAL LAW — Rape — Evidence.—Where accused admits carnal intercourse and that he was armed with a pistol, but claims that the act was with prosecutrix's consent, and she denies such claim, and states that she submitted through fear, a conviction for rape will not be disturbed.—MYERS v. STATE, Tex., 62 S. W. Rep. 750.

27. DEATH BY WRONGFUL ACT—Joint Principals—Express Companies.—Sayles' Civ. St. art. 3017, gives an action for injuries resulting in death (a) when the death of any person is caused by the negligence or carelessness of the proprietor, owner, or hirer of any railroad or other vehicle, or by the unfitness, negligence, or carelessness of their servants or agents; (b) when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another. Held, that where men under the direction of an agent, who was employed jointly by a railroad company and an express company, killed plaintiff's intestate under the mistaken impression that he was about to burglarize the railroad company's building, the express company was not liable under either subdivision of the article, since it was not alleged to be a proprietor, etc., of a railroad, nor were the injuries the result of its own wrongful acts or omissions.—HOUSTON & T. C. R. CO. v. LIPSCOMB, Tex., 62 S. W. Rep. 954.

28. DEATH BY WRONGFUL ACT—Pecuniary Interest in Deceased's Life.—Where decedent, whose death was alleged to have been caused by defendant's negligence, was more than 57 years old, and was being supported by plaintiffs, who were his children, and it appeared that he did no work, and did not contribute to the support of the family, but only carried the dinners for his sons, etc., for which he was given his food and clothes, plaintiffs had no pecuniary interest in decedent's life, for which they would be entitled to recover.—PROCTOR v. SAN ANTONIO ST. RY. CO., Tex., 62 S. W. Rep. 969.

29. DEED—Escrow.—The delivery of a deed in escrow renders it absolute when the condition upon which it was made is fulfilled, and the deed takes effect from the date of the first delivery.—GAMMON v. BUNNELL, Utah, 64 Pac. Rep. 95.

30. EJECTMENT—Case Tried to the Court.—Plaintiffs sued defendants in ejectment. The case was tried without a jury. Defendants claimed that plaintiffs were estopped to claim the land in controversy by acceptance of title to other land under a previous parol partition. Various deeds to the property were introduced and verbal testimony was adduced to show parol partition. No declarations of law were given. Held, that the trial court's judgment for defendants would not be disturbed, since it was impossible, in the absence of such declarations, to determine on what theory of the case the decision rested.—SELL v. BRETTELLE, Mo., 62 S. W. Rep. 968.

31. EQUITY—False Representations — Warranties.—Where a grantee of land sought to have rescinded a note given in part payment of the price on the ground of misrepresentations as to the quantity of the land,

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and the grantor pleaded in set-off the difference between the actual area and quality of lands received by it in part payment and the area and quality as represented by the grantee, the latter could not complain that the question of his representations as to his land and the grantor's reliance thereon were submitted to the jury, on the principle that "he who seeks equity must do equity."—SWOPE v. MISSOURI TRUST CO., Tex., 62 S. W. Rep. 947.

32. EVIDENCE — Privileged Communications—Attorney and Client.—Where an accused admitted to bail could not be found, and on investigation by the grand jury it appeared that his counsel was not retained by the accused, but by some person acting for accused, or in his interest, the counsel might be compelled to disclose the name and residence or usual place of abode of such person, but not the interest such person had in the matter.—UNITED STATES v. LEE, U. S. C. C., E. D. (N. Y.), 107 Fed. Rep. 702.

33. EXECUTION—Corporate Stock—Levy on Shares.—Plaintiff attempted to levy on corporate stock belonging to his debtor by procuring an order of attachment of his property, with a clause therein commanding the sheriff to summon the corporation to answer as garnishee. The sheriff executed the order "by delivering a true copy thereof" to the president of the company. Held, under Sand. & H. Dig. § 886, providing that the order of attachment shall be executed by the sheriff by delivering a copy of the order, with a notice specifying the property attached, as to stock in a corporation, to the chief officer thereof; and section 3057, providing that whenever an officer having a writ of attachment shall levy on shares of stock in corporations he shall leave a true copy of the writ with the president, with a certificate that he levies on and takes such shares to satisfy such writ,—that plaintiff acquired no lien on his shares of stock, since, shares of stock being intangible, and not subject to levy at common law, a lien thereon can be obtained only by strict compliance with the statute.—H. B. CLAFLIN CO. v. BRETZFELDER, Ark., 62 S. W. Rep. 905.

34. EXECUTORS AND ADMINISTRATORS — Temporary Administrator — Receiver.—Where plaintiff, after prosecuting an appeal to the district court from an order of the county court refusing to appoint a temporary administrator, filed a bill for the appointment of a receiver, and in vacation the district judge, on consideration of the bill, appointed M as temporary administrator, with power to hold and preserve the estate until further order, M will be treated as a receiver, since a receiver is the only officer the court had authority to appoint in vacation; and the fact that he was designated a temporary administrator was immaterial.—LONG v. RICHARDSON, Tex., 62 S. W. Rep. 964.

35. EXECUTORS AND ADMINISTRATORS — Wrongful Sale—Representative Capacity.—Where plaintiff sued in conversion to recover the value of his property, which had been sold by an administrator as part of the estate, he claimed, not through the estate, but adversely thereto; and hence a presentation of the claim to the administrator, and rejection by him, was not a necessary condition precedent to the right of action.—SCHMITT v. JACQUES, Tex., 62 S. W. Rep. 956.

36. FIRE INSURANCE—Acts Ultra Vires—Estoppel to Deny.—Where the charter of a mutual fire insurance company required all its members to be residents of the state of incorporation, and permitted it to insure property in that state only, the company cannot, where the contract is executed, and the company has received the benefits thereof, defend an action on a policy insuring property in a foreign country by showing its want of power to issue the policy either under the laws of its own state or those of the foreign country.—CONTINENTAL FIRE ASSN. v. MASONIC TEMPLE CO., Tex., 62 S. W. Rep. 980.

37. HIGHWAYS — Dedication — Subsequent Abutting Owners.—Land having been once dedicated by the owner of the soil as a highway, and having been accepted by the public, all subsequent grantees of abutting lands are bound by such dedication, and have no right to obstruct any portion of the street.—SCHETTLER v. LYNCH, Utah, 64 Pac. Rep. 955.

38. HIGHWAYS—Laying Out—Landowner's Title—Estoppel to Deny.—Where a county instituted proceedings to open a road, and a jury of view gave notice to owners of land over which the road was located, the county, by treating an owner of lands as the sole and undisputed owner thereof, was estopped to resist the owner's claim for damages on the ground that the land had been previously condemned and taken for a road identical with the one proposed.—NORTHINGTON v. TAYLOR COUNTY, Tex., 62 S. W. Rep. 936.

39. INTOXICATING LIQUORS—Local Option Election—Declaration of Result.—The fact that plaintiff was a citizen, voter and taxpayer in the school district in which there was an election on the question of local option, did not entitle him to maintain an action to restrain the commissioner's court from declaring the result of the election.—HILL v. ROACH, Tex., 62 S. W. Rep. 969.

40. INTOXICATING LIQUORS—Local Option Law—Local Option District—Boundaries.—Where an indictment for violating the local option law charged the sale in territory described by metes and bounds, a charge that if any person shall sell any intoxicating liquor in any "town" in which the sale of intoxicating liquor has been prohibited, was not erroneous, in that it did not describe the territory as described in the indictment, the town in which defendant sold the intoxicants being within the prohibited territory.—MATKINS v. STATE, Tex., 62 S. W. Rep. 911.

41. INTOXICATING LIQUORS—Seizure and Destruction Thereof.—Under Act Feb. 18, 1899, §§ 1, 8, authorizing the seizure and destruction of any intoxicating liquors shipped into any prohibition district for the purpose of sale, and providing that such seizure and destruction shall be a good defense to an action against any officer or other person to recover for such liquors, a seizure and destruction of liquor shipped from a point within the state to a prohibited district, is a defense to an action against the carrier for the conversion thereof.—ST. LOUIS S. W. RY. CO v. GANS, Ark., 62 S. W. Rep. 742.

42. JUDGMENT—Collateral Attack — Presumptions.—Where a judgment is attacked collaterally upon the ground that no findings of fact were made, signed and filed by the judge, the validity of such judgment is to be determined from the judgment roll; and if it appears therefrom that the court rendering it is a court of general jurisdiction, and had jurisdiction of the parties and subject matter of the action, the law presumes that finding of fact were, in their absence, waived, unless the judgment roll affirmatively shows that such findings were not waived.—MCCORNICK v. FRIEDMAN, Idaho, 65 Pac. Rep. 440.

43. JURISDICTION—Justice Court — Suit to Recover Taxes.—The justice court, and not the district court, has jurisdiction of an action under Rev. St., art. 5212a, to recover taxes in the sum of $120.77 on unrendered personal property, and the statutory penalty of 10 per cent. thereon for failure to pay the same, since it is an action on a debt, and the amount due is within the jurisdiction of the justice court.—STATE v. TRILLING, Tex., 62 S. W. Rep. 788.

44. LANDLORD AND TENANT—Implied Lease.—Where a petition alleged that defendant agreed to rent certain land for a period of from year to year, at an agreed rental, and that he occupied said land for two years under the agreement, becoming liable thereby for the rental, an instruction on an express contract, and not on an implied lease, is required.—ELMENDORF v. SCHUH, Tex., 62 S. W. Rep. 797.

45. LANDLORD AND TENANT — Lease — Authority of Agent—Ratification.—Where a term lease made by an agent having no authority to make such lease is repudiated by the principal, who notifies the tenant there-

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of, both orally and in writing, but authorizes the latter to remain as tenant from month to month, the acceptance of rent at the rate specified in the lease is not a ratification thereof.—OWENS v. SWANTON, Wash., 64 Pac. Rep. 920.

46. LANDLORD AND TENANT—Lease—Refusal—Damages—Measure.—Where a lease gave a tenant an option to renew it for three years, and after an exercise of the option the landlord rented the property to another, and refused to allow the tenant to remain in possession, it was proper to charge that the landlord was liable for the difference between the rental value of the land for the renewal term and the amount which the tenant had agree to pay for the lease.—WALCOTT v. MCNAW, Tex., 62 S. W. Rep. 815.

47. LANDLORD AND TENANT—Subletting—Landlord's Lien.—That a landlord consents to the subletting of part of the property, the subtenant agreeing to pay rent to the tenant, and makes no agreement to pay rent to the landlord, does not constitute a waiver of the landlord's lien on the subtenant's crop.—TROUT v. MCQUEEN, Tex., 62 S. W. Rep. 928.

48. LIMITATIONS—Prescription—Adverse Possession.—Where a defendant in a petitory action has been in possession, claiming as owner, of the property sued for, for more than 30 years, the action is barred by prescription, whether he can show title or not, unless the plaintiff is within some exception established by law. *A fortiori* is this the case where it appears that the plaintiff has always lived in the neighborhood, and is aware of such possession and claim.—LANDRY v. LANDRY, La., 29 South. Rep. 901.

49. LIMITATIONS—Trespass to Try Title.—Where, in an action of trespass to try title to 85 acres, defendant showed a deed to himself from one who wrongfully claimed title, the recording of such deed, and subsequent payment of taxes, and actual possession of 5 or 6 acres of the land by fencing and cultivation for more than the period of limitations, but did not identify such 5 or 6 acres so that the same could be awarded to him out of the larger tract, judgment for the plaintiffs for the whole tract should not be reversed.—WILCOXSON v. HOWARD, Tex., 62 S. W. Rep. 802.

50. LIMITATION OF ACTIONS—Acknowledgment in Writing—Sufficiency.—A debtor, in writing to his creditors, wrote of "my indebtedness to you," asked for a statement of what he "now" owed, "estimated" his indebtedness to one of them at more than it really was, and asked for statements from them of their figures, that he may compare with his own. There was nothing in his letters to "repel the presumption" of a promise to pay what he admitted he owed, and nothing inconsistent with such an inference from his admission. Held sufficient acknowledgment in writing, within Code Civ. Proc. N. Y. § 396, to take the debts in question out of the operation of the statute.—IN RE LORILLARD, U. S. C. C. of App., Second Circuit, 107 Fed. Rep. 677.

51. MASTER AND SERVANT — Assumption of Risk.—A complaint stated that plaintiff, a carpenter, was employed by defendants to repair a house roof, and that while standing in the gutter at the edge of the roof, and doing the work with one hand, holding on to a window casing with the other, the casing broke, causing plaintiff to fall to the ground. The complaint also alleged that the unsound condition of the casing was unknown to plaintiff, nor could it have become known to him by the exercise of ordinary care. Held, that the plaintiff assumed the risk, since the danger was as open to his observation as to his employer's, and that allegations in the complaint that his employers assured him of the safety of that manner of working, and commanded him to proceed in that way, and that plaintiff complied because it was necessary for plaintiff to work to support himself and family, were immaterial.—HENCKE v. ELLIS, Wis., 86 N. W. Rep. 171.

52. MUNICIPAL CORPORATIONS—Cleaning Streets—Liability of City.—The cleaning of city streets and disposal of such garbage is not the performance of a duty primarily resting on the state, but is the exercise of a corporate power, as distinguished from a governmental function, for the abuse of which a city is liable.—OSTROM v. CITY OF SAN ANTONIO, Tex., 62 S. W. Rep. 909.

53. MUNICIPAL CORPORATIONS — Levee District.—Neither the St. Francis levee district, nor the board of directors thereof, is a "municipality;" and hence its bonds issued in pursuance of legislative authority are not void, as being issued in violation of Const. art. 16, § 1, prohibiting a county, city, town, or municipality from issuing any interest-bearing evidences of debt, except to pay an existing indebtedness.—MEMPHIS TRUST CO. v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST., Ark., 62 S. W. Rep. 902.

54. NEGLIGENCE—Ordinary Care.—In an action by a locomotive fireman for personal injuries, an instruction requiring him to use "such ordinary care as a person of ordinary prudence would have used under similar circumstances" was not misleading, as causing the jury to believe that plaintiff was not required to use as high degree of care as a person of ordinary prudence "would reasonably have been expected to exercise" under similar circumstances.—GALVESTON, ETC. RY. CO. v. WILLIAMS, Tex., 62 S. W. Rep. 808.

55. NEGLIGENCE — Traveled Roadway — Fence — Injuries—Allegations.—Plaintiff alleged that, while traveling in a buggy at night, he ran into a barbed-wire fence which had been constructed across the road by defendant, and that thereby his horse was so injured that it afterwards died; that the road was in common use by the traveling public, and had been so used for a long time prior to the accident; and that the fence had no plank by which it could be distinguished at night. Held, that the petition was not demurrable for not alleging that the road was a public road and not on defendant's land, since, if defendant knew the road was in common use by the public, and the probability of injury, he was liable for constructing a wire fence across it in such a manner as to occasion injury to others, though the road was on his own land.—ALLISON v. HANEY, Tex., 62 S. W. Rep. 933.

56. OFFICERS—Inspection of Local Mines.—Act April 8, 1885, provides that in case of a vacancy in the office of coal-mine inspector, occasioned by death, resignation, or malfeasance in office, which shall be determined as in the case of other officers, the governor shall appoint some one to fill the office. Held that, the statute allowing a removal only for a specified cause, the governor could not remove the inspector of mines without hearing and notice to the inspector.—INSPECTOR OF COAL MINES v. DENMAN, Colo., 64 Pac. Rep. 455.

57. PRINCIPAL AND SURETY—Failure to Notify Surety of Principal's Breach of Duty—Conclusiveness of Judgment Against Principal.—The surety in the bond of an assignee for creditors cannot complain that he was not notified of the principal's failure to perform his duty, where the breach of duty consisted in failure to pay over the amount ascertained to be due in a settlement suit. The payment by an assignee for creditors of the amount found to be due upon a settlement is within the obligation of his bond, conditioned for the faithful discharge of his duties as assignee, and a judgment against an assignee for creditors in a suit to settle his accounts is conclusive against the surety as to the amount due, though he had no notice of the proceeding.—NATIONAL SURETY CO. v. ARTERBURN, Ky., 62 S. W. Rep. 862.

58. PUBLIC LANDS—School Lands—Actual Settlers.—An applicant to purchase school lands as an actual settler, who builds his house, through mistake, on an adjoining track of land, is an actual settler, and title derived from him is inferior to that of a subsequent purchaser from the state.—MARTIN v. MABE, Tex., 62 S. W. Rep. 932.

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Central Law Journal.

ST. LOUIS, MO., AUGUST 30, 1901.

Quite an interesting comment, and one which would be considered quite unusual in this country, is made by our esteemed and learned contemporary, *The Solicitors' Journal*, of London, on the importance of the case of Rex v. Tibbits and Windust, tried a few months ago at the Bristol assizes. It uses this language:

"No one can fail to notice the growing eagerness of some papers to pander to the public taste for sensational news. The law is probably strong enough to protect the reputation of individuals, as was shown by the large damages which a jury gave against a newspaper a few days ago in a case of libel. It remains to be proved, however, whether the law is strong enough to prevent interference with the due course of justice; and that will be shown when the conviction recorded in the recent case of Rex v. Tibbits and Windust comes before the Court for the Consideration of Crown Cases Reserved."

The defendants in this case were charged with conspiring to pervert the course of justice by the publication of items of news concerning certain accused persons whose alleged crimes had excited great public interest. Before trial, the paper which these defendants represented, by the pen of one who was known as the "crime investigator," published particulars of the past life and career of the persons accused calculated to prejudice the public against them. "It is difficult," resumes our contemporary, "to imagine anything more calculated to interfere with the proper trial of a prisoner than such a course. The men who are to try him as jurors of course read the papers. They are ordinary members of society, very often of imperfect education, and probably liable to be considerably influenced by what they read. It is well known with what scrupulous care the English law keeps from the knowledge of a jury dark facts in the life of a prisoner which are not connected with the charge actually being tried. It does not seem tolerable that a newspaper should be allowed to publish to the jury and the world matter which would not be admissible in evidence at the trial, and which tends to prejudice the minds of readers against the accused."

These words are refreshing to those of us in this country who have grown so accustomed to speak of the liberty of the press and right of free speech as if they had no limit. In fact, it would seem that in this connection some of our lawmakers have gone too far in shielding the public press in their utterances, especially respecting criminal and judicial proceedings. For instance, in Pennsylvania the statutes provide that no publication out of court respecting the conduct of the court or any of its officers, or parties in any cause pending, shall expose the party to summary punishment, and the only remedy of the person aggrieved is by indictment or action at law. Of late years, however, public sentiment has changed, and recent cases show an increasing tendency to punish in a summary manner, as for contempt, all attempts to influence judicial proceedings on the part of the public press. The rule is firmly established in England that while proceedings are pending it is contempt of court to publish anything in reference to the parties to, or the subject-matter of, a pending litigation, which tends to excite prejudice against those parties or their litigation. Tichborne v. Tichborne, 39 L. J. Ch. 398. This was also the rule at common law, and unless changed by statute might be enforced in any State where the common law prevails, and where the judges showed enough independence of newspaper influence to protect the rights of litigants and maintain the dignity of their own tribunals. How often newspapers of a certain class, to fill space or pander to a low public appetite, will seize upon the character of some alleged criminal and from the fertile brain of some "crime investigator," will spin a web of circumstances which, in addition to all the past facts of the man's life which it has been able to procure either by direct evidence or by hearsay, presents a picture so lurid and attractive to the mind of the undiscriminating public as to easily prejudice it against the one so charged with crime. In extenuation of their course in this regard these journals will insist that the widest publicity of the supposed

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criminal's life and character are rightfully demanded by the people, and that the more evidence that can be gathered about him by the activity of press representatives and "crime investigators," whether relevant or irrelevant, whether competent or incompetent, whether hearsay or direct, assists rather than prejudices the minds of jurors in arriving at a just verdict. In this they display ignorance of the fact that the rules of evidence now applied by the courts to safeguard the interests of all parties to any pending litigation and bring to the consideration of the jury only the best and most trustworthy evidence in every case are not merely the techuical and arbitrary exactions of the court, but, on the contrary, are the expression of Anglo-Saxon common sense and experience of over a thousand years. The trial of Capt. Dreyfus gave the world an illustration of the awful results of newspaper evidence and interference and of indiscriminate and unreliable testimony. We want none of it. Newspapers in this country can and should be compelled to keep silent about what they may know or have heard in regard to any parties engaged in litigation or charged with crime that may tend to prejudice the minds of the jury in favor of one side or the other. Summary punishment, as for contempt, should meet every infraction of this rule. To this attitude the courts of this country are rapidly coming as they begin to realize that unless such interference on the part of the press is checked in its incipiency. their own authority and the rights of litigants will be at the mercy of editors and "crime investigators." In Nebraska, for instance, it was held that the constitutional guaranty of the freedom of the press is not involved in a proceeding against a newspaper for contempt, in attempting, by threats or other form of intimidation, to control judicial action in a pending action. State v. Rosewater (Neb. 1900), 83 N. W. Rep. 353. In the same State and in the same year the court was called upon again to hold that a newspaper corporation, which deliberately seeks to influence judicial action, by the publication of of Massachusetts seem to take even firmer attitude against all interference on the part of the press, and in the recent case of Telegram Newspaper Co. v. Commonwealth (Mass. 1899), 52 N. E. Rep. 445, the court holds that where a corporation engaged in the publication of a newspaper publishes an article concerning a pending trial in the place where the trial is had, which is calculated to prejudice the jury and prevent a fair trial, it is guilty of a criminal contempt, though there was no criminal intent in the publication of such article. The same court further held that it was not necessary that matter published in a newspaper during the trial of a case calculated to prevent a fair trial, should be shown to have been read by members of the jury, in order that the publisher should be guilty of contempt; but it is sufficient that it was published and circulated in the place where the trial was had and might have been read. These decisions are certainly in the right direction, and it is to be hoped that they evidence a wholesome tendency on the part of the courts to maintain the sanctity of their own tribunals and absolutely prohibit any interference or suggestion from outside sources.

NOTES OF IMPORTANT DECISIONS.

BANKS AND BANKING—DEPOSIT IN NAME OF ANOTHER.—Quite an unusual question recently arose in the case of Greene v. Bank of Camas Prairie (Idaho), 64 Pac. Rep. 888, where it was held that where, by the terms of a contract of deposit in the name of the daughter of the depositor, with the agreement that he (the depositor) may draw such deposit on checks signed by him, and he does draw the money so deposited on checks so signed, the daughter cannot hold the bank for the money so deposited and drawn out. The record shows that during the lifetime of A. D. Greene, the father of appellant, he deposited with the respondent bank $285, in the name of his daughter, Aileen Greene, with the further agreement that the money would be paid out on checks drawn by him, that is, on checks signed "Aileen Greene, per A. D. Greene." The money was deposited, and in course of time paid out pursuant to the agreement. The court said: "The evidence clearly shows that said money

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the distinct agreement that it might be drawn out by the father. The appellant's contention is that, as the deposit was made in her name, it became hers; but reason, justice, and authority are against her. In Davis v. Bank, 53 Mich. 163, 18 N. W. Rep. 629, it is held as follows: 'A depositor contracting with a bank for the care of his money can control his funds until he has disposed of them, no matter in what name the account is kept, so long as it is understood to be his account, and has not been put beyond his control by some act that he cannot revoke.'"

CORPORATIONS—RIGHT OF STOCKHOLDERS TO COMBINE TO CONTROL THE CORPORATION.—One of the most interesting questions in law today is the right of majority stockholders to control the corporation. The earlier rule set very little check upon them, but the tendency of the present time is in favor of recognizing the rights of minority stockholders, and placing the latter in the position of *cestuis que trust* as regards their relation to the majority stockholders who are in control of the affairs of the corporation. An important phase of this question arose in the case of Withers v. Edwards (Tex.), 62 S. W. Rep. 795. The parties, who were president and teller and large stockholders in a bank, agreed that plaintiff should endeavor to secure the co-operation of other stockholders or control of sufficient stock to secure the election of a board of directors satisfactory to them, and who would continue them in their respective offices, and the expense of securing such control should be shared equally by them. After plaintiff had incurred expense, and secured control of stock which, added to theirs, was sufficient for their purpose, defendant defeated the plan by selling his stock. Held, that the agreement was illegal, because it involved the election of the parties to lucrative positions in the corporation; hence plaintiff was not entitled to recover the expense so incurred. The court said:

"The serious question arises from the contention of appellee that the contract was illegal, as against public policy, because the agreement, in part, was that appellant and appellee should retain their respective offices of president and teller in the bank. It is legal for a majority of the stockholders to combine and control the election of the board of directors and management of the corporation. 'But a contract in regard to elections in private corporations is not legal if it provides that a lucrative corporate position shall be given to one or more of the parties to the contract.' 2 Cook, Corp. § 622, and notes; Gage v. Fisher (N. Dak.), 65 N. W. Rep. 809, 31 L. R. A. 563; Guernsey v. Cook, 120 Mass. 501; Woodruff v. Wentworth, 133 Mass. 309; West v. Camden, 135 U. [illegible] lege that the position of president and teller were lucrative, yet we think the presumption should prevail that the parties, under the agreement, were to be remunerated for such services as they might perform if installed in such positions. At least, in the absence of a contrary stipulation, the law implies that reasonable compensation would be paid. This part of the contract being illegal, the contract is not enforceable in the courts."

CONSTITUTIONALITY OF MECHANICS' LIEN LAWS.—It seems that there will always be some who will never be satisfied that statutes giving to mechanics and material-men a special lien on the land and buildings, where their services or material is used, are not an infringement on the constitutional rights of the property owner. Especially is this so when the facts of the case arrange themselves as they appeared recently in the case of Barrett v. Millikan (Ind.), 60 N. E. Rep. 310. In that case A, the owner of a lot, made a contract with B for the repair of a building thereon. B contracted with C to furnish certain material which was used in making the repairs. C filed notice of a mechanic's lien. In the meantime, and before the filing of C's notice, and without any knowledge of the latter's claim, A paid B, the original contractor, in full. C brings an action against A to enforce his lien under the statutes which A in his answer claims to be unconstitutional on the following grounds: 1. The act authorizes the appropriation of the property of the landowner without due process of law. 2. It impairs the obligation of contract, in that it interpolates provisions for liens for third parties, with whom the owner of the real estate has no contractual relation. 3. It grants to one class of citizens rights not granted to all other citizens and is therefore class legislation.

This case represents a peculiar hardship and seeming injustice that often arises under the administration of mechanics' lien statutes and which often lead attorneys, as well as laymen, to attack their constitutionality. The court in this case holds that a statute giving contractors, subcontractors, material-men and laborers a lien on buildings for which they have furnished material or labor, is not unconstitutional, as depriving the land owner of property without due process of law, since he makes his contract with full knowledge of the obligations imposed on him by statute, and hence binds his property by his own voluntary act. The court shows that while in a few instances the constitutionality of similar statutes had been denied in some jurisdictions, their validity had been generally recognized, citing the following authorities: Donahy v. Clapp, 12 Cush. 440; Phil. Mech. Liens, §§ 65, 79; Laird v. Moonan, 32 Minn. 358, 20 N. W. Rep. 354; O'Neil v. St.

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ing a different rule, was overruled by the circuit court of appeals. 86 Fed. Rep. 370, 30 C. C. A. 108. After proving beyond a peradventure that there was no valid grounds for questioning the constitutionality of such statutes, the court takes up the alleged hardship and injustice sometimes resulting from their enforcement. "The objections taken to the statute in the brief of counsel for appellants," says the court in a well-reasoned opinion, "seem to rest upon the supposed hardships and inconveniences which may result from it, rather than upon constitutional grounds. A very conclusive answer to these criticisms is furnished by the decision in Colter v. Frese, 45 Ind. 96, in which the court, by Worden, J., says: Many arguments have been pressed upon our consideration in respect to this point, as well as upon the question whether a lien can be acquired on account of work done for or materials furnished to a contractor, and not the owner. The most of them are based upon the real or supposed hardships of the law, as we construe it, in this: that in many cases it subjects the owner to the liability of making double payment for the same work or materials, and prevents him from making contracts for the erection of buildings and the furnishing of materials therefor, to be paid for otherwise than in money, and other similar inconveniences. These arguments might have much force if addressed to the legislature, whose province is to make the law, but can have little weight against the clear and unequivocal terms of a statute, when addressed to a court whose province is to determine what the law is, and not what it ought to be. * * * Its object is to secure to the mechanic, laborer, or material-man compensation for his work or materials. It prevents the owners of real estate from securing to themselves, without compensation, the benefit of the labor and materials of others by means of low contracts with irresponsible or perhaps dishonest contractors. The inconveniences of the law do not seem to us to be insuperable. The owner may withhold from the contractor for the period of sixty days after the completion of the work enough to protect the property from liens for work or materials. If full payment is made at the end of that time, it is, perhaps, quite as prompt as payments are usually made."

CRIMINAL EVIDENCE—TESTIMONY AND CONFESSIONS BEFORE THE GRAND JURY.—There is a strong tendency to relax the general rule of the common law that proceedings and testimony before the grand jury are to be kept strictly secret. Many exceptions have been made—one of which is clearly set forth in the case of Wisdom v. State (Tex. App.), 61 S. W. Rep. 926, where it was held that admissions or confessions of accused, made before the grand jury, after being warned, in regard to the crime charged, are competent evidence against him on the trial. Davidson, P. J., in writing the opinion uses this language:

"The admissions or confessions of appellant, made before the grand jury, after being warned, in regard to the burglary charged in the indictment, were introduced in evidence. He reserved an exception, and assigns error. The ruling of the court is correct. Thomas v. State, 35 Tex. Cr. Rep. 178, 32 S. W. Rep. 771; Jones v. State, 33 Tex. C. Rep. 7, 23 S. W. Rep. 793; Paris v. State, 35 Tex. Cr. Rep. 82, 31 S. W. Rep. 855; Thompson v. State, 19 Tex. App. 593; Nicks v. State, 40 Tex. Cr. Rep. 1, 48 S. W. Rep. 186. It is claimed that these authorities are in contravention of Gutgesell v. State (Tex. Cr. App.), 43 S. W. Rep. 1016. That case seems to indicate that testimony before a grand jury can be used for two purposes only: First, where perjury is assigned upon evidence adduced before the grand jury; and, second, where witnesses testifying before the court made different statements before the grand jury in regard to the same matter,—in other words, for impeachment purposes."

After making the statement that the Gutgesell case was not correct in limiting the right to use the testimony before the grand jury for the purposes just indicated, the court gives the following splendid review of the authorities:

"There are other instances in which such testimony can be used. Where an attack is made upon an indictment by reason of the fact that some person other than those authorized were present before the grand jury when the indictment was considered, the secrecy hanging around the grand jury can be unveiled, and testimony introduced showing that fact. Rothschild v. State, 7 Tex. App. 519; Stuart v. State, 35 Tex. Cr. Rep. 440, 34 S. W. Rep. 118; Sims v. State (Tex. Cr. App.) 45 S. W. Rep. 705. So the question may be investigated as to whether the grand jury is a full and complete grand jury. Drake v. State, 25 Tex. App. 293, 7 S. W. Rep. 868; Jackson v. State, 25 Tex. App. 314, 7 S. W. Rep. 872; Smith v. State, 19 Tex. App. 95; Watts v. State, 22 Tex. App. 572, 3 S. W. Rep. 769; Woods v. State, 26 Tex. App. 490, 10 S. W. Rep. 108; Trevinio v. State, 27 Tex. App. 372, 11 S. W. Rep. 447; Mays v. State, 28 Tex. App. 485, 13 S. W. Rep. 787. 'Neither the rule of secrecy nor the oath of secrecy which grand jurors are required to take prevents the public or an individual from proving by one or more of the grand jurors in a court of justice what passed before the grand jury, where, after the purpose of secrecy has been affected, it becomes necessary to the attainment of justice and the vindication of truth and right, in a judicial tribunal, that the conduct and testimony of prosecutors and witnesses shall be inquired into.' 17 Am. & Eng. Ency. Law (2d Ed.), p. 1294; Jenkins v. State, 35 Fla. 737, 18 South. Rep. 182; Hinshaw v. State, 147 Ind. 334, 47 N. E. Rep. 157; State v. Buskirk, 59 Ind. 384; Burdick v. Hunt, 43 Ind. 381; Shattuck v. State, 11 Ind. 475; Burnham v. Hatfield, 5 Blackf. 21; Hunter v. Randall, 69 Me. 183; State v. Benner, 64 Me. 267; Sands v. Robison, 12 Smedes & M. 704; State v.

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Broughton, 29 N. Car. 96, 45 Am. Dec. 507; State v. Moran, 15 Oreg. 262, 14 Pac. Rep. 419; Jones v. Turpin, 6 Heisk. 181; U. S. v. Kirkwood, 5 Utah, 123, 13 Pac. Rep. 234. And the refusal of a grand juror to testify is contempt. *Ex parte* Schmidt, 71 Cal. 212, 12 Pac. 55. Nor can witnesses before a grand jury invoke the rule of secrecy, after the hearing before that body has been terminated; nor can witnesses rely upon such rule in criminal proceedings against them, or where it is sought subsequently to impeach their credibility as witnesses. or to take advantages of admissions made by them. People v. Northey, 77 Cal. 618, 19 Pac. Rep. 865, 20 Pac. Rep. 129; People v. Kelley, 47 Cal. 125, 126; People v. Young, 31 Cal. 564; State v. Broughton, 45 Am. Dec. 507; U. S. v. Kirkwood, 5 Utah, 123, 13 Pac. Rep. 234; People v. Reggel, 8 Utah, 21, 28 Pac. Rep. 955. So it is held that testimony given by a witness before the grand jury can be used to refresh his memory on the trial of the case. Spangler v. State (Tex. Cr. App.), 55 S. W. Rep. 326. Where a person is being tried for crime, a confession voluntarily made by him before a grand jury may be proved by members of that body, and it has been held in civil actions a grand juror may testify to admissions made by a person against his interests before the grand jury. In support of the proposition that grand jurors may testify as to a defendant's confession, see Sikes v. Dunbar, 2 Selw. N. P. (13th Ed.) 1015. This case was decided by Lord Kenyon, and was cited in State v. Broughton, 29 N. Car. 96, being reported in 45 Am. Dec. 507. See, also, U. S. v. Porter, 2 Cranch, C. C. 60, 27 Fed. Cas. 595 (No. 16,072); U. S. v. Charles, 2 Cranch, C. C. 76, Fed. Cas. No. 14,786; Hinshaw v. State, 147 Ind. 344, 47 N. E. Rep. 157; State v. Broughton, 45 Am. Dec. 507, and the cases above cited in 5 Utah, 13 Pac. Rep., and 8 Utah, 28 Pac. Rep. As to the use of admissions made before the grand jury in civil cases, see 5 Blackf. 21; Kirk v. Garrett, 84 Md. 383, 35 Atl. Rep. 1089; 17 Am. & Eng. Ency. Law, p. 1296, and notes 3-6.

PENAL STATUTES—LIMITATION—STOCKHOLDERS' LIABILITY.—The distinction to be observed between penal statutes running in favor of the state and statutes which create a liability in favor of private individuals, in the nature of a penalty, is clearly explained by the Supreme Court of Rhode Island in the case of Kilton v. Providence Tool Co., 48 Atl. Rep. 1039. The exact holding of the court was that the section of the General Laws of Rhode Island, allowing twenty years for bringing an action on a specialty, and not the section allowing one year for bringing suits founded on any penal statute, is the statute of limitations applicable to an action for the enforcement of the individual liability of stockholders for the debts of the corporation; since the action, though of a penal character, is not an action to enforce a penalty, within the meaning of the words "penal statute" as used in chapter 288. The court said:

"It is argued, that the liability imposed is penal, and hence that the action or suit brought against the stockholder must be begun within one year from the time it accrues. But the statute of limitations which these defendants refer to has no application to 'civil actions,' strictly so called. Section 8 of chapter 288, which is referred to, is as follows: 'All suits or prosecutions founded upon any penal statute, which are wholly or in part for the use of the prosecutor, shall be brought within one year, and all other suits and prosecutions on such statute within two years after the commission of the offense, unless otherwise provided.' That the effect of this statute (making stockholders liable for the debts of the corporation) is to impose a penalty upon the stockholder for the default of the corporation may be admitted (Sayles v. Bates, 15 R. I. 34, 25 Atl. Rep. 497; Wing v. Slater, 19 R. I. 597, 35 Atl. Rep. 302, 33 L. R. A. 566; Bank v. Farnum, 20 R. I. 466, 40 Atl. Rep. 341); but this does not bring it within the meaning of the words 'penal statutes,' as used in chapter 288. The statute referred to in Bank v. Bliss, 35 N. Y. 412, fixed at six years the limitation of time within which 'an action upon a liability created by statute, other than a penalty or forfeiture,' might be commenced, and three years as the limit within which 'an action upon a statute for a penalty or forfeiture, where action is given to the party aggrieved,' might be commenced. The court held that the action before them, which was against trustees of a corporation for not rendering returns, was to recover a penalty given by statute, and the latter statute of limitation applied. The supreme court commission of Ohio arrived at exactly the opposite conclusion in regard to the statute of that state, which was in the same words. Hawkins v. Furnace Co., 40 Ohio St. 507. In Patterson v. Thompson, 86 Fed. Rep. 85, the statute of limitations of Oregon is not given. But we infer from the argument of the court that it resembles the New York statute rather than our own. The case was also against the directors of a corporation for declaring dividends when the corporation was insolvent. In Attrill v. Huntington, 70 Md. 191, 16 Atl. Rep. 651, 2 L. R. A. 779, the court refused to enforce a statute of the state of New York providing that corporation officers who make false returns shall be liable to pay the debts of the company, on the ground that the statute was penal. The dissenting opinion of Stone, J., discriminates between statutes which impose penalties by way of compensation to private individuals, and criminal statutes imposing penalties to be recovered on behalf of the state, but which may be shared, when recovered, between the state and the informer. The former statutes, he shows, may be enforced in a foreign jurisdiction, while the latter cannot. The Supreme Court of the United States, where this case was taken on writ of error, reversed the decision of the court, and approved the minority opinion. 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. Ed. 1123.

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Mr. Justice Gray, in delivering the opinion of the court, says (page 666, 146 U. S., page 227, 13 Sup. Ct. Rep., and page 1127, 36 L. Ed.): 'In order to determine this question, it will be necessary, in the first place, to consider the true scope of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: "The courts of no country execute the penal laws of another." The Antelope, 10 Wheat. 66, 123. 6 L. Ed. 268. In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word "penal" in our language. In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. U. S. v. Reisinger, 128 U. S. 398, 402, 9 Sup. Ct. Rep. 99, 32 L. Ed. 480; U. S. v. Chouteau, 102 U. S. 611, 26 L. Ed. 246. But they are also commonly used as including any extraordinary liablity to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. In the words of Chief Justice Marshall: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party." Tayloe v. Sandiford, 7 Wheat. 13, 17, 5 L. Ed. 384. Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which by the English and American constitutions the executive of the state has the power to pardon. Statutes giving a private action against a wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.' The statute of limitations we are considering is very clearly applicable only to 'penal actions,' strictly and properly so called, and does not affect the present action. The statute here applicable is that which allows 20 years for bringing an action of debt on a specialty. Gen. Laws, ch. 234, § 4; Atwood v. Bank, 1 R. I. 376. It need hardly be said that this construction of chapter 288 is not a decision that the provisions of chapter 555, Pub. Laws 1876, imposing special liabilities upon stockholders and officers of manufacturing corporations, in cases of non-performance of statutory duties, are not of a penal character. Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. Rep. 554, 28 L. Ed. 1038; Bank v. Remsen, 158 U. S. 337, 15 Sup. Ct. Rep. 891, 39 L. Ed. 1008; and Rhode Island cases cited above."

CONTRACTS — WHEN SEVERAL CONTEMPORANEOUS CONTRACTS ARE CONSTRUED TOGETHER — EFFECT UPON NEGOTIABILITY OF PROMISSORY NOTES.

It is not the purpose of the writer to discuss this question in all its phases; the limit of this article forbids this. Inquiry will be directed chiefly to the consideration of two questions, viz.: 1. The nature and scope of the rule that: "Two or more instruments executed contemporaneously by the same parties in reference to the same subject-matter constitute one contract." 2. What effect has this rule upon the negotiability of promissory notes, executed contemporaneously with other writings in relation to the same subject?

1. The general rule above quoted has been applied in many cases; but it is deemed important only to cite part of the more recent ones, showing how the rule has been followed in different states and by the federal courts.[1] In the application of the rule a variety of circumstances may arise. Sometimes the several writings refer in intelligible terms to one another. Sometimes their connection can be ascertained only by examination of the subject-matter of the contract. Again, sometimes the connection can be established only by parol evidence.

When there is a reference in the several writings to one another, all are to be construed together as one instrument.[2] Where a railroad company entered into a contract to issue a certain number of its bonds, secured by first mortgage, the contract should be read as though the bond and mortgage were set out

[1] Bailey v. Han. & St. J. R. R. Co., 84 U. S. 96; Woodward v. Jewel, 25 Fed. Rep. 689; Pierce v. Tidwell, 81 Atl. Rep. 299, 2 South. Rep. 15; O'Reilley v. Burns (Colo.), 22 Pac. Rep. 1090; Gardt v. Brown, 113 Ill. 475, 55 Am. Rep. 434; Martin v. Murphy, 129 Ind. 464, 28 N. E. Rep. 1118. Parks v. Cook, 66 Ky. 168; Ahern v. White, 39 Md. 409; Hunt v. Frost, 58 Mass. 54; Keagle v. Pessel (Mich.), 52 N. W. Rep. 58; Brackett v. Edgerton (Minn.), 100 Am. Dec. 211; Waples v. Jones, 62 Mo. 440; Hill v. Huntress, 43 N. H. 490; Owens v. Owens, 23 N. J. Eq. 60; Meriden Britannia Co. v. Zingsen, 48 N. Y. 248, 8 Am. Rep. 549; Kitchen v. Gandy, 101 N. Car. 86, 7 S. E. Rep. 663; White v. Brocaw, 14 Ohio Stat. 339; Dean v. Lawham, 7 Oreg. 442; Atchinson v. Hutchinson, 51 Tex. 223; Reed v. Field, 15 Vt. 672; Hagerty v. White (Wis.), 34 N. W. Rep. 92.

[2] Bradstreet v. Rich, 74 Me. 303; *In re* Board of Com. of Wash. Park, 52 N. Y. 131; Miller v. Edgerton (Kan.), 15 Pac. Rep. 894; Sawyer v. Hammet, 15 Me. 40.

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therein.[3] Sometimes a contract may grow out of a previous one between the same parties and reference is made in the later one to the first, which may have been fulfilled. In such case the terms of the first become part of the second so far as not in conflict therewith[4]. The reference to a former, or other, writing must be clear and unambiguous.[5] A postscript, though below the signatures, may become part of the contract, with the aid of parol testimony.[6] Likewise as to a memorandum attached to the contract, when signed by the parties, though the principal contract was under seal and the memorandum was not.[7] Where the separate writings contain no reference to each other, yet if their terms or subject-matter show a relationship they will be construed together.[8] Where a contract is supported on one side by a bond with sureties, in a suit against the principal contractor and his sureties, any contract made with the sureties relating to the matter will be used in construing the principal contract.[9] Parol evidence may be introduced to show that separate writings are part of the same contract,[10] and this may be done although the parol evidence adds materially to the written contract.[11] (So held in this case, though a very questionable proposition.)

Incidentally it may be noted that two or more instruments, relating to the same subject-matter and executed at different dates may be construed together. They may be considered contemporaneous although not so in point of time, paradoxical as this may seem.[12] Also sometimes separate instruments executed at different times between parties not identical in all respects may be construed together.[13]

2. The rule is applicable to negotiable paper, executed in connection with other instruments; as, for instance, a promissory note secured by a real estate mortgage. This, perhaps, is the most important application of the rule because of the effect it may have upon commercial paper. A promissory note, drawn in usual negotiable form, must be construed in connection with a real estate mortgage given to secure it.[14] A note and trust deed, given to secure it, must be construed together.[15] In the case above cited of Brooke v. Struthers, the mortgage contained an agreement to pay taxes, and the condition that if the mortgagor failed to pay the taxes for 30 days such taxes and the whole principal and interest should become payable at once. The Michigan court says: "A mortgage executed simultaneously with a note is part of the contract and they are to be construed together. * * * This is but the recognition of a rule of general application that applies to all contemporaneous writings. And where a note is secured by a mortgage and there is a provision in the mortgage not contained in the note, it will control. * * * The case of Goodenough v. Curtis, 33 Mich. 505, is a case depending upon this principle. A defense of fraudulent alteration on the part of a promissory note by the insertion of the words 'or bearer' was interposed. Ordinarily such alteration would invalidate the instrument, but it was held that it did not, because it did not change the effect of the note in any material particular, inasmuch as by the terms of the mortgage, to which the note referred, certain conditions which might excuse payment, or change and fix the time of maturity, took away any negotiable character the note might otherwise possess. See also Humphrey v. Beckwith, 48 Mich. 151, 12 N. W. Rep. 28; Elmore v. Hoffman, 6 Wis. 71; Norton v. Kearney, 10 Wis. 443; Goodwin v. Nickerson, 51 Cal. 169; McCroskey v. Ladd, 96 Cal. 455, 31 Pac. Rep. 558. * * * See also Brownlee v. Arnold, 60 Mo. 79; Railway Co. v. Atkinson, 17 Mo. App. 494. * * * On the other hand, there are cases where the contemporaneous

[3] Galena V. S. W. R. R. Co. v. Barrett, 95 Ill. 467.
[4] Bronson v. Green, Walk. Ch. 56.
[5] Stocker v. Partridge, 25 N. Y. Super. Ct. 198.
[6] Close v. Clark, 9 N. Y. Supp. 538.
[7] McArthur v. Ladd, 5 Ohio, 514.
[8] Pillow v. Brown, 26 Ark. 240; Bradley v. Marshall, 54 Ill. 173; Bobbitt v. Globe Ins. Co., 66 N. Car. 70.
[9] Williams v. Markland (Ind.), 44 N. E. Rep. 562.
[10] Dillingham v. Estill, 33 Ky. 23; Cornell v. Todd, 2 Denio. 130.

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writing is invoked to make the note certain and therefore negotiable. Elliott v. Deason, 64 Ga. 67. See also Muzzey v. Knight, 8 Kan. 4546; Meyer v. Greyber, 19 Kan. 165; Dobbins v. Parker, 46 Iowa, 356; Winchell v. Coney, 54 Conn. 24, 5 Atl. Rep. 354; Parke v. Cooke, 3 Bush, 173; Hill v. Huntress, 43 N. H. 480; Rogers v. Broadnax, 24 Tex. 538; Manfg. Co. v. Howard, 28 Fed. Rep. 741."

Then follows in the opinion a lengthy discussion of the question of what would be necessary to charge the indorsee of the note secured with notice of the terms of the mortgage that render the note non-negotiable, and citing other decisions, among them the leading case of McClelland v. Railroad Co., 110 N. Y. 469, 18 N. E. Rep. 238. This was a case where coupons annexed to a bond were clipped therefrom and sold. They were payable to bearer. The bond from which they were clipped referred to a trust deed which secured it. The court held that the question of the negotiability of the coupons was determined by the terms of the trust deed; citing Ror. R. R. 250; Everston v. Bank, 66 N. Y. 14; Thompson v. Lee Co., 3 Wall. 327; Commissioner v. Aspinwall, 21 How. 539, to the general proposition that such coupons were negotiable generally, unless their negotiability was taken away by particular provisions in the security. The same rule is found in several other cases, so that the doctrine seems to be fully established.[16]

Where the mortgage securing the note contains an agreement to pay taxes or insurance premiums, or both, as is often the case, the rule applies for the conclusive reason that whenever the mortgagor fails to comply with these conditions and the mortgagee pays the taxes or the insurance premiums, the amount paid by him is at once added to the amount of the debt secured by the mortgage.[17] It is clear that if, by the application of this rule, the agreement in the mortgage to pay the taxes and insurance premiums becomes a part of the note, the amount to fall due upon the note becomes uncertain, and hence the note is rendered non-negotiable.[18] In the cases just cited the agreement to pay taxes was in the note, but the notes were held non-negotiable as a consequence. It can make no difference, however, whether such agreement be in the note or in the mortgage, inasmuch as the terms of the mortgage in respect of amount to fall due, time of payment, etc., become part of the note. But in the two Michigan cases, Brooks v. Struther and Walker v. Thompson, and in the Utah case, Donaldson v. Grant, the agreement to pay taxes was in the mortgage and the notes were rendered non-negotiable thereby.

By way of *addenda* it may be added that the same rule of construction applies to chattel mortgages and contracts relating thereto.[19] In this case there was a schedule of the property attached to the mortgage, at the foot of which there was a further memorandum of the terms and conditions of the mortgage, which memorandum was not signed; yet it was held to be part of the mortgage. In the case of First National Bank v. Turnbull[20] A made a deed of trust to B of a cotton factory to secure a loan. Afterwards a second contract was entered into whereby B was to make advances to A to buy cotton to use in the factory and A was to deliver the manufactured goods to B and not sell any of them to others without B's written authority. C levied an execution on the manufactured goods as A's; but in a contest between him and B it was held that the lien of the trust deed extended to the manufactured goods by virtue of the second agreement and gave B a first lien thereon. So it was held by the Wisconsin Supreme Court that a chattel mortgage and a written agreement relating to the same subject-matter, of same date, should be construed together as one contract, although

[16] Walker v. Thompson (Mich.), 66 N. W. Rep. 584;

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SEPARABLE CONTROVERSY.

What is a separable controversy, within the meaning of the decisions of the United States, as a condition of jurisdiction of the United States courts? A master and a servant cannot be joined in an action for a tort, and therefore the controversy between each of them and the plaintiff is a separate controversy.[1] Some states have a statutory or constitutional provision authorizing joint actions for such a tort caused by a master and a servant growing out of the same act. Further, as said in Chesapeake & Ohio Railway Company v. Dixon:[2] "* * * Many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action, although other courts have reached the opposite conclusion." This case of Chesapeake & Ohio Railway Company v. Dixon, further states: "In respect of the removal of actions of tort on the ground of separable controversy, certain matters must be regarded as not open to dispute. In Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92, it was said: 'It is well settled that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one.' * * * ." "To entitle a defendant to a removal on account of the separability of a controversy from the rest of the case, there must exist a separate cause of action on which a separate suit could be brought and complete relief afforded distinct from the rest of the case, and of which all the parties on one side are citizens of different states from all the parties on the other."[3] "Mr. Justice Blatchford expressed the opinion[4] that it was proper for the federal courts to follow the decisions of the state courts that a cause of action was entire." In the case of Chesapeake & Ohio Railway Company v. Dixon, the United States Supreme Court further say: "In Powers v. Chesapeake & Ohio Ry. Co., * * * plaintiff subsequently discontinued the action as to all the defendants, except the company, and the company again made application to remove. This was denied by the state court, but granted by the circuit court, and the judgment of the latter was affirmed by this court, the question of separable controversy being necessarily not passed on here." In the case of Whitcomb v. Smithson[5] the Supreme Court of the United States say: "The record shows that the circuit court granted the motion to remand on the authority of Thompson v. Chicago, St. P. & K. C. R. Co., 60 Fed. Rep. 773, in which case it was ruled that there was no separable controversy; and its judgment covered the question of fact as to the good faith of the joinder. The contention here is that when the trial court determined to direct a verdict in favor of the Chicago, Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the circuit court. This might have been so if, when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*." In the foregoing action the Chicago, Great Western Railway Company answered the complaint, and the receivers filed a petition for the removal of the cause into the circuit court of the United States for the district of Minnesota, setting up diverse citizenship, and that they were officers of the United States courts; that the controversy was separable; and that the railway company was fraudulently made a party for the sole purpose of preventing the re-

[1] Powers v. C. & O. Ry. Co., 169 U. S. 92.
[2] 179 U. S. 131.
[3] Foster's Federal Practice, vol. 2, par. 384, pp. 813 and 814, and cases cited.
[4] Connell v. Utica, U. & E. R. Co., 13 Fed. Rep. 241.
[5] 175 U. S. 635.

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moval of the cause. "A controversy is not separable when a defendant, who would otherwise be entitled to remove the suit, is charged as jointly liable with another defendant, who is a fellow-servant of the plaintiff."[6] "It has been held that after a removal on the ground of a separable controversy the plaintiff may discontinue as to the defendant who removed the suit, and then move to remand; but that his motion to remand will not be granted if the record still shows a controversy between citizens of different states. The removal takes the entire suit, not merely the separate controversy into the federal court."[7] A controversy which is separable, under the rules of the state court, can be removed to the federal courts, where the other essential elements of federal jurisdiction exist.

Milwaukee, Wis. RUBLEE A. COLE.

[6] Foster's Federal Practice, vol. 2, p. 815.
[7] Foster's Federal Practice, vol. 2, p. 817.

EQUITY—CREDITORS' BILL—FRAUDULENT CONVEYANCE.

ANDERSON v. PROVIDENT LIFE & TRUST COMPANY.

Supreme Court of Washington, April 24, 1901.

1. The statutes in aid of executions issued on judgments at law do not abolish the right of a judgment creditor to maintain a creditors' bill to enforce payment of a judgment from land fraudulently conveyed.

2. The fact that a judgment is a lien on real estate before a fraudulent conveyance thereof does not prevent the judgment creditor from maintaining a creditors' bill to enforce its payment from such real estate, on the ground that there is an adequate remedy at law by sale of the property under execution, since such remedies are concurrent.

ANDERS, J.: This is an action, in the nature of a creditors' bill to set aside certain conveyances alleged to have been made in fraud of creditors, and to subject the real estate described in the complaint to the payment of a judgment. Briefly stated, the facts, as alleged in the complaint, are that John W. Sprague died on December 24, 1893, in Pierce county, Wash., leaving a will which was probated on December 29, 1893, and by which Otis Sprague and James R. Hayden were appointed executors; that at the time of his death the said John W. Sprague was the owner in fee of three certain parcels of real estate, all of which are specifically described, situated in said Pierce county, of the value of $300,000, and money and personal property of the value of about $60,000 all of which money and personal property has been applied by the executors in payment of debts and legacies, which debts and legacies together did not exceed the sum of $60,000; that the said Otis Sprague is a son of the said decedent, and to him was devised by the will an undivided one-fourth interest in and to all the real estate owned by the said John W. Sprague at the time of his death, and that the said Otis Sprague on the 24th day of December, 1893, became the owner in fee of an undivided one-fourth of all of said real estate; that the will provided that the real estate might be sold if necessary for the purpose of paying the debts of the testator; that on January 24, 1894, judgment was recovered by the Tacoma National Bank, in the superior court of Pierce county, against the said Otis Sprague for the sum of $4,730, which judgment upon its entry became a lien upon certain of the real property belonging to said Otis Sprague, and which is particularly described in the complaint, and that no transfer of the interest of said Otis Sprague in the property devised to him by the said decedent, or incumbrance thereon, had been made by him prior to the giving of said judgment and the existence of said judgment lien; that the judgment was duly assigned to the plaintiff on November 15, 1897, and that executions were issued thereon and returned wholly unsatisfied, and that no part of said judgment has been paid; that the executors on August 21, 1894, executed a deed to Charles Sprague, a son of the decedent, and one of the devisees named in the will, purporting to convey to him a portion of the real estate in question for the consideration of $120,000, with the understanding between the said executors, the said Charles Sprague, and the defendant, the Provident Life & Trust Company, that Charles Sprague would execute to said company a mortgage on the premises for $55,000 and turn the money so received over to the executors, and then reconvey the estate so incumbered to said executors, and that the said agreement was accordingly carried out and performed; that on September 5, 1895, upon a similar agreement and understanding with the said Charles Sprague and the Provident Life & Trust Company, said executors executed a deed purporting to convey to said Charles Sprague another portion of said real estate, expressing a consideration of $90,000, which real estate was mortgaged by said grantee to said Provident Life & Trust Company for $30,000, and then conveyed to said executors, and that both of said deeds and mortgages were recorded in the office of the county auditor of Pierce county; that said executors had no right, power, or authority to incumber said real estate, nor any of the real estate of the deceased, or to mortgage the same; that Charles Sprague paid no consideration for the premises described in said deeds; that the defendant company took said mortgages from said Charles Sprague with full knowledge of the facts, and consented to and advised the doing of said acts, and that the whole transaction was a fraudulent scheme to dispose of Otis Sprague's interest in said premises, and thereby

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to prevent the collection of plaintiff's judgment and defeat the lien thereof; that the said grantors had no right or authority, under the terms and provisions of the will, to make said deeds, and the same were not made under the order of court, or in the course of administration of said estate, or pursuant to any power contained in the will, nor for the purpose of settling the estate of the deceased, nor under any order of distribution thereof; that the said sales of real estate were not necessary to the payment of debts of the estate or legacies, nor was any considerable portion of the proceeds of said sales and mortgages used for such purposes, and that the same were made for the purpose of enabling the said Otis Sprague to defraud his creditors, and particularly the plaintiff herein; that in pursuance of some subsequent secret arrangement, not disclosed on the county records and not known to the plaintiff, the property described in said two deeds and mortgages was, prior to the commencement of this action, turned over to the defendant, Provident Life & Trust Company, and ever since has been, and now is, held by said company under a claim of full ownership thereof; that said premises are yielding a rental of about $700 per month, and the same is being collected by said company, and all right of lien by reason of plaintiff's judgment is denied by said defendant; that by reason of the said conveyances and the said mortgages and said secret arrangement, and the said claim of title to said premises and possession thereof by said defendant company, the plaintiff is obstructed in the enforcement of his lien and the payment of his judgment; that there is no property out of which to make payment of plaintiff's judgment, other than that covered by said deeds and mortgages, and described in the complaint herein; that the executors, and especially Otis Sprague, are insolvent and without property of any kind, except the premises claimed and possessed by the defendant, Provident Life & Trust Company; that Otis Sprague has been insolvent ever since the rendition of plaintiff's judgment, and that execution was not issued on said judgment prior to the year 1895, because the executors had possession and control of said premises, and were entitled to one year's time within which to pay the debts and distribute the property of the estate; that at the time this action was commenced the said executors and the defendant, Provident Life & Trust Company, with intent to further obstruct and defeat the collection of plaintiff's judgment, were colluding together to sell and convey the premises to an innocent purchaser, who, without knowledge of the fraudulent designs and purposes thereby intended, might buy the premises, believing that he would get a clear title thereto, because of certain provisions in the will empowering the executors to sell property of the estate for the payment of debts and legacies, in that a *lis pendens* was filed by plaintiff, giving notice of the commencement of this action, and describing the property involved and the lien claimed by plaintiff as set forth in his complaint; that subsequently to the return of the unsatisfied execution the plaintiff caused another execution to be issued and levied upon the property in controversy, and the same was advertised for sale by the sheriff, whereupon the defendant, the Provident Life & Trust Company, applied to the federal court for an injunction against this plaintiff, alleging that it was the absolute owner of the said real estate, and upon the prayer of said company an injunction was issued restraining the sheriff and this plaintiff from selling said property on said execution; that the said superior court had theretofore acquired jurisdiction over the subject-matter of this action and th parties thereto; that the said estate and the sai l executors are under the control of the said superior court and subject to its orders, to the exten of administering their trust with just regard to the rights of all parties interested in the assets of said estate, the said federal court being without jurisdiction in said matters; that by reason of the conditions alleged the said one-fourth interest in said real estate will not sell for anything near its value, and but for a small portion of plaintiff's judgment, unless before such sale the lien of plaintiff is adjudged valid, and that if said lien be adjudged valid the said one-fourth of said premises will sell for much more than if sold under the present conditions; and that by reason of unpaid taxes, and the taxes accruing upon the said premises, and the depressed condition of values of property in Tacoma, the said one-fourth interest will not sell for sufficient to fully pay plaintiff's judgment, interest, and costs, and it is necessary that one-fourth of the rents of said premises be brought into court and preserved for that purpose. To this complaint the Provident Life & Trust Company interposed a demurrer upon the ground that it failed to state facts sufficient to constitute a cause of action against said defendant, which demurrer was sustained by the court. The plaintiff elected to stand upon his complaint, and refused lo further plead; and thereupon the court dismissed his action, and gave judgment against him for defendants' costs and disbursements. The plaintiff appeals.

The sole question for determination is, as we have seen, whether the complaint, upon its face, states facts sufficient to entitle the appellant to equitable relief. It is asserted in the brief of the appellant that the court below sustained the demurrer to the complaint for the reason that, in its opinion, creditors' bills have been abolished in this state by force of our statutes in aid of executions on judgments at law. This statement is disputed by the learned counsel for the respondent, who claims that the demurrer was sustained because it appeared from the allegations of the complaint that appellant had an adequate remedy at law, and therefore did not need the aid of equity. The record does not disclose upon which, if either, of these theories the learned court acted, but we are of the opinion that the judgment can-

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not be sustained upon either of the grounds suggested by counsel. This court has repeatedly entertained actions to set aside fraudulent conveyances, and subject property so conveyed to the satisfaction of judgments, and this is conceded by counsel for the respondents. Nor does the fact that a party may have a remedy at law necessarily preclude him from invoking the aid of equity in cases of this character. If the legal remedy is inadequate to afford full relief, resort may be had to equity in proper cases. Indeed, it is a well-established principle that equity has concurrent jurisdiction with law over frauds, under statutes relative to fraudulent conveyances. Wait, Fraud. Conv. (2d Ed.) § 51; Bump, Fraud. Conv. (4th Ed.) § 530. And the creditor himself may select the forum in which the question of fraud shall be determined, or, in other words, he has the option to submit the determination of the question either to a court of law or a court of equity. "But," says Mr. Bump, "the remedy most frequently used is a bill in equity, because a court of equity sifts the consciences of the parties and removes the cloud from the title. Fraud constitutes the most ancient foundation of its jurisdiction, and is a sufficient ground for its interposition. It may grant relief, although there is ample remedy at law; for no relief is adequate except that which removes the fraudulent title. The relief in equity is different and may be more beneficial than that given by the law." Bump, Fraud. Conv. (4th Ed.) § 532. And in Wait on Fraudulent Conveyances it is stated that "the existence of a remedy at law does not interfere with the right of a creditor to resort to a court of equity to secure a cancellation of a fraudulent conveyance, as an obstacle in the way of the full enforcement of a judgment, and a cloud on the title to the property sought to be reached. * * * The creditors' bill, or a suit to clear the fraudulent transfer, is, for many reasons, entitled to preference as a means of relief. Should the creditor attempt to sell the disputed property arbitrarily under execution, bidders would be deterred from purchasing, lest they should buy a lawsuit; hence the market value of the land embraced in the covinous transfer is practically destroyed. Then the seizure of the property subjects the creditor to the peril incident to proving that the transfer was fraudulent, and, in the event of failure to establish fraud, of paying damages for the unwarrantable interference, seizure and sale." Wait, Fraud. Conv. (2d Ed.) § 60. In 5 Enc. Pl. & Prac. p. 402, the writer observes: "The remedy of the judgment creditor by a sale under execution of the premises fraudulently conveyed does not affect the jurisdiction of equity, as the creditor has the right not only to have the property subjected to the payment of his judgment, but to have it done in such a manner that it will bring its fair market value." And on page 392 of the same volume it is said that the most common instance of a creditors' bill is where property legally liable to execution has been fraudulently conveyed or incumbered, so that, although the property might still be sold on execution, it would not sell for an adequate price, and a suit is brought to clear away such conveyance or incumbrance. The law as laid down by these text writers is in accordance with the overwhelming weight of authority. In fact, no decisions announcing a contrary doctrine have been cited by counsel, and we have observed none. In Cornell v. Radway, 22 Wis. 260, the court said: "The existence of the [judgment] lien, without adequate remedy for enforcing it at law, by reason of the fraudulent or inequitable obstruction interposed by the defendant, is sufficient to give a court of equity jurisdiction." And in Zoll v. Soper, 75 Mo. 460, which was an act to subject land to the payment of a judgment, it was held that, "while the creditor might have the land sold on execution, equity will not compel him to pursue that ruinous course." See, also, Freem. Judgm. (4th Ed.) § 350; Pom. Eq. Jur. § 1415, and note; Black, Judgm. § 423; Metzger v. Burnett (Kan. App.) 48 Pac. Rep. 599, 4 Am. & Eng. Ency. Law (1st Ed.) 576; Taney v. O'Connell (Colo. Sup.), 27 Pac. Rep. 888. While it is true that the appellant, if he had been permitted to do so, might have sold the premises in controversy on execution in the first instance, it is equally true, under the authorities above cited, that he was not obliged to pursue that course. He had the right, under the averments of the complaint, which are admitted to be true by the demurrer, to proceed in equity to have the obstructions in the way of execution removed. We are convinced that the complaint, viewed in the light of the authorities, states a cause of action; and the judgment is therefore reversed, and the cause remanded, with directions to overrule the demurrer.

NOTE.—*Right of Creditor to Maintain Creditors' Bill to Set Aside Fraudulent Transfer of Debtor's Property.*—Where a debtor conveys his land in fraud of creditor, the creditor may, at his election, sue to set aside the fraudulent deed and subject the land to the payment of the debt, or he may sell the land under the execution before ascertaining the debtor's interest therein, and then sue to set aside the fraudulent deed. Lionberger v. Baker, 88 Mo. 447; Ladd v. Smith, 107 Ala. 506; Howland v. Knox, 59 Iowa, 46; Lynn v. Le Gerse, 48 Tex. 138. The latter remedy, while the most dangerous and one not generally to be recommended, is sometimes advantageous and advisable. As, for instance, where the proof of the fraudulent conveyance is absolutely convincing so as to practically leave no doubt of its being set aside—in such case the possibility of buying a lawsuit deters bidders and enables the creditor very often to purchase his debtor's interest at a sacrifice and reap quite a substantial profit on the subsequent setting aside of the fraudulent conveyance. Shrewd commercial lawyers appreciate their election of remedies in cases of this character and are quick to see the advantage of one mode of procedure over the other, in proportion as their case is doubtful or certain. In either case, it affords quite a profitable speculation to certain classes of investors, but has been regretted by the courts for this very reason. In Lionberger v.

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Baker, *supra*, after admitting that the creditor had the election either by bill in equity to set aside the fraudulent conveyance and then have the property sold to satisfy his debt, or by sale under execution to sell the interest of his debtor in the property conveyed and then have the fraudulent conveyance set aside, the court said: "It is to be regretted that the former course is not more frequently pursued, and thereby avoid the sacrifice of property and speculation attending such execution sales, of which this case is no exception; but the right of the creditor to do either is well established in this State."

In most cases, however, where the creditor has no desire to speculate, the remedy at law by sale under execution is not adequate, and even if it were it would not affect his right to proceed by a creditors' bill in equity to have the fraudulent conveyance set aside and the property subjected to the payment of his judgment. Lathrop v. McBurney, 71 Ga. 815; Abbey v. Commercial Bank, 31 Miss. 434; Gaines v. Exchange Bank, 64 Tex. 18; National Bank v. Hollerin, 31 Neb. 558. In Martin v. Atchison, 2 Idaho, 590, the court held the creditor to have the right to proceed in equity to enforce his claim against the debtor who has fraudulently conveyed his property, in spite of the fact that he had a remedy at law by execution, and the court assigns as a reason for its holding that the remedy by sale under execution is not adequate, because no one would purchase the property at anything over a nominal sum, and the result would be that the creditor would be compelled to buy in the property and then bring an action to clear the cloud against the title. In Chambers v. Sallie, 29 Ark. 407, a debtor made a fraudulent conveyance and died, and a judgment creditor, having probated his claim, and had it allowed and classed in the third class, filed a bill in chancery to have the conveyance set aside and the land subjected to the payment of his claim. It was held that the court of chancery had jurisdiction to set the sale aside, and subject the property to the payment of the debts, and might retain its jurisdiction to settle and dispose of the equitable rights of the parties. In Decker v. Decker, 108 N. Y. 128, it was held that an action in the nature of a creditors' bill lies to reach property in the hands of one who purchased it at an execution sale, and holds it for the benefit of the debtor to defraud the creditors of the debtor. In Pierstoff v. Forges, 86 Wis. 128, it was held that a creditor might prosecute a bill to set aside a fraudulent conveyance, notwithstanding the fact that the property fraudulently conveyed still remained in the open possession of the debtor. In Lee v. Hollister, 5 Fed. Rep. 752, it was held that equity has jurisdiction of a bill by a creditor to set aside conveyances made to the debtor's wife in fraud of his creditors, and to subject the property to the payment of the creditors' claim; the remedy at law being neither plain nor adequate. In Rozek v. Redzinski, 87 Wis. 525, it was held that a judgment creditor who has obtained a lien by levy of execution on his debtor's property has the right to maintain an equitable action to set aside fraudulent claims of third persons on the property, independent of Rev. Stats. § 3186, providing that anyone having a lien on land shall have the same right to maintain a suit to quiet title as the owner of the legal title.

Statutes expressly authorizing the sale of the property fraudulently conveyed, under an execution, do not oust equity of its jurisdiction. Cook v. Johnson 12 N. J. Eq. 51; Chardavoyne v. Galbraith, 81 Ala. 521; Scott v. Wagon Works, 48 Ind. 75. A purchaser at a sheriff's sale, however, of lands fraudulently conveyed by the judgment debtor has a remedy by ejectment, and cannot, before obtaining possession, come into equity to secure a cancellation of the fraudulent transfer. Smith's Executor v. Cockrell, 66 Ala. 64. In Indiana a statute provides that any creditor of a decedent whose claim shall have been filed and allowed by the court, may file his petition showing the insufficiency of the personal estate of the decedent to pay the liabilities, and that the deceased died owning real estate liable to be made assets for the payment of his debts, and praying an order requiring the executor or administrator to proceed to sell it for the payment of such debts. Held, that such statute does not prevent a creditor from maintaining an action to set aside a fraudulent conveyance made by the decedent. Battorff v. Cavert, 90 Ind. 508. In Massachusetts, however, where an insolvent gives notes, without consideration, to persons aware of his insolvency, and procures his property to be attached and seized on execution, a bill will not lie to vacate the judgment and to set aside a levy theron, as § 96 of Pub. Stats. ch. 157, provides that when an insolvent with a view to give a preference procures his property to be attached and seized on execution, the person to be benefited thereby having reasonable cause to believe him insolvent, such transaction shall be void, and the assignees may recover the value of the property from the person so benefited, furnishes a complete remedy at law. Ames v. Sheehan, 161 Mass. 274. Proceedings in aid of execution do not furnish such an adequate remedy at law as will preclude equitable interference to set aside a debtor's fraudulent conveyance. Scanlan v. Murphy, 51 Minn. 536; Klosterman v. R. R., 8 Wash. 281; Faber v. Matz, 86 Wis. 370. In North Carolina, however, it was held that creditors, electing to sell land fraudulently conveyed by the judgment debtor, treating the conveyance as void under St. Eliz., cannot afterwards invoke the jurisdiction of equity to set such conveyance aside, nor can the execution purchaser do so, since the relief already availed of is complete. Thigpen v. Pitt, 54 N. Car. 49.

These cases have been carefully selected to show the trend of the best considered authorities in upholding that ancient and effective remedy of equity—the creditors' bill—in setting aside conveyances in fraud of creditors and in enforcing payment of a judgment from land thus fraudulently conveyed.

JETSAM AND FLOTSAM.

A BRIEF AGAINST THE UNANIMITY RULE.

Perhaps as terse an argument in favor of abolishing the unanimity rule in jury trials so that verdicts may be rendered by a majority or other proportion of the jury is the following by Judge A. B. Grace of Pine Bluff, Ark., reported by the *American Lawyer*. Though not elegant, it certainly is forceful. He says: "In every relation of life in America where the result is made to depend on the opinions and decision of a number of persons the principle of majority rule has been adopted, with the sole exception of the verdict of a jury. A majority of one vote in each house of a general assembly or the congress suffices to create, repeal, or change a positive law, regardless of the magnitude of the interests involved, as in the case of a currency bill, a tariff law, or a declaration of war. A majority of the national senate ratifies or refuses to consent to a treaty with a foreign power. A majority of a single vote in half a million in a pivotal state may elect a president of the United States,

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change the entire policy of the government, and bring prosperity or ruin to seventy millions of people. And yet lawyers—good lawyers, honest and patriotic lawyers—will roll their eyes in horror at the very suggestion that it would be sensible to apply the same principle in deciding a replevin suit for a 'ticky' calf or a pestle-tailed pony. And yet, again, this very calf or pony case, when it has ascended by appeal from the justice of the peace to the circuit court, and thence to the supreme court of the state, is decided by a bare majority of the judges, if they should happen to differ. In a capital case, if three supreme judges vote to break the appellant's neck and two decide that he ought to go scot-free, the accused gentleman must suffer the inconvenience of being hanged until he is dead. So the Supreme Court of the United States if five learned gentlemen are of the opinion that an income tax, for instance, is unconstitutional, and four other equally 'potent, grave, and reverend seigniors' think that it is not, the majority of one prevails and the solemn act of the senate and house of representatives of the United States becomes a nullity. So again, in bodies having purely ministerial or executive functions, as in the case of boards of directors of corporations, for example, the majority rules, and the rights of the minority must give way to the will of the majority when lawfully expressed."

EXAMINATION OF WITNESSES.

The Hon. Joseph F. Daly, ex-justice of the Supreme Court of New York, writing for "*The Brief*," makes, among others, the following suggestions for the examination of witnesses, which we have selected as especially valuable:

It injures a cause for counsel to find fault with his own witness.

The examination and cross-examination of witnesses develop the strength or weakness of the case. To manage your own and your adversary's witnesses with ease, grace and decorum should be the particular study of counsel.

Experienced cross-examiners humor the disposition of witnesses to display superior knowledge of the matter at issue and a good deal besides, and they readily fall into the trap prepared for them by the cross examiner with the encouraging manner.

The calling of witnesses whom your adversary will be compelled to call ought to be avoided if possible, as the chances are that they may be unfriendly, and it is better not to make them your own witnesses, since you may not then impeach them.

If I were asked what is the first qualification for a good cross-examiner I should say, "an intimate knowledge of human nature." To know its tendencies under certain conditions, its frailties and weaknesses, is to have a dishonest or an imprudent witness at your mercy.

Incompetent and irrelevant testimony volunteered by a witness may be suffered until the full answer is out and then be stricken from the record by motion; but it is generally wise to let adverse witnesses talk freely. More is to be gained by the chance of their saying too much than by coercing them into keeping to strict rules.

Nothing, it is certain, is so fatal as a suspicion of disingenuousness on the part of counsel, and no where is it more distasteful to a jury than in the treatment of the testimony of witnesses. It is important, for example, to always quote a witness correctly when referring to his evidence in cross-examination or in summing up to a jury.

While I do not favor too much technicality in this regard, I consider it always prudent to object to leading questions. The leading questions of counsel who is "intoxicated by the exhuberance of his own verbosity" is one of the most insidious and dangerous things to be apprehended from an adversary, and should be promptly met by persistent objection.

It should be borne in mind that if you have to subpœna a hostile witness to produce a book or document, you may call him to the stand and ask for the production of writings, without swearing him as a witness. This is important as such evidence is only to be gotten from persons who are in many cases friendly to, if not implicated with, the other side.

It would be proper to impress upon the most honest of witnesses that their impressions, not founded upon recollection, as to what possibly or even probably occurred, must be dismissed from the mind and the absolute memory only given in evidence on the direct. If the opposing counsel seeks to lead the witness into the realms of surmise he may be safely followed, but it will never do to let him discover the witness there and drag him out as a terrible example of mendacity.

Experienced lawyers expect that even candid and respectable witnesses will be tempted to round out their version of a transaction with matter of mere surmise. The invented portions will of course change with every repetition, the matters of pure memory alone remaining the same. Counsel will, therefore, generally ask a witness to repeat on cross-examination what has been given on the direct and will easily distinguish by the change of words and phrases where the imagination has come to the aid of recollection in the details of a transaction.

One of the most skillful of our young trial lawyers, whose ability in cross-examination has been over and over again developed, has an extraordinary faculty for seizing upon a chance exaggeration by a hostile witness and clinging to it with tenacity until the admission of falsehood is obtained. He will repeat his question, "Why did you say so and so?" or "It was not true, was it?" in spite of a dozen evasions unti the witness has no recourse except to confess that h or she had added what was not the fact to testimony given under the solemnity of an oath.

Cross examination may be compared to a sword without a hilt. Unless it is handled carefully it may injure the one who uses it more than it hurts his adversary. Where counsel would test the accuracy or honesty of a witness by inquiring into a multitude of circumstances, he must be careful lest this very process may elicit the most convincing corroboration of the witness' direct testimony and leave the counsel in the sorry plight of having made his adversary's case stronger than it was before. It may be safely said that unless counsel feel pretty sure of their ground and know the case of the other side thoroughly it is better to be frugal in cross-examination and confine questioning to the thorough exposure of palpable error or bias.

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Since it is indispensable that witnesses should be thoroughly investigated before trial and their honesty and character put to the severest tests, it is a proper precaution to warn them not to be embarrassed by questions of the adversary as to whether they have talked with the counsel or with anybody about the testimony they were to give. Ignorant witnesses connect these questions with some imputation that they have been coached for examination, and in their fear to injure the cause for which they testify are apt to hesitate. It is surprising how successful this threadbare scheme for confusing witnesses proves to be in nine cases out of ten. It is generally counsel who, it may safely be inferred, confer most largely with their own witnesses who are prone to this kind of cross-examination, but it is a very easy and effective way of beginning a cross-examination, and is resorted to like a familiar opening in a game of chess. The only way to check your adversary is to warn your witnesses to answer frankly on the subject and never to be afraid to tell how often and to whom they have told the story they are telling on the stand.

BOOK REVIEWS.

THE TAX LAW OF THE STATE OF NEW YORK, SECOND EDITION.

The first edition of this valuable work was published in 1898, since which many changes have been made in the tax law. The special franchise tax law was enacted in 1899; some important decisions have been rendered by the courts in the enforcement of this law which are cited in the work. Since the publication of the first edition many cases have been decided relating to the provisions of the tax law. The book contains forms for lawyers, assessors, collectors and other officers. The author is H. Noyes Greene, of the Troy bar, author of "Law of Taxable Transfers," "Practice Time Table," "Law of Negotiable Instruments," "Highway Law, etc." There is also added to the book a very valuable chapter on the Powers and Duties of Assessors, by J. Newton Sierro, council for the state board of tax commissioners, author of special actions and special proceedings. The book contains 365 pages, 8vo., bound in law sheep. Published by Matthew Bender, Albany, N. Y.

HUMORS OF THE LAW.

"Taking into consideration the things Sharp has had to contend against, I think his success as a lawyer has been remarkable."

"Why, what did he ever have to contend against?"

"Everything. He came of a wealthy family. He didn't have to work his way through college. He never studied by the light of a pine torch, never had to drive dray, never walked six miles to school, and wasn't compelled to borrow his books. He had every possible facility, and yet he has done well from the very start."

An Atchison girl taught school for a living and found it hard to buy bread and shirt waists on $40 a month. One night the fire bells rang, and she ran to the fire, and was introduced there to a man getting $200 a month, with no kin incumbrances, who married her. Since then, every time the fire bells ring, the women throw their aprons over their heads, and run, but no more $200 a month men have been picked up.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ATTACHMENT—Action on Bond—Limitations.—An action to recover damages upon an attachment bond is an action on a written contract, and is not barred until the expiration of five years from the time the right of action accrues.—BAKER V. SKINNER, Kan., 64 Pac. Rep. 961.

2. BENEFICIAL ASSOCIATIONS—Actions for Benefits—Conditions—Burden of Proof.—Where an action is brought by a member of a brotherhood order against the order for indemnity for disability, the constitution of which order provides that the same shall be paid to disabled members in good standing, failure of such member to prove his good standing will not defeat his claim, in the absence of evidence to the contrary, since the burden of proof is on defendant to show that plaintiff was not in good standing.—LILLIE V. BROTHERHOOD OF RAILWAY TRAINMEN, Iowa, 86 N. W. Rep. 279.

3. BILLS AND NOTES—Guarantor—Notice of Dishonor.—One who guaranties the payment of a note is not entitled to notice of dishonor, to which an ordinary indorser of a negotiable paper is entitled.—FARRER V. PEOPLE'S TRUST CO., Kan., 64 Pac. Rep. 1031.

4. BILLS AND NOTES—Indorsement in Blank—Notice of Protest.—Code, § 3049, provides that the blank indorsement of an instrument by a person not the payee, indorsee, or assignee thereof shall be a guaranty of the contract, and that the guarantor is chargeable without notice if he has received no detriment from the want thereof. Plaintiff brought action on notes indorsed in blank by the makers against the guarantors, who were strangers thereto, alleging that no protest had been made, but that defendants had received no detriment thereby, because the makers and payees were insolvent. Defendants demurred on the ground that there was no protest as provided by law. Held, that no notice was required to fix defendants' liability, since their demurrer admitted plaintiff's allegation that there was no detriment.—GRIER V. IRWIN, Iowa, 86 N. W. Rep. 278.

5. BOUNDARY—Division Fence.—Where a division fence between adjoining owners has stood for over 10 years, each party claiming to own up to it, an agreement to make it the true boundary will be implied.—KULAS V. MCHUGH, Iowa, 86 N. W. Rep. 288.

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6. CHATTEL MORTGAGE—Sales by Mortgagor—Assignment for Benefit of Creditors.—On July 25, 1895, D executed a mortgage to F on astock of goods and fixtures to secure a debt of $1,000; and D, with consent of F, continued selling the goods and replacing them with a new stock, and using the proceeds as he saw fit. Subsequently the goods and fixtures were sold under attachment, and $426 received for the fixtures was paid to F on July 28, 1896. On July 15, 1896, D filed a petition in insolvency, and plaintiff was appointed assignee. Held, that the constructive fraud of D and F in dealing with the mortgaged property did not render the mortgage void as to plaintiff, and, in the absence of actual fraud, plaintiff was not entitled to any of the funds as against F.—BRODERICK v. RICHARDSON, N. H., 49 Atl. Rep. 92.

7. CHATTEL MORTGAGE—Validity—Change of Possession.—Plaintiff took a mortgage on a stock of groceries belonging to D's wife. D had been conducting the business for his wife, and plaintiff agreed that he should continue to do so, and that the mortgage should not be recorded. Held, that the mortgage was void as to third parties.—LEHMAN-HIGGINSON GROCER CO. v. MCLAIN, Kan., 64 Pac. Rep. 1029.

8. CHATTEL MORTGAGE—Validity—Power of Mortgagor to Sell.—A provision in a chattel mortgage that the mortgagor may remain in possession of the mortgaged property,—the same being a stock of merchandise,—and sell the same, turning over to a bank the proceeds of such sales until a debt due the bank was paid, does not render the mortgage void. Neither does the mortgagee in such mortgage lose his lien because the mortgagor fails to carry out such agreement, but uses a portion of such proceeds in a manner not provided in the mortgage, when the mortgagee had not consented to or permitted such misappropriation.—ATCHISON SADDLERY CO. v. GRAY, Kan., 64 Pac. Rep. 988.

9. CONTRACTS—Consideration.—In order to constitute a valuable consideration for a promise, neither the benefit to the promisor nor the detriment to the promisee need be actual. It would be a detriment to the promisee, in a legal sense, if he, at the request of the promisor, and upon the strength of his promise, performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obliged to perform.—BIGELOW v. BIGELOW, Me., 49 Atl. Rep. 49.

10. CORPORATIONS—Directors — Individual Liability for Debts.—Pub. St. ch. 150, § 4, declares that no corporation except banks and insurance companies shall contracts debts exceeding one-half the value of its property; and section 5 provides that, for a violation of such act by a vote of its officers, the directors shall thereby become individually liable, to the amount of the excess, for the debts and contracts then existing, or contracted while they remain in office. Held, that on violating such acts the directors became liable as sureties for the corporation, and creditors were entitled to sue the directors as sureties, independent of their rights of action against the corporation.—SWAN v. BURNHAM, N. H., 49 Atl. Rep. 93.

11. CORPORATIONS—Ultra Vires—Estoppel.—Where a mutual fire insurance company, the articles of incorporation of which provide that it shall insure only town or city property, insures country property, receiving and accepting the premiums therefor, and levies and collects assessments thereafter, such company is estopped to plead *ultra vires* in an action on the policy.—GARNER v. MUTUAL FIRE INS. CO., Iowa, 86 N. W. Rep. 289.

12. CRIMINAL EVIDENCE—Intoxicating Liquors—Unlawful Sales.—The fact that bottles, glasses, liquors, and other articles may have been taken by an officer free from the possession of the defendant in an unauthorized search of his premises does not constitute a valid objection to the admissibility of such articles in evidence against him, if they are otherwise pertinent and competent.—STATE v. MILLER, Kan., 64 Pac. Rep. 1088.

13. CRIMINAL LAW—Libel—Information.—An information for publishing a libel not defamatory *per se*, and not averring that such publication tended to provoke the person libeled to wrath, is fatally defective.—STATE v. ELLIOTT, Kan., 64 Pac. Rep. 1027.

14. ELECTIONS—Canvassing Boards—Duties and Powers.—The object and purpose of the canvass made by such board is to determine the result of the election as shown by the official returns of such election, and not to determine judicially who received the most votes in fact. In case the official returns do not truly recite the votes as cast, the remedy provided for those who are aggrieved is by contesting the election.—STATE v. MACKENZIE, N. Dak., 86 N. W. Rep. 281.

15. FRAUD—Damages—Purchase on Joint Account.—Defendant, having been made the depositary of plaintiff's money, proposed that they should jointly purchase land, to which plaintiff assented; and defendant made a purchase, using plaintiff's money therein, representing that the price was $10 per acre, when it was but $6 per acre, and taking title in himself. Afterwards plaintiff's share, on the basis of a purchase at $10 per acre, was conveyed to him. Held, that there was a fraud, rendering defendant liable for the difference between the price paid and that represented, though plaintiff realized from his land more than $10 per acre.—JOHNSON v. CAVITT, Iowa, 86 N. W. Rep. 256.

16. FRAUD—Pleading.—A mere general averment of fraud and illegality, without stating the facts upon which the charge is based, presents no issue, and is demurrable for insufficiency.—LADD v. NYSTOL, Kan., 64 Pac. Rep. 985.

17. FRAUD AND DESCENT — False Representations.—A representation made to one person, with the intention that it shall reach the ears of another, and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to redress as if it had been made to him directly.—HENRY v. DENNIS, Me., 49 Atl. Rep. 58.

18. FRAUDULENT CONVEYANCE — Creditors.—Defendant was engaged in the millinery business in partnership with her sister, and she also conducted a like business individually in another city. Attachments were levied on the firm stock, and defendant immediately executed a bill of sale of her stock to her brother for the express consideration of $2,500, and telegraphed him what she had done. There had been no previous correspondence as to such sale, but he at once started for the place where the store was, and took possession of the stock. She was indebted to him on a note for $900, which he turned over to her. He gave her $400 in cash, and the balance was made up by his notes. The transfer of the cash was made in the presence of a third party, because the brother, as he stated, wanted a witness. On taking possession of the store, he posted signs therein to the effect that the stock belonged to him. No invoice was made of the stock. The brother had never seen it before, and he knew nothing of the millinery business, his occupation being that of a common laborer, but he testified that some months previously he had endeavored to buy the stock. Held, that the conveyance to him was void.—ROSENHEIM v. FLANDERS, Iowa, 86 N. W. Rep. 298.

19. GARNISHMENT—Defective Service—Payment by Garnishee.—Rev. St. 1898, § 2756, provides that garnishee summons shall be served on the principal defendant or his attorney within 10 days after service on the garnishee, and unless the garnishee summons be so served, or the proof of service show that, after due diligence, such service cannot be made within the state, the service on the garnishee shall become void and of no effect from the beginning. Held, that where garnishee summons was not served as provided by the statute, and the proof of service on the gar

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nishee did not show that after due diligence such service could not be made within the state, a payment by garnishees to the principal defendant, prior to any motion to amend the return of the sheriff, discharged them from liability on the garnishment.—SMITH, THORNDIKE & BROWN CO. v. MUTUAL FIRE INS. CO., Wis., 86 N. W. Rep. 241.

20. GUARDIAN AND WARD—Guardian Ad Litem—Compensation.—Before his appointment as guardian *ad litem*, an attorney agreed to accept such appointment in a proposed suit, and conduct the litigation therein for his wards, for a specified sum in the trial court and for a like sum in the supreme court on appeal. He received and receipted for the agreed sum after the trial. Thereafter the opposing attorney was changed, and the guardian *ad litem's* right to appeal was opposed, and the general guardian attempted to secure his discharge, and opposed all his efforts in behalf of the wards. Held, that the compensation of the guardian *ad litem* for services in the trial court was fixed by the agreement, but the circumstances of the appeal were so changed from those contemplated when the agreement was made that compensation should be awarded independent of the agreement.—RICHARDSON v. TYSON, Wis., 86 N. W. Rep. 250.

21. HIGHWAYS—Deeds.—A deed conveying land for a street to a city "to have and to hold to the same extent and with the same effect as if the said street had been opened by a decree on proceedings had for that purpose under the road laws of the commonwealth," gives the city the same power over the street, including the narrowing or vacating of it, as though it had been opened by adverse legal proceedings.—MORRIS v. CITY OF PHILADELPHIA, Pa., 49 Atl. Rep. 70.

22. HUSBAND AND WIFE—Deed of Trust in Anticipation of Marriage.—A wife whose husband, just prior to the marriage, and without her knowledge, conveyed his property to a trustee, to pay the income to him for life, and after his death to convey the property to persons named, not including her, is not entitled to have the deed of trust set aside, so that management of the property may be restored to the husband, though after his death she may have it annulled, that she may take a share in the property.—POTTER v. FIDELITY INS., TRUST & SAFE-DEPOSIT CO., Pa., 49 Atl. Rep. 86.

23. HUSBAND AND WIFE—Release of Dower Interest.—A release by the husband to the wife, during coverture, of all his right, title, and interest in dower, or right and interest by descent, in her real estate, and of all claim he may have in her personal estate at her decease; by allowance or otherwise, is not a "pecuniary provision" for her, within the meaning of Rev. St. ch. 103, §§ 8, 9; and her release to him in consideration thereof, of her right and interest by descent in his real estate, is invalid.—PINKHAM v. PINKHAM, Me., 49 Atl. Rep. 48.

24. HUSBAND AND WIFE — Separation Agreement.—The separate acknowledgment by the wife required by Act Feb. 24, 1770 (1 Smith's Laws, p. 807; Purd. Dig. p. 682, pl. 22), when she conveys her interest in real estate, is not necessary to an agreement of separation, to bar her right of dower.—IN RE KAISER'S ESTATE, Pa., 49 Atl. Rep. 79.

25. INSURANCE—Fidelity of Employees—Indemnity—Evidence.—A fidelity company, insuring the honesty of a railway company's employees, was compelled to pay certain indemnity. It sued defendant as one of such employees to recover the amount so paid. Defendant denied the execution of the policy. The only proof thereof was a copy of the policy attached to a deposition of an officer of the railway company. Held, that a demurrer to the evidence was properly sustained.—FIDELITY & CASUALTY CO. OF NEW YORK v. YODER, Kan., 64 Pac. Rep. 1027.

26. IRRIGATION DISTRICTS — Directors — Authority—Suspension of Work.—Under Ballinger's Ann. Codes & St. § 4176 (Sess. Laws 1890, p. 677, § 11), providing that directors of an irrigation district shall have power to manage the affairs of the district, execute all necessary contracts, and generally perform all necessary acts, a board had authority to consent to the cessation of work on a ditch, where the contractor was to be paid from a sale of bonds, and sufficient funds had not been raised by such sales to meet payments due.—DYER v. MIDDLE KITTITAS IRR. DIST. OF KITTITAS CO., Wash., 64 Pac. Rep. 1009.

27. JUDGMENTS — Fraud—Suit to Set Aside.—The fact that a judgment is obtained by means of perjured testimony is not sufficient to support a suit in equity to set it aside on the ground of fraud.—STEEN v. MARCH, Cal., 64 Pac. Rep. 994.

28. JUDGMENT—Vacating.—The court should not vacate a judgment on an application made under subdivision 3 of section 568 of the Civil Code until the party applying therefor, if he be the defendant, shall have set up a defense to the action as provided in section 572. These two sections are to be construed together, and it is error to vacate a judgment on such grounds until the defendant has presented to the court a complete answer to the action upon which the judgment was rendered.—SCHULER v. FOWLER, Kan., 64 Pac. Rep. 1035.

29. LANDLORD AND TENANT — Repairs.—The plaintiff was injured by a defective stairway to a tenement leased by defendant to him. There was no evidence that the defendant knew of the existence of the defect. All that was visible or known to the defendant was visible to the plaintiff.—SHACKFORD v. COFFIN, Me., 49 Atl. Rep. 57.

30. LANDLORD AND TENANT—Taking Leased Property for Street—Liability of Lessee for Rents.—A city having given notice to a property owner—under Act April 21, 1855 (P. L. 266), authorizing it, on three months' notice, to open a street—that at the expiration of three months it would require certain of his land for a street, and he having served this notice on his lessees, and the property leased being of no value to them without the part claimed for a street, they may remove from the premises, without liability for rent after expiration of the three months, though the city does not then take possession; they being liable to be dispossessed at any time thereafter, and the owner being given by the act of 1855 an immediate remedy, on receipt of the notice, to obtain from the city full compensation for injury sustained.—UHLER v. COWEN, Pa., 49 Atl. Rep. 77.

31. LEASE—Right to Assign—Renewal.—A term lease of land, on which the lessee had erected a cottage, authorized him to terminate the lease and remove the cottage at any time, and authorized the sale of the house to be used on the premises, on the consent of the lessor, his heirs or assigns. The lease contained a covenant not to underlet, and all the rights thereunder were expressly granted to the lessee and his heirs, but no mention was made of his assigns. Held, to prohibit an assignment of the lease without the consent of the lessor.—UPTON v. HOSMER, N. H., 49 Atl. Rep. 96.

32. LIMITATION OF ACTIONS—Pleading—Amendment.—Though a cross complaint filed within the period of limitations was not signed by the attorneys until after the filing of a trial amendment, such amendment related back to the filing of the cross complaint, and the action was not barred by limitations.—ANTHONY INV. CO. v. ARNETT, Kan., 64 Pac. Rep. 1024.

33. MANDAMUS — Appeal — Dismissal.—Where, pending an appeal from an order granting *mandamus* directing the transfer of bank stock, a receiver is appointed for the bank, and is discharged after showing a disposition of all the assets, the appeal will be dismissed on the ground that the order has become incapable of enforcement.—PARSONS v. TETIRICK, Kan., 64 Pac. Rep. 1028.

34. MASTER AND SERVANT — Injuries to Servant—Appliances—Fellow-Servants.—Where a servant sued for

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injuries sustained by reason of the slipping of a ladder which was nailed to a roof by his fellow-servants, and the negligence alleged was that the nails used were too short, but there was no evidence that other and suitable nails were not furnished, plaintiff having testified that there was plenty of nails in such places, and that he had no doubt that there were other nails there, there was no evidence tending to show that defendant had not furnished proper appliances with which to conduct the work, and hence plaintiff was not entitled to recover.—MANNING v. MANCHESTER MILLS, N. H., 49 Atl. Rep. 91.

35. MORTGAGE—Foreclosure — Limitations.—A husband and wife jointly executed a note, and secured the same by a mortgage on real estate belonging to the wife. The note became barred as to the wife by the statute of limitations, but not as to the husband, he having made payments which tolled the statute. Held, that the mortgage could be foreclosed, and the wife's land sold to pay the judgment rendered against the husband.—JACKSON v. LONGWELL, Kan., 64 Pac. Rep. 991.

36. MORTGAGE— Minors—Homestead—Foreclosure.—A mortgage upon a homestead was executed by the father and mother of minor children to secure a note which they had given. Before the note matured, the father died intestate, and the mother and children continued to occupy the homestead. With the products of the homestead the mother made payments on the note, and kept it alive. No guardian was appointed for the children, and no payments on the note were expressly made for them. An action of foreclosure was brought more than five years after the maturity of the note, and the minor children claimed that the mortgage was barred as to them, and not enforceable as against the undivided one-half of the mortgaged land which they had inherited. Held that, the debt having been kept alive, the mortgage executed to secure its payment may be foreclosed against the whole of the land.—PERRY v. HORACK, Kan., 64 Pac. Rep. 990.

37. MORTGAGE—Recovery of Possession.—A mortgagee or the assignee of a mortgage may maintain a real action against a person in possession of the mortgaged premises, and obtain a common-law judgment for possession, without the production of the notes referred to in the mortgage, or other evidence of the existence of some portion of the mortgage indebtedness, except the mortgage itself, where there is no evidence to the contrary, and no circumstances from which a payment of the indebtedness may be inferred.—MORSE v. STAFFORD, Me., 49 Atl. Rep. 45.

38. PARTITION—Minors—Step Parent.—Where a landowner dies leaving a widow and minor children, and the widow and her second husband occupy and cultivate the land and support the children, in a suit for partition after the children are of age the widow and her husband are chargeable with the value of the use of each child's interest during his minority, since the husband is not a tenant in common with the children, as he has no interest in the land.—PLANT v. FATE, Iowa, 86 N. W. Rep. 276.

39. PARTNERSHIP — Evidence — Verdict Improperly Directed.—Plaintiff contracted with defendant W to the evidence tended to show a partnership, from the agreement for participation in profits, and it was error for the court to instruct in favor of defendants.—MOORE v. WILLIAMS, Tex., 62 S. W. Rep. 977.

40. PLEADING AND PRACTICE — Assignments—Sufficiency.—At a meeting of about 50 persons who had been working for the defendant company, all present agreed that plaintiff should present their claims; and plaintiff sued on his own claim and those of 45 others, and alleged that they were assigned to him, which defendant denied. Held, that the evidence of an assignment was not sufficient to justify a verdict in favor of plaintiff as assignee, under Code Civ. Proc. § 1835, defining satisfactory evidence as that which ordinarily produces moral certainty or conviction in an unprejudiced mind.—GUSTAFSON v. STOCKTON & T. C. R. Co., Cal., 64 Pac. Rep. 995.

41. PLEADING AND PRACTICE — Liability for Fires—Statute.—A count in a petition in an action for property destroyed by fire while in a railroad depot which alleges that defendant was negligent, in that the depot was insufficient and highly inflammable, and that the property was destroyed through the defendant's negligence, and that it caught from a spark negligently allowed to escape from defendant's locomotive, is defective, as combining an action for common-law negligence with a claim under Rev. St. 1899, § 1111, making a railroad liable for fire set by sparks escaping from its locomotives.—BLACKMORE v. MISSOURI PAC. RY. CO., Mo., 62 S. W. Rep. 993.

42. PLEADING AND PRACTICE—Remark of Court—New Trial.—In an action against defendant by his children to recover the community interest of their deceased mother in $10,000, the plaintiffs testified to having seen and counted the money just before their mother's death; and defendant swore that they never had any such money. The trial court, without knowledge that he was heard by the jury, remarked that somebody was guilty of perjury, and that he would have them before the grand jury. Two jurors made affidavit that, on consideration of the case, one juror claimed that the court said that defendant was guilty of perjury, and that some of the jurors seemed prejudiced against defendant. Held, that it was error to deny defendant a new trial.—RIDDLE v. RIDDLE, Tex., 62 S. W. Rep. 970.

43. PUBLIC LANDS — Purchase — Forfeiture.—Act March 25, 1897, ch. 37, § 1, provides that, if on November 1st of any year any part of the interest due for public lands heretofore sold has not been paid, the land commissioner shall indorse on the obligation for said lands, "Lands forfeited," and thereupon the lands shall thereby be forfeited to the state. Defendant made default in the payment of interest on a sum due for public lands, and the land commissioner marked "Forfeited" on the file wrapper in which the papers concerning the land were kept in the land office, and also marked opposite the ledger account of such lands, "Forfeited," and the account in the treasurer's office was marked "Forfeited," and thereafter the commissioner of the land office sold the lands to plaintiff. Held, that the action of the land commissioner in reselling the lands to plaintiff was not an exercise of the state's right of rescission, since that right

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roneous, as eliminating the question of what the employees by ordinary care might have seen, since the company owed no duty to trespassers, and the relaxation of this rule, in case of children, was provided for by other instructions.—THOMAS v. CHICAGO, M. & ST. P. RY. CO., Iowa, 86 N. W. Rep. 259.

45. REAL PROPERTY—Trespass to Try Title—Board of Land Commissioners.—Plaintiff in trespass to try title offered in evidence an order of the board of land commissioners of the county in which the land was situated which showed that the grantor of plaintiff's intestate had been granted an unconditional certificate to the land by virtue of having purchased the conditional certificate at sheriff's sale, and also a deed of the grantor conveying the property to plaintiff's intestate. Held, that the exclusion of the deed on the ground that it did not show any title in the grantor to the unconditional certificate was erroneous, since the order of the board was sufficient to show that the certificate was sold to the grantor.—KARNES v. BUTLER, Tex., 62 S. W. Rep. 950.

46. RES JUDICATA — Laying Out Highways.—Complainant sought to enjoin a township and its highway commissioner from entering his premises and converting part thereof into a highway. Defendants answered under oath, setting out the proceedings for the laying out of such highway, and the award of damages. The record showed no filing of a replication within the time allowed, and that the bill was dismissed. Held *res judicata* in a subsequent suit by complainant to prevent the township from opening the highway, and removing his fences, and to compel restoration of the former road and fences.—SCHULMEISTER v. BLENDON TP., Mich., 86 N. W. Rep. 237.

47. SALES—Breach of Warranty—Damages.—Defendant purchased ladies' gloves under a special warranty that, if they were not satisfactory or if they ripped, they should be returned to the plaintiff, who would furnish new ones. Five pairs were returned to defendant by customers as not satisfactory, the defendant having sold them to customers under a similar warranty. The defendant sent the five pairs to the plaintiff, who repaired them and sent them back to defendant, and he retained them without objection, and again sold them. The customers returned other gloves to defendant as not satisfactory, but he did not send them back to plaintiff, claiming it would be useless. Held, that the defendant could not counterclaim his damages by reason of a breach of the warranty as to gloves not returned by him.—JAMES v. BEKKEDAHL, N. Dak., 86 N. W. Rep. 226.

48. SALES — Conditional Order.—Where defendant signed a written order to plaintiff for a harvester, and delivered it to the plaintiff's agent under an oral agreement that the order should not be delivered to plaintiff until defendant examined the machine, and, if he was not then satisfied with it, he could countermand the order, a charge that such agreement means that the machine could not be objected to by defendant unless it was, for a satisfactory reason, based on some matters relating to the machine, and not simply the fact that he did not like it, is erroneous, since, if defendant was honestly dissatisfied with the machine on inspection, he was not required to take it.—MCCORMICK HARVESTING MACH. CO. v. OKERSTROM, Iowa, 86 N. W. Rep. 284.

49. SALES—Delay — Damage — Release.—Where the purchasers of goods requested further time in which to pay part of the purchase price, on the ground that the seller's delay in shipment seriously inconvenienced them, and the seller granted such time, this operated as a release and satisfaction of any claim for damages for such delay, estopping the purchaser from pleading damages therefor, as a cross demand against the balance due on the purchase price.—ARKANSAS CITY CANNING CO v. DUNSTON, Kan., 64 Pac. Rep. 1025.

50. SALE—Execution—Adequacy of Price.—An execution sale will not be held void because the lots were sold in bulk, and because the price bid was small; there having been no bid when they were offered separately, and there being an adverse claim to the property under a sale on execution against the prior title holder.—WILSON v. COEY, Iowa, 86 N. W. Rep. 289.

51. SCHOOLS AND SCHOOL DISTRICTS—Colleges—Tuition.— A receipt of its own stock by a solvent college corporation in payment of a debt for tuition is a valid payment, though it is invalid if made after the insolvency of the corporation.—ROACH v. BURGESS, Tex., 62 S. W. Rep. 804.

52. SHIPPING—Negligence of Vessel.—The American barkentine Anita Berwind, loaded with coal, was anchored near Port au Prince, in the bay of Hayti, under the direction of a government pilot. Afterwards the pilot came on board to move the vessel to another anchorage. On attempting to raise the anchor it was found to be fouled with what was supposed to be a wire rope, but was in fact libelant's submarine telegraph cable, and in attempting to free the anchor the cable was broken. The vessel had never been in that port before, and the cable was not shown on its chart of the bay. The libel charged that the breaking was negligent and intentional. Held, that the proof failed to support such allegations, the weight of evidence showing that the vessel was attempting to support the cable, which had not been raised to the surface, by means of a chain while the anchor could be freed, and that the cable was probably broken across the edge of one of the anchor's palms, owing to the straining of the vessel against it while the work was in progress.—THE ANITA BERWIND, U. S. D. C., E. D. (Penn.), 107 Fed. Rep. 721.

53. SPECIFIC PERFORMANCE—Pleading—Complaint.—A complaint, in an action for specific performance, which alleges a legal contract, part payment of the consideration, the placing of the title papers in escrow, the tender of the balance of the consideration and its refusal, the hostile attitude of the one refusing the money tendered, and the possession of the lands by plaintiff since the date of the original contract, states a cause of action.— GAMMON v. BUNNELL, Utah, 64 Pac. Rep. 958.

54. TAXATION—Curative Act — Constitutional Law.—The legislature, subsequent to a void tax sale, attempted to validate said attempted levy of county taxes. Chapter 99, Laws 1897, section 1 reads: "That the levy of taxes as made in the various counties for the year 1895 is hereby legalized and made valid for all intents and purposes the same as if made in conformity to the law then in force." Held, that said act of validation can operate only upon uncollected taxes based on said levy. It does not purport to do more than validate the levy. It does not undertake to validate any tax sale, or to give effect to any void tax deed. If it did do so, the act would be unconstitutional. It is beyond legislative power to transfer title to land by declaring that void deeds shall be valid conveyances of title. The tax deed in question is neither cured nor affected by the validating statute.—DEVER v. CORNWELL, N. Dak., 86 N. W. Rep. 227.

55. TAXATION — Exemptions — St. Louis Mission School.— Under Act Jan. 30, 1863, incorporating a mission free school of St. Louis, and exempting its property from taxation to the extent of $50,000, and Const. art. 10, § 6, exempting lots of one acre and the building thereon, when used for charitable purposes, such mission free school is not entitled to add the exemption of the constitution to that of the statute but is liable for taxes on all the excess of its property over $50,000.— STATE v. MISSION FREE SCHOOL, Mo., 62 S. W. Rep. 998.

56. TAXATION—School Tax—Amount of Levy.—The right of a school district to levy a tax, if it exists at all, must be clearly found in the statute. If there be a fair doubt as to its existence, it must be denied.—MARION & M. RY. CO. v. ALEXANDER, Kan., 64 Pac. Rep. 977.

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57. TAXATION—Stock—Assessment for Bank Taxes.—Where certain shares of the stock of a bank, which are above par, have escaped taxation, they are subject to an assessment for back taxes computed according to the actual, and not the par, value of such stock.—BANK OF OXFORD v. BOARD OF SUPRS. OF LAFAYETTE CO., Miss., 29 South. Rep. 825.

58. TRADE—Unfair Competition—Injunction.—Unfair competition, which entitles complainant to an injunction, is shown by proof that defendant sold to a representative of complainant bitters which it represented to be those of complainant, but which were not, but were an inferior article, and that defendant also furnished to the purchaser at his request an empty bottle of complainant having its labels thereon.—HOSTETTER CO. v. WILLIAM SCHNEIDER WHOLESALE WINE & LIQUOR CO., U. S. C. C., E. D. (Mo.), 107 Fed. Rep. 705.

59. TRESPASS TO TRY TITLE.—Where, in an action of trespass to try title, plaintiffs show title to an undivided interest in the land, and defendant shows no title, plaintiffs are entitled to judgment, since a cotenant is entitled to recover the entire tract, as against a trespasser.—WILCOXSON v. HOWARD, Tex., 62 S. W. Rep. 802.

60. TRUSTS—Validity.—Grantor conveyed realty to trustees to hold to his sole use, and, whenever directed by him, to convey and deliver the same to persons he should direct, and to hold the proceeds received in exchange therefor, to grantor's use. Held, that such trust being merely a trust to hold for the grantor's use, and not within the uses authorized by Civ. Code, § 857, was invalid. Where an attempted life trust in certain property is void, the trust to take effect on the death of the settler, as to the residue of such property, will fail.—CARPENTER v. COOK, Cal., 64 Pac. Rep. 997.

61. TRUST—Validity.—Since all uses and trusts in relation to real property are abolished by Civ. Code, tit. 4, § 847, except those specified in that title, and those enumerated therein do not include a trust to convey real property to beneficiaries, a devise of the residue of testator's property to trustees, to have and to hold during the lives of testator's children, and to be transferred and conveyed on the death of the surviving child to certain beneficiaries, was void.—IN RE FAIR'S ESTATE, Cal., 64 Pac. Rep. 1000.

62. TRUSTS AND TRUSTEES — Resulting Trusts—Parol Evidence.—Parol evidence to establish a resulting trust must be clear and satisfactory, and sufficient to take the matter out of the realm of conjecture or presumption; and hence where only one witness testified directly that funds which defendant invested in mortgages were furnished by plaintiff's intestate, and it appeared that witness derived all his information from conversations with deceased, which it did not appear were contemporaneous with the investments, the evidence was insufficient to show that deceased furnished the money, and that a trust resulted in favor of his estate.—REYNOLDS v. BLAISDELL, R. I., 49 Atl. Rep. 42.

63. TRUSTS AND TRUSTEES—Revocation by Settlor.—A voluntary active trust, by its express terms irrevocable, and which directs that the income be paid the settlor for life, and on his death the principal be conveyed to others, cannot be revoked by him, in the absence of fraud, imposition, mistake, or a misapprehension of the facts or its legal effect.—POTTER v. FIDELITY INS., TRUST & SAFE-DEPOSIT CO., Pa., 49 Atl. Rep. 85.

64. USURY—Evidence.—In an action to have a mortgage declared paid and satisfied, on the ground that there has been paid as usurious interest more than the amount of the principal debt, it is error to charge that a contract for interest over 10 per cent. will cause a forfeiture of all interest, since the forfeiture for usury is only the interest in excess of that permitted by law.—COTTON STATES BLDG. CO. v. RAWLINS, Tex., 62 S. W. Rep. 805.

65. VENDOR AND PURCHASER — Rescission of Sale—Note—Indorsement.—Rescission for the non-payment of the purchase price may be enforced if the parties to the sale can be placed in the same condition as they were, "as though the obligation had not existed." The test in a suit between the parties to the sale is the return to the purchaser of that portion of the price he has paid, if any, and his complete discharge as to the remainder, the unpaid portion of the price.—RAGSDALE v. RAGSDALE, La., 29 South. Rep. 906.

66. WATERS AND WATER COURSES — Dam — Flashboards.—Defendants conveyed to plaintiffs the right to maintain a dam, with flashboards two feet high on the top thereof, to be supported by iron pins not less than four feet apart. Thereafter defendants conveyed to plaintiffs the additional right to maintain a three-foot flashboard, but nothing was specified as to the manner of constructing it, though iron pins four feet apart were insufficient to maintain it. Held, that plaintiffs could place the pins as near together as was necessary to support the flashboard, since the second conveyance carried with it the right to use the necessary means for the construction of an adequate flashboard of the height mentioned.—AMOSKEAG MFG. CO. v. SHIRLEY, N. H., 49 Atl. Rep. 91.

67. WATERS AND WATER COURSES — Eminent Domain—Dams—Flooding Lands.—Where a company flooding lands disclaimed its right to flood the lands under the general flowage act in a suit by the landowner to assess damages under such act, and its right to flow the land under its charter is denied, the landholder's petition will be dismissed on the continued adherence of the company to this position, since the company has no flowage right, and the landowner must bring action for damages, or suit to abate the flow.—MITCHELL v. UNION ELECTRIC CO., N. H., 49 Atl. Rep. 94.

68. WITNESSES—Competency — Transactions with Decedent.—A father gave each of two sons a tract of land. On one tract was a mortgage, and it is claimed that, in order to equalize the gifts, it was agreed that each son should pay one-half of this mortgage debt. Before the debt was paid, the son whose land was free from incumbrance died, and the other son brought an action against the administrator of the estate of the deceased son to recover one-half of the mortgage debt. The mother, who had joined the father in the conveyance of the land to the sons, became a witness, and testified as to the agreement with reference to the mortgage debt. Held, that she is not to be regarded as an assignor of the thing in action, nor is she precluded from giving such testimony by any of the prohibitions of section 322 of the Civil Code.—MILLER v. MCDOWELL, Kan., 64 Pac. Rep. 9810.

69. WITNESSES — Immunity to Witness. — Where, in a prosecution for card playing, defendant's counsel had argued that it was dangerous policy for a man to be exempted from punishment by the county attorney for testifying in a case, it was not error for the court to charge the statute providing that any person summoned before a grand jury may be compelled to testify in regard to any game of cards he may have engaged in, and, when so compelled to testify, shall be exempted from prosecution.—PHILPOTT v. STATE, Tex., 62 S. W. Rep. 921.

70. WITNESSES—Transaction With Deceased Person—Extent of Rule.—The provision of Rev. St. 1899, § 8918 that, where one of the parties to a tract or cause of action is dead, the other party shall not be permitted to testify in his own favor, extends to every occasion on which such contract or cause of action may be involved; and hence a party claiming land under a trust deed is incompetent to testify concerning conversations with the grantor therein, as against a claimant under another trust deed, who would be injured by the admission of such evidence.—BAKER v. REED, Mo., 62 S. W. Rep. 1001.

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Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 6, 1901

In this day of extensive corporate enterprise, one of the schemes often resorted to by promotors to induce the unwary to subscribe for stock in a proposed corporation is offering to issue to them full-paid stock for a small per cent. of its face value, and agreeing further in behalf of the corporation that no more than that per cent. will ever be called for by the corporation. While such agreement is good against the corporation, it is not good against creditors of the corporation who have extended credit to it on the faith that its corporate stock is payable in full, and without notice of a different agreement between the corporation and its stockholders, the unpaid subscriptions being assets for the payment of such creditors on the insolvency of the corporation. This question arose and was so decided in the case of Bent v. Underdown (Ind.), 60 N. E. Rep. 307, where the court gives this excellent statement of the rule:

"An agreement between a corporation and its stockholders that only a certain per cent. of the stock subscribed by each stockholder shall be paid in is binding on the corporation, and the corporation can collect the per cent. specified and no more. But if such corporation becomes insolvent, such unpaid stock subscriptions are subject to be made assets for the benefit of all creditors who gave credit to the corporation on the faith of its capital stock being paid in full, without any knowledge of such agreement."

Gourick's Digest makes a very excellent and pithy comment on the recent decision of the United States Supreme Court in the Insular Tariff Cases, in which it was held that the constitution did not follow the flag into the territories of the United States, unless congress so decreed by proper action. The criticism referred to is as follows: "Whether wittingly or unwittingly done, it is obvious that in holding that the constitution does not follow the flag the supreme court relieved the legislative and executive branches of the government of some problems that would have been vexatious and troublesome for them to handle, but in spirit of 'let the future take care of itself' that seems to have possession of the country, the criticisms that are heard in every direction show that our proverbial insistence upon fair play and the golden rule is still strong and vigorous if not paramount to the selfishness of the age. The majority of the court may be right in holding that the constitution does not follow the flag until congress sends it after it, but it is hard to believe that the framers of the constitution had any thought of controlling or regulating its blessings for mankind by the whims and political intrigues of congress, even if capable of creating the anomaly of a congress controlled by the constitution controlling the constitution." In our editorial of June 21, 1901, 52 Cent. L. J. 477, we endeavored to show that in the light of plain wording of the constitution and its subsequent interpretation by the courts, the decision of the court in these cases was perfectly correct. That, however, does not lessen the appropriateness of the comment just quoted, but is rather an appeal to the people than to the judiciary.

The Supreme Court of New York furnished opportunity for an interesting discussion of the question of the proper punishment for different grades of professional misconduct on the part of attorneys, in the recent case of *Re* Reifschneider, 69 N. Y. Supp. 1069. In this case a father, as guardian of his injured child, desired to accept a railway company's offer to settle a damage suit for a sum which his attorneys thought inadequate. An attorney in the employ of the defendant railway company got himself substituted for plaintiff's attorneys by paying them a fee furnished by defendant, and then, in the capacity of plaintiff's attorney, advised and attempted to effect the settlement. The court was divided in opinion as to the degree of punishment; the majority decision holding that while the attorney was guilty of conduct which was very unprofessional, such conduct was not sufficiently flagrant to justify disbarment, but was properly punishable by reprimand. The minority opinion insisted on suspension or disbarment, and after calling attention to the New York statute on the misconduct of attorneys uses this

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strong language: "The standard of honor among the members of the bar is high, and has been so maintained by the natural and instinctive probity and purity of the profession, and it should never be lowered by the action of the court. If a counselor refuses to sit down when told to do so by the court, or uses intemperate language, the occasion might justly admit of a rebuke or reprimand. But the framers of the law never meant that deliberate and persistent professional misconduct should be punished by a mere reprimand from the bench." We are inclined to favor the minority opinion to the extent of insisting that temporary suspension from practice would have been a more just and salutory punishment for the serious offense charged against this attorney. We are not unmindful of the fact, however, that this power in the court should not be exercised harshly, but in the wise discretion of the court after taking into consideration the surrounding circumstances, and the causes or motives which prompted the unprofessional action. And in this connection the plea of Justice Field in the case of Bradley v. Fisher, 13 Wall. 355, for a lenient policy in cases which are not exceedingly flagrant, can be wisely followed: "Admission as an attorney," says Justice Field, "is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and to their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should, therefore, never be decreed where any punishment less severe, such as reprimand, temporary suspension or fine, would accomplish the end desired."

NOTES OF IMPORTANT DECISIONS.

FIXTURES—TAPESTRIES AFFIXED TO WALL—TENANT FOR LIFE — REMAINDER-MAN.—*In re* De Falbe, Ward v. Taylor (1901), 1 Ch. 523, reported in the *Canada Law Journal*, was a contract between the personal representatives of a deceased tenant for life and remainder-man, touching the right to remove certain tapestries which had been fixed by the deceased tenant for life to a mansion to which the remainder-man was entitled in remainder. The tapestries in question had been affixed to the walls of a drawing room in the following way: strips of wood were fastened on the walls by nails, canvas was then stretched over the strips, and the tapestries were then stretched over the canvas and fastened by tacks to it, and pieces of wood mouldings fastened to the walls were placed round each piece of tapestry. Portions of the wall not covered by tapestries were covered with canvas, which was colored so as to harmonize with the tapestries. Byrne, J., considered that the tapestries had been so affixed to the freehold as to be irremovable by the tenant for life or his personal representative, but the court of appeal (Rigby, Williams and Sterling, L. JJ.) took a more liberal view, and held that as the tapestries had been affixed to the walls merely for purposes of decoration, they were removable by the tenant for life or her representative, and though the latter should make good any damage to the wall occasioned by the removal, he was not liable for the cost of entirely redecorating the room. Although Williams, L. J., seems to think the principles laid down by Lord Romilly in D'Eyncourt v. Gregory, L. R. 3 Eq. 382, were not in conflict with the present decision, Rigby, L. J. did not hesitate to say that he thought the decision in that case was not right "if it would apply to such a case as the present" and ought not to be followed.

INTOXICATING LIQUORS—UNLAWFUL RESALE.—A very difficult question was encountered by the court in the case of Graves v. Johnson (Mass.), 60 N. E. Rep. 383. This suit was for the price of intoxicating liquors sold in Massachusetts. It was found that the plaintiff's agent supposed rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were known by the defendant to be indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. The court held that although the buyer of the liquor intended when he made the purchase to resell them in the state of Maine, contrary to the laws of that state, the seller's mere knowledge of the buyer's intent will not prevent recovery of the purchase price. The court makes the following argument:

"The defendant was free to change his mind, and there was no communicated desire of the plaintiffs to co-operate with the defendant's present intent, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts (Com. v. Peaslee [Mass.], 59 N. E. Rep. 55; Com. v. Kennedy, 170 Mass. 18, 22, 48 N. E. Rep. 770), the line of proximity will vary somewhat according to the gravity of the evil apprehended (Steele v. Curle, 4 Dana, 381, 385-388; Hanauer v. Doane, 12 Wall. 342, 346, 20 L. Ed. 439; Bickel v. Sheets, 24 Ind. 1, 4), and in

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different courts with regard to the same or similar matters. Compare Hubbard v. Moore, 24 La. Ann. 591, and Michael v. Bacon, 49 Mo. 474, with Pearce v. Brooks, L. R. 1 Exch. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. McIntyre v. Parks, 3 Metc. 207; Sortwell v. Hughes, 1 Curt. 244, 247, Fed. Cas. No. 13,177; Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5755; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Distilling Co. v. Nutt, 34 Kan. 724, 729, 10 Pac. Rep. 163; Webber v. Donnelly, 33 Mich. 469; Tuttle v. Holland, 43 Vt. 542; Braunn v. Keatly, 146 Pa. 519, 524, 23 Atl. Rep. 389; Wallace v. Lark, 12 S. Car. 576, 578. 32 Am. Rep. 516; Rose v. Mitchell, 6 Colo. 102; Jameson v. Gregory's Exr., 4 Metc. (Ky.) 363, 370; Bickel v. Sheets, *supra;* Hubbard v. Moore, *supra;* Michael v. Bacon, *supra.*"

DAMAGES — DISTINCTION BETWEEN LIQUIDATED DAMAGES AND A PENALTY.—When the courts depart from the ordinary practice of judging of the intention of the parties to a contract by the words they have used, and look beyond the words to discover that intention in the circumstances of the transaction, they embark upon a course of doubtful utility and open the way for litigation. Such has been the case with the well-known line of decisions as to the effect of describing a fixed sum made payable upon a breach of contract as either a penalty or liquidated damages. These expressions do no more than give a *prima facie* indication of the meaning of the parties, and before it can be said with any confidence that a sum is a penalty—so as in effect to give a right only to unliquidated damages—or liquidated damages—so as to give a right to recover the specified amount—a careful inquiry must be made as to the relation between this sum and the nature of the breaches in respect of which it is payable. It is probable that the whole doctrine in question arose from the absurdity of allowing payment of a fixed sum as liquidated damages to be enforced on breach of an agreement to pay a fixed smaller sum, and in such cases the larger sum is treated as a penalty, notwithstanding that the language used indicates the contrary. Astley v. Weldon, 2 B. & P. 346. On the other hand, a fixed sum made payable on the breach of a single stipulation, not itself involving payment of a sum of smaller amount, will be treated as liquidated damages. Of this nature were the sums fixed in *Re* An Arbitration between White and Arthur (Time, 3d inst.), decided by a divisional court (Kennedy and Phillimore, JJ.) recently. A contract had been made for the installation of electric lighting in a theater which was in course of erection. Upon non-completion of part of the work by a certain date a "penalty" of £15 a day was to be payable, and upon non-completion of the remainder by another date, a "penalty" of £3 a day so long as the respective portions of the work remained unfinished. These sums were made payable each in respect of a breach of a single stipulation not involving payment of money, and hence, according to the test stated above, they were liquidated damages, notwithstanding that they were described as penalties. In Law v. Local Board of Redditch (1892), 1 Q. B. 127, the circumstances were similar, save that the sum was there described as "liquidated damages," and it was held to be such. The decision in the present case was to the same effect. A different case arises where the sum is made payable upon breach of any one of a number of stipulations. Usually it will be treated as a liquidated sum, but if the breach of one or more of the stipulations involves payment of a smaller fixed sum of money, or is trivial in its nature, then the opposite construction prevails, and the sum payable, being a penalty, is reduced to the amount of the loss actually sustained Wallis v. Smith, 31 W. R. 214, 21 Ch. Div. 243; Elphinstone v. Monkland Iron Co., 35 W. R. 17, 11 App. Cas. 332.—*Solicitors' Journal.*

TAXATION—EXEMPTION OF PROPERTY USED PARTLY FOR RELIGIOUS SERVICES AND PARTLY AS A SOURCE OF REVENUE.—A most valuable annotation on the right of exemption of property used for religious or charitable purposes, but also as a source of revenue for the same purposes, appears in the opinion of Bartch, J., in the recent case of Parker v. Quinn (Utah), 64 Pac. Rep. 961. In that case a society organized exclusively for mission work and other charitable purposes owned certain premises in Salt Lake City. The upper floor of these premises was used for meetings and other work of the society, while the lower floor was rented out at $25 per month, and the income used entirely in carrying on the work of the society. In a suit to enjoin the assessment and taxation of the property, the court held that only that portion of the property of a religious or benevolent society which is occupied and used exclusively for the purpose for which the society was organized, is exempt from taxation, and that the exemption does not extend to that portion not appropriated by the society to its own use, but held as a source of revenue, especially when the value of each portion is separately ascertainable. After alluding to the statutes specifying what property should be exempt from taxation, the court said:

"Among the several classes of property exempt are 'lots with the buildings thereon used exclusively for either religious worship or charitable purposes.' Only such of the society's property, therefore, as is occupied and used exclusively for charitable purposes, is exempt from taxation. It follows that the exemption does not extend to that portion not appropriated by the society to its own use, but held as a source of revenue. Especially is this so since the value of each portion is ascertainable, as appears from the findings of the court. Where, therefore, as in this case, a portion of certain property owned by

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a charitable institution is occupied and used by it for charitable purposes, and the other portion thereof is devoted to purposes of revenue, the portion used and occupied for charitable purposes is exempt, and the portion not so used and occupied is subject to taxation. "We are aware that a few cases hold that under such circumstances the exemption is lost as to the whole property, and that some, on the contrary, hold that the whole property is exempt. We think, however, that the weight of authority is in harmony with the rule above stated, and that the disposition of this case in accordance therewith is equitable and just. In City of Philadelphia v. Barber, 160 Pa. 128, 28 Atl. Rep. 644, it was held: 'Where a part of a building is used for church purposes, and certain rooms in the building are rented for a school, the building may be divided for the purposes of taxation, and the portion used solely for church purposes be declared exempt from taxation.' County Comrs. of Frederick Co. v. Sisters of Charity of St. Joseph, 48 Md. 34, is a case where the proof showed that, among other improvements which were claimed by the appellees, a society organized for charitable purposes, to be exempt, there were one or more buildings in which a number of schools were required to pay tuition at the rate of $250 per annum; and the court held that so much of the property as was appropriated to this secular and educational purpose 'for revenue' was taxable, notwithstanding the fact that the 'surplus revenue' thus derived was devoted to charitable uses." The court cites the following recent authorities as sustaining its position: Sunday School Union v. City of Philadelphia, 161 Pa. 307, 29 Atl. Rep. 26; Detroit Young Men's Soc. v. Mayor, etc., of City of Detroit, 3 Mich. 172; Trustees of Chapel of Good Shepherd v. City of Boston, 120 Mass. 212; City of Cambridge v. County Comrs. of Middlesex, 114 Mass. 337; Appeal Tax Court of Baltimore City v. St. Peter's Academy, 50 Md. 321; Appeal Tax Court of Baltimore City v. Grand Lodge A. F. & A. M., *Id.* 421, 429: Redemptorists v. Howard Co. Comrs., *Id.* 449; Ft. Des Moines Lodge v. Polk Co., 56 Iowa, 34, 8 N. W. Rep. 687; Mulroy v. Churchman, 52 Iowa, 238, 3 N. W. Rep. 72; Society v. Kelley, 28 Oreg. 173, 42 Pac. Rep. 3; Elizabeth Library Assn. v. Leester, 28 N. J. Law, 103; First M. E. Church v. City of Chicago, 26 Ill. 482; Presbyterian Theological Seminary v. People, 101 Ill. 578; State v. Board of Assessors, 35 La. Ann. 668; State v. Ross, 24 N. J. Law, 497; Massenburg v. Grand Lodge, 81 Ga. 212, 7 S. E. Rep. 636; Morris v. Lone Star, 68 Tex. 698, 5 S. W. Rep. 519; Bank of Commerce v. State, 104 U. S. 493, 26 L. Ed. 810; Young Men's Christian Assn. v. Mayor, etc., of City of New York, 113 N. Y. 187, 21 N. E. Rep. 86.

Before dismissing this subject, it might be well to call attention to the authorities holding a different rule. Thus, in Missouri, it is held that a hospital building is not excluded from the benefits of a statute exempting from taxation property used for "purposes purely charitable," merely because certain patients pay for what they receive, where it appears that any profit derived therefrom is applied exclusively to the charitable purposes of the institution. State v. Powers, 74 Mo. 476. Also, the case of North St. Louis Gymnastic Society v. Hudson, 12 Mo. App. 342, affirmed 85 Mo. 32, in which it was held that a school building exempted from taxation "so long as it is used only for the purpose of education," is not made taxable by the renting of a room therein for other purposes when the proceeds thereof are used exctusively for the benefit of the schools. The following authorities hold that whenever part of the property alleged to be exempt is used for other than the exempt purposes, the whole becomes taxable. Red v. Johnson, 53 Tex. 284; St. Mary's College v. Crowl, 10 Kan. 451; Morris v. Lone Star Chapter, 68 Tex. 698.

VESTED INTEREST OF BENEFICIARY UNDER A POLICY OF LIFE INSURANCE.

The character of the beneficiary's interest under a policy of life insurance is a question of growing importance, and one often litigated. Its difficulty lies in the fact that it is comparatively a new question, having sprung into existence contemporaneously with modern life insurance, and at once assuming many different and surprising aspects. In the light of the common law a policy of life insurance was nothing more or less than a contract entered into between two parties for the benefit of a third party. In Langdell's Cases on Contracts,[1] the learned author says: "In truth, a binding promise to A to pay one hundred dollars to B confers no right upon B in law or equity. It confers no authority upon the promisor to pay the money to B, but the authority may be revoked by A at any moment." In the light of modern statutes and public sentiment, however, a life insurance policy is something more than a mere contract between two parties for the benefit of a third. The contingency upon which payment is to be made is the death of one of the parties, and the consideration, the payment of certain stipulated premiums, the amount of which is determined by the probabilities of life in the obligee. It is evident that unless sustained for other reasons such an agreement would have all the earmarks of a wagering contract,

[1] Langdell, Cases on Contracts (2d Ed.), p. 1021.

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and, therefore, void on grounds of public policy. There is only one reason which will sustain such a contract, *i. e.*, that the third party for whose benefit the contract is made is not a disinterested party, his pecuniary interest in the life of the obligee, and in the contingency upon which payment is to be made, giving him the right to enforce the agreement. A contract of this kind is usually made for the benefit of wife or children or others dependent upon or having some pecuniary interest in the life of the insured, and is in the nature of an irrevocable trust conferred upon interested parties for their protection and indemnity against pecuniary loss by reason of his death in their lifetime.[2] This is undoubtedly the origin, and certainly the only reason for the modern doctrine of vested interest. Statutes which have hedged about the interest of the wife and children to the proceeds of insurance policies, of which they were the beneficiaries against the claims of creditors or the act of the insured himself, while giving force to the rule and defining public sentiment, were not necessary to its existence nor gave any reason for its extension.[3]

The clearest statement of what is known as the doctrine of vested interest, in its application to the construction of life insurance policies, is to be found in the opinion of Fuller, C. J., in the case of Central Bank v. Hume,[4] where the learned judge said: "We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no powers of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts which belong to the beneficiaries to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or will, to transfer to any other person the interest of the person named." This statement of the law, as the general rule upon this subject, is sustained by the overwhelming weight of authority.[5] The only authority holding to an absolutely contrary doctrine is to be found in the decisions of the Supreme Court of Wisconsin.[6]

To exactly define just what he meant by "vested interest" is not an easy undertaking, and the authorities themselves lend us very little assistance. In the effort to literally interpret this doctrine and apply it logically to all cases many difficulties are encountered. Suppose by the terms or nature of the contract the interest of the beneficiary is contingent upon surviving the insured, or, as in endowment policies, contingent also on surviving the insured within the endowment period, or, as in accident policies, contingent not only on survivorship within a definite time (accident policies being generally in force for only one year at a time), but also contingent on the injury causing the death of the insured being the result of an accident of the particular description named in the policy. In such cases can the interest of the beneficiary, which is plainly contingent as to its enjoyment, be considered at the same time and for some purposes as vested. These difficulties, in aggravated form, were encountered by the court in the case of Lockwood v. Insurance Co.[7] In this case the policy was payable to the insured in twenty years, if living; but in case of his death before the completion of the endowment period, then to A, if living, and, if not, then to B and C. The court said: "The brief of the plaintiff is based upon the theory that the interests of the beneficiaries were contingent, that the insured could deal with the policies as he chose. Such, however, is not the rule of law governing contracts of life insurance.

[2] See Ryan v. Rothweiler, 50 Ohio St. 595.
[3] Hubbard v. Stapp, 32 Ill. App. 541.
[4] 128 U. S. 195.
[5] Pingrey v. Insurance Co., 144 Mass. 374; Chapin v. Fellowes, 36 Conn. 132; Glanz v. Gloeckeler, 104 Ill. 573; Small v. Jose, 86 Me. 120; Lockwood v. Insurance Co., 108 Mich. 334; Splawn v. Chew, 60 Tex. 532; Johnson v. Hall, 55 Ark. 210; Smith v. Insurance Co. 44 Atl. Rep. 531; Wilmaser v. Insurance Co., 66 Iowa 417; Packard v. Insurance Co., 9 Mo. App. 469; Van Bibber v. Van Bibber, 82 Ky. 347; Allis v. Ware, 28 Minn. 166; Brown's Appeal, 125 Pa. St. 303.
[6] Clark v. Durand, 12 Wis. 223; Kernan v. Howard, 23 Wis. 108; Breitung's Estate, 78 Wis. 33.
[7] 108 Mich. 334.

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The beneficiaries upon the execution of the policy acquire thereby an interest which the law recognizes and which the insured cannot dispose of at his own will. This interest is recognized by the authorities, and it is of little consequence whether it is called vested or contingent." Without presuming to reconcile the cases which attempt to define the interest of the beneficiary in a regular life policy, we would suggest that much of the difficulty would be removed if the origin of the doctrine be kept clearly in mind. As already suggested, the only reason upon which an insurance policy can be held a valid contract is the interest of the beneficiary in the life of the insured, a contract of insurance, for instance, upon the life of the husband in favor of the wife, being in the nature of an irrevocable settlement or trust for the purpose of protecting her against pecuniary loss and damage by reason of his death in her lifetime. When we thus consider a policy of life insurance as more nearly resembling and partaking of the nature of a trust than a chose in action, we make easy the solution of many otherwise difficult problems, and effectuate more closely the intention of the parties.

Let us examine the authorities and carefully bear in mind the suggestions just offered. Take, for instance, the simple case of a wife, the beneficiary under a policy of insurance on the life of her husband, who predeceases the latter. Are her representatives or his representatives entitled to the proceeds? In other words, under a literal construction of the doctrine of vested interest, is her interest transmissible to her heirs, or, looking upon the proceeds of the policy as a trust fund, would her death within the lifetime of the husband be considered a termination of her interest in his life which alone sustained the policy in her, and, therefore, a failure of the trust with reversion in the husband. The authorities are in conflict, some holding to the former[8] and others to the latter construction.[9] In Ryan v. Rothweiler,[10] the court said: "The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action. We regard the doctrine of choses as action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. The question is not as to change of beneficiary, but as to reverter of the policy to the assured by reason of the death of all the beneficiaries. On principle, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig, and at his death became a part of his estate. It seems to us that this was the manifest intention and understanding of all parties interested, and that the result is just and equitable. While there may have been a vested interest it was an interest not in possession, but in expectancy, liable to be devested by the death of the beneficiary before the death of the assured." In the case of a policy on the life of the husband payable to the wife, if living, and if not living to her children, where the wife dies first, the authorities are again in conflict, some holding the policy payable exclusively to the children living at the death of the insured,[11] while others hold that the policy vests at once in both wife and children at the same time, and the interest of any deceased child is transmissible to his heirs.[12] In Hooker v. Sugg[12a] it was held that if "children" be designated in a life policy as beneficiaries, the interest vests at once in such as then meet the description, and is not devested in favor of survivors by a death afterwards. As already noted, New York and several other states reject this view and apply the class doctrine to such policies, so that under the rule there laid down only such children take as are alive at the death of the insured. We believe that the New York rule recognizes more clearly the evident purpose of life insurance and lays down the more equitable and reasonable construction.

[8] Drake v. Stone, 58 Ala. 138; Harley v. Heist, 86

[10] 50 Ohio St. 595.

[11] United States Trust Co. v. Insurance Co., 115 N. Y. 115; Schneider v. Insurance Co., 63 Mo. App. 68; Walsh v. Insurance Co., 133 N. Y. 408; Robinson v.

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Life insurance exists solely for the protection of those who would be pecuniarily damaged by the insured's death. To permit those who would not be so damaged to take under the policy would be to overturn the whole purpose and intent of such contracts. Indeed, the doctrine of vested interest, as applicable to insurance contracts, cannot be carried out logically and literally,—the word "vested" having a legal significance too great and too extended to properly define the rights and interest of the beneficiary. Nothing more can be meant by the use of such words as applicable to life insurance, than that the beneficiary named in the policy has such an interest in the policy that prevents the insured from interfering in any manner with her right to take under the policy, or to demand the proceeds upon the happening of all contingencies and upon compliance with all the conditions contained therein.

It has been suggested that the doctrine of vested interest cannot be applied to accident insurance.[13] In Hoffman v. Indemnity Co.,[13a] the court held that the beneficiary in an accident policy, until the death of the insured, has, at most, an inchoate and contingent interest, and the insured cannot recognize her as a party to the contract having a present interest therein. This case did not squarely decide the question that the interest of the beneficiary was materially different from that of the beneficiary under a regular life policy, but clearly shows how illogical would be a literal application of the rule of vested interest to the right of a beneficiary, where that right, under the terms of the policy, is the most inchoate and contingent that can be imagined. In the case just referred to, a condition in an accident policy required the beneficiary to give notice of the death of the insured within ten days of the happening of the accident causing it. Such a condition was held to be impossible, on the ground that the beneficiary acquired no definite interest in the policy until the death of the insured. Another late authority suggesting any difference between regular life and accident policies is the case of Standard Life & Accident Insurance Co. v. Carroll.[14] In that case the exact decision was that a statute of Pennsylvania declaring that in all controversies relating to "life and fire insurance policies," neither the constitution nor by-laws, etc., of the company should be received in evidence, does not include policies of insurance against bodily accident. The court said: "The suggestion that the act includes policies of insurance against bodily accidents seems to us to be quite inadmissible. The instrument sued on here is strictly an accident insurance policy. The primary purpose is to secure a weekly indemnity in money to the insured in the event of his disability from accidental injury. In certain specified contingencies, resulting from accidental injury, a specified gross sum is to be paid. One of the latter is, death resulting from the accident within ninety days thereafter. But this contingent provision does not make the instrument a life insurance policy, either in a popular or in a legal sense." These are the only two cases that have come within the knowledge of the writer suggesting that accident policies, with provisions for death benefits, were to be distinguished in any material manner from regular life policies. The question seems to be as yet an open one whether the beneficiary, under such a policy, acquires a vested interest or not. We apprehend that, giving the word the limited significance already suggested, *i. e.*, the absolute, irrevocable right to demand the proceeds of the policy on the happening of all contingencies and compliance with all conditions, there is no material distinction to be made between such policies and regular life insurance. But if by vested interest is meant any absolute present right or interest in the proceeds of the policy (which we believe in any case to be an unwarranted extension of the right of the beneficiary), then its application is, on the face of things, an absurdity.

Endowment policies have also been suggested as being without the rule of vested interest.[15] But for the same reason we have just discussed in the case of accident policies, we believe any distinction untenable.[16] The interest of the beneficiary is as irrevocable in

[13] Hoffman v. Indemnity Co., 56 Mo. App. 301.
[13a] 56 Mo. App. 301.
[14] 86 Fed. Rep. 567.
[15] Tennes v. Northwestern Mut. Life Insurance Co., 26 Minn. 271.
[16] Pingrey v. Insurance Co., 144 Mass. 374; Lockwood v. Insurance Co., 108 Mich. 334; Lemon v. Insurance Co., 38 Conn. 294.

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an endowment policy as in a regular life policy, and the insured can no more interfere with this right in the one case than in the other. Of course, the enjoyment of the proceeds is contingent upon the insured dying within the endowment period, and the beneficiary cannot be said to have any present interest, other than the mere right to demand the proceeds of the policy, upon the happening of all contingencies and compliance with all the conditions of the policy, which is the same right held by any other beneficiary in any other kind of policy.

The difficulties of this question are increased when it becomes complicated with questions of survivorship. Suppose the insured and the beneficiary perish in a common disaster, and it is impossible to find, as a fact, from the evidence, which of them died first,—in such a case in whom does the right to the proceeds exist? The modern rule as to survivorship in a common disaster is well stated and thoroughly discussed in the case of Newell v. Nichols.[17] The rule may be summarized as follows: There are no presumptions in law of survivorship in case of persons who perish by a common disaster, but one who claims through a survivorship must prove the survivorship. In the absence of other evidence, the fact is assumed to be unascertainable, and the property rights are disposed of as if death occurred at the same time, not because of a presumption of simultaneous death, but because there is no evidence or presumption to the contrary. In applying this rule to the distribution of the proceeds of a policy of insurance, the doctrine of vested interest becomes an obstacle of grave importance. Of course, if the policy is payable to the wife "and her legal representatives," the interest of the wife is, in such case, transmissible, and the question of vested interest presents little difficulty. But where the policy is payable simply to the beneficiary on the death of the insured, or "if surviving," or on any other condition, the question of vested interest assumes an importance, according to the meaning given to the word "vested," and especially so in the case where both insured and beneficiary perish in a common disaster. The same conflict of authority exists here which has been observed under other aspects of this question. Giving the word "vested" its full logical meaning, the beneficiary would have such a present interest in the proceeds of the policy, while living, that even where the enjoyment of the fund is conditioned on her survivorship, such condition, or, in fact, any other condition annexed to her right to take under the policy, would be a condition subsequent, and the burden of proving survivorship would be, not on the beneficiary or her representatives, but upon those who would seek to controvert her *prima facie* title to the proceeds of the policy.[18] But, on the other hand, applying the trust fund doctrine and giving to the words "vested interest" the limited meaning already suggested, the beneficiary would acquire no present interest in the proceeds until the death of the insured, and the distribution of the fund would then be governed by the ordinary rules of construction, and the beneficiary could take nothing until all contingencies and conditions of the policy had happened or been complied with, the burden of proof in such case resting upon her or her representatives.[19] In the case of Cowman v. Rogers[20] the regulations of a beneficial association provided that, if the beneficiary named in the certificate should die in the lifetime of the member, and if the latter should make no other disposition of the benefit, it should be paid to the member's widow, if no widow then to the children; if no widow or children, then to his relatives, naming them. The certificate in this case was made payable, upon the member's death, to his wife. The member, together with his wife and children, perished in the Johnstown flood. Held, that there was no presumption of survivorship, and in the absence of competent and sufficient evidence to show that the wife, the nominated beneficiary, died before her husband, her legal representative was entitled to the fund. As a logical application of the doctrine of vested interest no criticism can be found with this decision, but the inequitable result, to which a strict application of the doctrine has led the court in this case, shows clearly that it is not the right principle upon which to decide such

[17] 75 N. Y. 78.

[18] Cowman v. Rogers, 73 Md. 403.

[19] Fuller v. Linzee, 135 Mass. 468; Paden v. Briscoe, 81 Tex. 563.

[20] 73 Md. 403.

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questions. The husband in this case procured the policy for the benefit and protection of his wife and children after his death, and for this purpose alone he faithfully kept up the payment of the premiums thereon. It is no stretch of the imagination to say that it certainly was not his intention that this entire fund should, under any circumstances, become the property of distant relatives of his wife, who had no interest whatever in his life. It is more natural to suppose that in such case he would prefer his own estate or his own relatives as the beneficiaries of the fund. That the intention of the insured is material in these cases has been decided on good authority.[21] But apart from any question of intention, the application of the trust fund doctrine easily disposes of the whole question. Under this view of the case, the beneficiary is regarded as the *cestui que trust*, and the insurance company as the trustee of the fund represented by the policy, of which the insured may be regarded as the grantor. The fund is to be paid over to the beneficiary, or *cestui que trust*, on the happening of all contingencies and compliance with all conditions named in the policy. The insurance company, as trustee, can certainly not be compelled to execute the trust until all contingencies have happened and all conditions complied with, and the burden is upon the beneficiary, or her representatives, as against the insurance company, to prove that all contingencies have happened and all conditions have been complied with, before any title to the fund vests in her; and unless her right to the fund is so proven there is a failure of the trust and reversion of the fund to the insured or his representatives. Where the policy provides that the beneficiary shall take, "if surviving," no difficulty should arise in any view of the case, as, in such case, survivorship is clearly a condition precedent to the enjoyment of the fund, and upon the representatives of the beneficiary must be the burden of proving survivorship before they are entitled to take anything under the policy. In Fuller v. Linzee[22] the policy provided that "in case the said insured should die before the decease of her husband," the amount of this insurance should be payable to their children. The husband and wife and their children were lost at sea, and there was no direct evidence as to which survived the other. The court held that the interest of the wife in the policy was contingent on her surviving her husband, and that the burden of proof was on her next of kin to show that she survived. The court said: "He (the insured) was providing for the disposition of a fund, which was not to exist until after his death, and he made the provision by designating the persons to whom it was to be paid, and his obvious intention was that it should be paid to his wife, if she should survive to take it, and to their children if she should not survive. * * * We think, upon the view of the contract already taken, that the wife had no interest, transmissible to her next of kin unless she survived her husband, and that they cannot maintain their claim without proof that she survived him."

We have taken but a general view of this question, and have earnestly sought for right principles rather than to attempt to harmonize the conflicting opinions of the courts in the decision of individual cases. Courts, in their zeal to protect the wife and children, have undoubtedly been led into the use of words in defining the interest of such parties as beneficiaries of insurance, which do not properly limit their rights under the policy, and which in many cases, could not be literally enforced without doing violence to all principles of life insurance and arriving at results that could not be other than inequitable. The great purpose of such contracts in making provision for the protection of those interested in the life of the insured, against pecuniary loss by reason of his death in their lifetime, should be kept constantly in view, and the assertion of no legal quibbles or technicalities should be permitted to defeat the clear intention of the insured under a reasonable construction of the plain terms of the contract.

ALEXANDER H. ROBBINS.

St. Louis, Mo.

[21] Robinson v. Duval, 79 Ky. 83.

[22] 135 Mass. 468.

CRIMINAL LAW—CONTEMPT—ATTORNEY—INVALID ORDER—FAILURE TO OBEY.

EX PARTE DUNCAN.

Court of Criminal Appeals of Texas, April 24, 1901.

An order of court, appointing a committee to examine a candidate for admission to the bar, failed to fix a time for the examination, as required by Rev.

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Civ. St. art. 256, but the court inquired of an attorney if he could act on the committee on the evening of a certain day, and the attorney answered that he could not be present at a night examination, but was placed on the committee, the judge stating that he should be excused if he could not attend. Held, that the attorney was not guilty of contempt in failing to appear at such time, since the order, though considered in connection with the oral statement of the court, was incomplete and invalid; and where the attorney is arrested and brought into court under a judgment and attachment for contempt in failing to appear at such examination, he is not guilty of contempt in refusing to continue the examination as then directed by the court, since his presence was obtained by an illegal arrest, and he had the right to refuse to serve while under such duress.

DAVIDSON, P. J.: This is an original application for the writ of *habeas corpus*. Relator was appointed one of five attorneys to examine an applicant for admission to practice law. The order appointing this committee was entered on March 16th. The order failed to designate any time when the examination should occur. On the 16th of March, relator being in the court room, the presiding judge asked him if he could serve upon the committee, and was informed, if it did not occur at night, he could do so, but if at night it would be impossible for him to attend by reason of the fact that he lived remote from the court house, and could not leave his wife alone at night. The district clerk states the judge then informed relator that he would appoint him anyway, and if he could attend to do so, and, if not, "of course I will excuse you." On the night of the 20th of March, all of the committee failed to attend except Hon. Cone Johnson. The judge fined the absent attorneys $25 each, and ordered the clerk to issue attachment. These orders were not entered of record, but the attachment was issued, and the next morning was served upon relator, Duncan, in his office by two deputy sheriffs, who immediately escorted him to the court room, where he took a seat in front of the judge's stand. A few minutes afterwards Judge Russell, the district judge, took the bench and said, "Gentlemen, proceed with the examination." Relator arose and said, "I decline to serve on this committee." The judge replied, "Judge Duncan, I cannot excuse you;" to which relator replied: "I cannot help that. I will not serve. I told the court at the time of my appointment that I could not serve on an examination committee to meet at night, and gave the court my reasons for it. Now, I have been arrested at my office this morning, and brought over here under arrest by officers, under the order of this court, for failing to be present last night. I have always treated this court as a gentleman, and I expect to be treated or must be treated by the court as a gentleman, if not as a member of the bar." The court replied, "I will not sit here and allow you to reprimand the court, and I will fine you if you do not desist from it." "I then took my seat, saying, 'Well, if you fine me, and I have the money to pay the fine, I can pay it; if not, I will have to go to jail.'" The court then said, "Mr. Clerk, enter a fine of $50 against Judge Duncan for contempt of court." It is shown by the evidence that it has never been the practice at that court, or in that district, for the judge to compel members of the bar to serve on such examining committees, and never before, in the knowledge of witnesses, was a fine assessed against, or an attachment issued for, a member of such committee who failed to attend; that the custom was either to postpone on account of the absence of one or more of the committee, or proceed with the examination by the appointment of other members of the bar. Relator further states that he had no intimation in any way from the judge at any time, after stating his reasons for not being able to attend the meeting of the committee at night, that he would still be expected to attend or be fined or attached; and that he had no notice or knowledge, or any reason to suspect, until the morning of the 21st, that he was fined, or was to be fined or arrested, and that the facts recited in the judgment of contempt rendered against him were placed there without his knowledge, and that he had no opportunity to see that the facts were correctly stated in the judgment; that it was wholly *ex parte*, and was prepared entirely under the direction of the trial judge.

This case involves and turns upon the question of jurisdiction. If the jurisdiction of the court properly attached to the person of the relator and the subject-matter of the contempt, and the facts showed contempt, then this writ should be refused, and the relator remanded. Article 256, Rev. Civ. St., provides: "During the term of the district court upon application in writing of any person desiring to obtain a permanent license to practice as an attorney and counselor at law in the courts of this state, the court shall, as soon as convenient, appoint a committee of three or more practicing attorneys of good standing, and set a day for the examination of the applicant, on which day the committee so appointed shall in open court proceed to examine the applicant; and if they or a majority of them and the court are satisfied of his legal qualification, a report of that fact shall be made." The district courts of this state being courts of record, every order made by such court must be entered of record. Upon the presentation of the application, it becomes the duty of the court to appoint a committee, naming them; and this appointment, together with the day appointed, must appear from the records to have been made as any other judicial order must so appear. Until this has been done, and the members of such committee have been notified, the court has no power to compel any member of the committee to proceed with the examination of such applicant. The question then presented is, did the court have the power to issue the attachment to compel the appearance of the relator? If it did, it must be held relator

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was in contempt, and the court had the power to punish, not only for the disobedience of its order originally made, but to enforce its orders subsequently made by fine or imprisonment, and to punish for refractory conduct on the part of the relator. If, on the other hand, it had no power to compel the attendance of the relator by the attachment as issued, then, the appearance of the relator being an enforced appearance, without sanction of law, the court had no power to punish, by either arrest under the writ of attachment, or for the subsequent acts of relator, while in such duress, in questioning or demanding, in a respectful manner, the right of the court in ordering his arrest, or in seeking to compel him to serve on the committee. It is conceded from the evidence before us that the application to be examined for license to practice as an attorney and counselor at law was filed by an applicant; that on the 16th of March an order was made and entered of record on the minutes of the court appointing relator and four other attorneys as such committee. But from this order, which is also in evidence, it is observed that no day was set or mentioned when the examination should occur. However, on the morning of the 16th of March, while relator was in the court room, the district judge inquired of him as to whether he could serve on said committee on the 20th of March. He replied: "I could not serve on any committee to examine an applicant at night; that I could not come down at night, on account of living so far out, as my wife would be left alone should I leave." To this relator testifies that he heard no reply, but is sure that the district judge did not dissent. The district clerk, however, states that the judge replied to relator, "Well, judge, I will put you on (or leave you on), as it might be that you can come down; and, if not, of course I will excuse you." These facts are undisputed. Neither the order of the court, as made of record, nor the request of the judge to the relator to be present and take part in the examination, can form the basis for this proceeding in contempt. The order, to have been the subject of disobedience, must have been complete and perfect within itself. It was not complete. No attorney, from an inspection of the order, could say, without aid from other evidence, at what time the examination would be held, and, as no time was fixed by it for the examination, it cannot be said that relator in any way disobeyed such order. True, taken in connection with the oral statement of the judge, relator might have known that the examination would be held at 8 p. m. on the 20th of March, but in cases of this kind this is not sufficient. It is the disobedience of the order of the court as rendered and recorded which must constitute the basis of this proceeding. Stress is laid upon this from the fact that it is this order which is claimed to have first been disobeyed, and which gave rise to the subsequent proceedings. Nor can it be said, assuming that it is within the power or province of the judge to aid a recorded order by oral statements *aliunde* such record, that the request of the judge to relator, Duncan, was in any sense such order or command, or so regarded by the judge at the time, as to be the subject of disobedience, so as to form the basis of a contempt proceeding. It was, at most, a mere request, and evidently so understood at the time by the judge, relator, and the district clerk; and the manner in which the judge informed relator, Duncan, if he could not comply with it, would form the basis of relator's belief that he was excused from attendance. Where the court seeks to punish either by fine, arrest, or imprisonment, for the disobedience of an order or command, such order or command must carry with it no uncertainty, and must not be susceptible of different meanings or constructions, but must be in the form of a command, and, when tested by itself, must speak definitely the meaning and purpose of the court in ordering. There being no such order as relator was required to obey, and there being nothing in his conduct remotely bringing him within contempt, the action of the judge in ordering the writ of attachment was absolutely void and without jurisdiction. His arrest was for no offense, either actual or constructive. The court, so far as relator was concerned, was without jurisdiction as to the subject-matter or person, and had no authority to impose the fine of $25 originally imposed, whether entered of record or not.

But it is contended the court rightfully punished relator by a fine of $50, when brought before the court in arrest by virtue of the writ of attachment, on the 21st of March; that here the contempt was committed in the presence of the court, by words spoken by relator and from his manner; and that the facts recited in the judgment were conclusive. The writ of attachment being void, because issued without authority, the court at no time rightfully obtained jurisdiction over his person. His presence in the court room was illegally enforced, and he had the right, in a respectful manner and by decorous language, in the presence of the court, to protest against the unlawful arrest and seizure of his person, and while thus in duress to refuse to serve upon the committee. If the original order was not sufficient to require obedience, certainly no illegal arrest under such order would add weight, strength, certainty, or validity to it; and, if the court had no power to render the particular judgment against relator in aid of which the writ of attachment was issued, certainly the jurisdiction of the court could not be so enlarged when the jurisdiction was originally wanting. There is nothing in evidence before this court, outside the facts recited in the judgment entered on the 21st of March, which shows that relator made use of any language in any way discourteous, or which could have been, under the circumstances, construed in any other way than an indignant protest of an unoffending citizen against the unlawful arrest and humiliation to which he had been

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subjected, without legal authority; nor was his manner offensive or discourteous, but, upon the contrary, all the evidence (the facts recited in the judgment excepted) show that neither his language nor manner was in any respect offensive, such as to form the basis for the proceeding in contempt. A judgment which is void is conclusive of nothing, and may be the subject of inquiry in a collateral proceeding. The recited facts therein are not binding in any way nor for any purpose. Nor can the court make contempt of that which is not contempt (Church, Hab. Corp. § 152); and every attempt to do so would be in excess of authority or jurisdiction, as much so as if the court had no authority or power to punish for contempt, either in relation to the person or subject-matter. There must be contempt in order to justify punishment for that offense. "There are three essential elements necessary to render conviction valid. These are that the court may have jurisdiction over the subject-matter, the person of the defendant, and the authority to render the particular judgment. If either of these essential elements are lacking, the judgment is fatally defective, and the prisoner held under such judgment may be released on *habeas corpus*." *Ex parte* Degener, 30 Tex. App. 576, 17 S. W. Rep. 1111; *Ex parte* Taylor, 34 Tex. Cr. Rep. 591, 31 S. W. Rep. 641; *Ex parte* Tinsley, 37 Tex. Cr. Rep. 517, 40 S. W. Rep. 306; *Ex parte* Kearby, 35 Tex. Cr. Rep. 531, 34 S. W. Rep. 635; *Id.*, 35 Tex. Cr. Rep. 634, 34 S. W. Rep. 962; Brown, Jur. §§ 109, 110; *Ex parte* Lake, 37 Tex. Cr. Rep. 656, 40 S. W. Rep. 727. "Some of the older authorities regard jurisdiction of the matter and the prisoner sufficient to give the court jurisdiction to pronounce the judgment, which could not be successfully assailed by this writ. The rule now, supported by high and abundant authority and excellent reason, is that the court must not only have jurisdiction over the person and the matter, but authority to render the particular judgment. The judgment is not conclusive upon the question of the authority of the court to render it. That, as well as any other matter which would render the proceedings void, is open to inquiry." 7 Am. & Eng. Ency. Law (2d Ed.) p. 36; People v. Liscomb, 60 N. Y. 559; People v. Court of Oyer & Terminer, 101 N. Y. 245, 4 N. E. Rep. 259, 54 Am. Rep. 691; *Ex parte* Degener, 30 Tex. App. 566, 17 S. W. Rep. 1111; Holman v. Mayor, etc., 34 Tex. 668; *Ex parte* Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724, 28 L. Ed. 1117.

Jurisdiction of the person and subject-matter are not alone conclusive, but the authority of the court to render the particular judgment is the subject of inquiry; and if, upon review of the whole record, it appears that a judgment unwarranted by law was entered, the party thus placed allowed by law (*Ex parte* Edwards, 11 Fla. 174; Haines v. Haines, 35 Mich. 138; People v. Lincomb, 60 N. Y. 559; *In re* Patterson, 99 N. Car. 407, 6 S. E. Rep. 643; *In re* Walker, 82 N. Car. 98; Com. v. Newton, 1 Grant, Cas. 453; *In re* Pierce, 44 Wis. 411); as also where the commitment is for an indefinite time. *Ex parte* Kearby 35 Tex. Cr. Rep. 531, 34 S. W. Rep. 635; Yoxley's Case, 1 Salk. 351; Rex v. James, 5 Barn. & Ald. 894, 7 E. C. L. 292; Cromartie v. Commissioners, 85 N. Car. 211; *In re* Hammel, 9 R. I. 248; *In re* Leach, 51 Vt. 630; People v. Pirfenbrink, 96 Ill. 68; State v. Myers, 44 Iowa, 580; Bickley v. Com., 2 J. J. Marsh. 575; *Ex parte* Alexander, 2 Am. L. Reg. (O. S.) 44; *In re* Watson, 3 Lans. 408; Com. v. Roberts, 4 Pa. L. J. 126.

If the judgment is not conclusive upon the question of the authority of the court to render it when the facts are not therein recited, then the recitation or partial recitation of the facts in such judgment, and upon which it is predicated, will not add anything more to its sanctity than if unrecited, and such judgment is as much the subject of attack as if such facts were entirely omitted. If the unrecited facts would not or do not authorize the particular judgment rendered, then the mere recitation of the same facts in the judgment will not make it valid, nor add strength or vitality to it. If the judgment is void, in either event it is the subject of inquiry in a *habeas corpus* proceeding, and it must be void to be so attacked. Authorities *supra*. In Parker's case, 35 Tex. Cr. Rep. 12, 29 S. W. Rep. 480, 790, this question was expressly decided. The judgment in that case recited as a fact that the court adjourned on May 14, 1892, and it was attacked on *habeas corpus* on the ground that this recitation was false, in that the court as a matter of fact did not adjourn on May 14th, but did adjourn after 12 o'clock at night of said day, which rendered the judgment void, because said court by law was necessarily terminated at midnight of said day. The contention was that the verdict was returned into court after 12 o'clock at night, and on this issue the case was tried by this court. If the verdict was returned after 12 o'clock at night, it was void, because, as stated above, the term of the court had necessarily terminated at the hour of midnight, and before the verdict was rendered. The recitation of fact in the judgment, if true, constituted the verdict a legal one, and the judgment valid. It was contended in that case, as it is in this, that the recitation of the fact in the judgment was conclusive, and not subject to attack in the *habeas corpus* proceeding. This court, however, held otherwise, and that it was permissible "to go behind the record, and probe into the very truth of the matter," etc. Judge Henderson, delivering the opinion of the court, uses this language: "Notwithstanding

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purporting to have been done during the term was in fact done during the time recited by the record." See also *Ex parte* Juneman, 28 Tex. App. 488, 13 S. W. Rep. 783; White's Ann. Code Cr. Proc. § 98, subsecs. 6, 7; also sections 130 and 131,—for collated authorities, as well as the authorities cited *supra*. After hearing the facts in that case, the court sustained the judgment of the trial court. The Parker case, then, is authority for the further proposition that we will hear the facts on controverted issues of this character, and where there is a conflict in the evidence, which may or may not support the judgment, and there is sufficient evidence to support the judgment, that we will not disturb the ruling of the trial court. The writer did not participate in the decision in the Parker case, as will be seen by the report of that case. That case is decisive against the state's contention that the recitation of the facts in the judgment is conclusive, and cannot be attacked on *habeas corpus*, and that case but follows the unbroken line of decisions in this state since *Ex parte* Degener, *supra*. The same rule obtains as to orders, etc., of the court. See *Ex parte* Lake, 37 Tex. Cr. Rep. 656, 40 S. W. Rep. 727.

The order appointing relator one of the committee to examine the applicant for license to practice law was invalid, for reasons already stated, and was therefore non-enforceable. The fine of $25 sought to be imposed was equally invalid, for reasons already given. *Ex parte* Kearby, *supra*. The warrant by which he was arrested and brought into court was also void for want of authority for its issuance, there being no valid judgment or order for its support. Hence the refusal to act on the committee was not contempt. Relator had the right to protest against the illegal arrest, under the circumstances, and the mere fact that he may have exhibited anger or indignation at the unwarranted arrest did not constitute contempt. We wish to say that the power of the court is official,—judicial, and not personal,—and the relations of court and attorney are correlative. Courts may, will, and should enforce judicial power and functions when necessary; yet this must be done in a manner sanctioned by law, and in consonance with judicial dignity, and with due regard to the rights of parties to be affected. Attorneys are bound and will be held to obey legal orders of courts, yet the court should invoke its judicial authority under the law and in obedience thereto. The relationship of court and attorneys, bench and bar, are reciprocal, and each, in their proper sphere, is clothed with powers, rights, and privileges, which are to be recognized and respected by the other. These relations should be recognized and respected alike by the bench and bar, and, being carefully kept in view and followed as rules of action and conduct, will avoid friction. The judgment, being void, should be set aside, and the relator discharged; and it is so ordered.

NOTE.—*Jurisdiction of Courts to Punish for Contempt.*—Before reviewing the latest authorities on this important subject, a glance at the suggestions offered by Henderson, J., in his opinion dissenting from the decision in the principal case will not be without value and interest. He said in part:

"Inasmuch as it occurs to me that the court in its opinion has overlooked certain well recognized principles of the law which pertain to contempts in the presence of the court, and the power of this court on *habeas corpus* to examine into and review the action of the court adjudicating contempt, I deem it proper, at the outset, to state briefly the principles which govern such cases.

All courts of general jurisdiction have the inherent power incident to their very existence as courts to punish contempts committed in their presence. *Ex parte* Degener, 30 Tex. App. 572, 17 S. W. Rep. 1111; *Ex parte* Terry, 128 U. S. 306, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405; Church, Hab. Corp. § 309; Rap. Contempts, § 1. In all cases of contempt in the presence of the court, the judge bases his action on his own personal knowledge; that is, the judicial eye witnessing the act. The judicial mind comprehends all the circumstances of aggravation, provocation, or mitigation, and his judgment does not require any extraneous support to render it effective. Crow v. State, 24 Tex. 12; *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405; *In re* Wood, 82 Mich. 75, 45 N. W. Rep. 1113; *Ex parte* Wright, 65 Ind. 504; Middlebrook v. State, 43 Conn. 257; State v. Woodfin, 27 N. Car. 199. According to some of the authorities, and in consonance with the better practice, the court in finding a contempt should adjudicate the facts constituting such contempt. 4 Enc. Pl. & Prac. p. 798, and note 2 for authorities; Church, Hab. Corp. § 316 and note.

As a general proposition, before a court will exercise jurisdiction to discharge a party on *habeas corpus* from a contempt proceeding in another court, the judgment must be void for want of jurisdiction over the subject-matter or over the party. In some jurisdictions courts will inquire whether the court had the power to render the particular judgment it did,—that is, whether the matter was in fact a contempt,—and our own courts have adopted this doctrine. *Ex parte* Degener, 30 Tex. App. 572, 17 S. W. Rep. 1111. In the United States courts, and in most of our state courts, the judgment of a court finding a party guilty of contempt imports absolute verity, and cannot be questioned or contradicted in its findings on writ of *habeas corpus* by any other tribunal. *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405; *Ex parte* Sternes, 77 Cal. 156, 19 Pac. Rep. 275; *Ex parte* Ah Men, 77 Cal. 198, 19 Pac. Rep. 380; *Ex parte* Acock, 84 Cal. 50, 23 Pac. Rep. 1029; Whittem v. State, 36 Ind. 196; Smith v. McLendon, 59 Ga. 523; *Ex parte* Bergman, 3 Wyo. 396, 26 Pac. Rep. 914; People v. Pirfenbrink, 96 Ill. 68; Church, Hab. Corp. §§ 316, 317, and notes; *Id.* §§ 336, 340; Rap. Contempts, 155.

Applying these well recognized rules of law to the question here involved, let us see how the relator stands as to the judgment of the court finding him guilty of contempt. I take it that no one will seriously contend that the district court did not have jurisdiction of the subject-matter at the time this contempt arose; that is, authority to appoint a committee of attorneys to examine the applicant, McCord, for license to practice law, and to require their attendance and service. It is contended, however, that

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the jurisdiction did not properly attach, because no time was fixed in the order; but the parties were present, including the relator, and knew as to the time set, and this, at most, was a mere irregularity. It may be conceded that the court did not have authority to order an attachment for the relator on his failure to be present at the examination of the night of the 20th of March, and that he was illegally attached and brought before the court on the morning of the 21st of March; but when he was brought into the presence of that tribunal he was then before the court in regular session, and the court could require of him to discharge the duty, which had previously been imposed on him as an officer of the court, of examining the applicant for license. It occurs to me he could no more decline to oin the committee and make the examination than could a witness in a case pending in court, who had been illegally attached on an order of the court, when brought before it refuse then to testify as a witness. *Ex parte* Ah Men, 77 Cal. 201, 19 Pac. Rep. 380, and authorities there cited. Suppose a witness in such case should not only refuse to testify because he had been brought into court under an illegal process, but should proceed to bandy words with the court, to tell the court that it must treat him as a gentleman, etc. This, according to the judgment of the court, is what the relator did. He peremptorily refused to go on with the examination. He told the court that he proposed to be treated as a gentleman, and not have an attachment served upon him to compel his attendance; that he treated the court like a gentleman, and that the court had to treat him as one. Not only so, he did this in an angry manner. If this was not a contempt of court, then what was it? I would not in this respect be understood as holding that, where a member of the bar or others may be illegally brought before the court, they have not the right at the proper time, in a respectful manner, to ask an explanation of the court as to the reasons which caused such action, and of uttering, if need be, a respectful protest; but I do not believe it accords with the dignity of the courts, and the respect in which they should be held, that their authority should be defied in threatening and menacing language and in angry tones. For aught that appears, if relator, in the first instance, had inquired of the court as to why he had been attached and had done this in a respectful manner, the court would have either heard him then, or have arranged to hear him subsequently. But it does not occur to me, from his own statement, that this was his conduct. On the contrary, in every essential respect it accords with the judgment of the court; and certainly it must be held, if the judgment of the court finding the contempt is to be nullified and destroyed by some other tribunal, it must be upon a clear case, showing that the matter could not under any circumstance constitute a contempt.

I believe in the rights of the American citizen; I believe in the dignity and manhood of the members of the legal profession; but I believe in the majesty of the law; and these rights, whether of life, liberty, or property, and whether assailed by the illegal acts of government or by the lawlessness or violence of individuals, will be best upheld and safeguarded by preserving the authority of the courts, for upon these [illegible]stence of the tribunals themselves."

The power to punish for contempt is the highest exercise of judicial power, it is not a mere incident to the exercise of judicial functions, and is necessarily inherent in all courts of law or equity. *In re* Mason, 43 Fed. Rep. 510; *In re* Millington, 24 Kan. 214; State v. Mathews, 37 N. H. 450; Holman v. State, 105 Ind. 513; Hughes v. People, 5 Colo. 436; Watson v. Williams, 36 Miss. 331; *In re* Rosenberg, 90 Wis. 581. At common law every court of competent jurisdiction was the absolute and exclusive judge of contempt committed against its own dignity and authority, and its decision could not be reviewed on appeal or on writ of *habeas corpus*. King v. Wooten, 54 Fed. Rep. 612; *Ex parte* Hardy, 68 Ala. 305; *Ex parte* Clancy, 90 Cal. 553; *In re* Debs, 158 N. S. 564; Bloom v. People, 23 Colo. 416; Shattuck v. State, 51 Miss. 50; *Ex parte* Goodwin, 67 Mo. 637; *In re* Rosenberg, 90 Wis. 581; Matter of Bissell, 40 Mich. 63. This is the general rule except where changed by statute. The following authorities show in what jurisdictions appeals are allowed. State v. Leftwhich, 41 Minn. 42; Hawes v. State, 46 Neb. 149; Welch v. Barber, 52 Conn. 147; People v. Diedrich, 141 Ill. 665; Matter of Daves, 81 N. Car. 72; Hundhausen v. Insurance Co., 5 Heisk. (Tenn.) 702; Worland v. State, 82 Ind. 49; People v. Dwyer, 90 N. Y. 402; State v. Knight, 3 S. Dak. 509; State v. Miller, 23 W. Va. 801; N. J. Pub. Laws 1884, p. 219; Va. Code, 1887, § 4053; Stat. Wis. § 115.

No judgment for contempt, however, is valid unless the court passing judgment had jurisdiction over the person and the subject matter and also jurisdiction to render that particular judgment. This is the modern rule, the earlier cases not inquiring into the question whether or not the court possessed jurisdiction to render the particular judgment. Thus in *Ex parte* Kearney, 7 Wheat. (U. S.) 40, the petitioner had been committed for contempt for refusing to answer a question which tended to incriminate him. Justice Story held that, irrespective of whether the refusal of the witness to answer the question constituted contempt of court, the only question which could be considered on application for a writ of *habeas corpus*, or on appeal, was the jurisdiction of the court over the party and the subject-matter, and that the jurisdiction to render the judgment in question could not be inquired into. In People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211, the court gave an excellent statement of the modern rule, holding that jurisdiction of the person and of the subject-matter are not alone conclusive, but if the jurisdiction of the court to render the particular judgment was unwarranted by law, the contemnor would be released on the hearing of a writ of *habeas corpus*. One cannot, therefore, be punished for contempt for disobeying a void order or one which the court had no power to make. Brown v. Moore, 61 Cal. 432; *Ex parte* Grace, 12 Iowa, 208; St. St. Louis, etc. R. R. v. Wear, 135 Mo. 230; Ruhl v. Ruhl, 24 W. Va. 279; Call v. Pike, 66 Me. 350; Lester v. People, 150 Ill. 408; *Ex Parte* Gardner, 22 Nev. 280. A glance at the decided cases will serve to make clear the exact limits of the rule just stated. Of course, an order of court which is merely erroneous must be obeyed. He who disobeys such a mandate commits a contempt for which he may be punished. But an order in excess of the powers of the court is without jurisdiction and void. Disobedience to it is not a contempt. Keenan v. People, 58 Ill. App. 241. It is contempt of court to refuse to obey any order which the court had jurisdiction to make, irrespective of whether such order is erroneous or improper; such error must be questioned by direct proceedings to review the order, not by disobedience.

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Forrest v. Price, 52 N. J. Eq. 16; State v. Horner, 16 Mo. App. 191; *Ex parte* Spencer, 83 Cal. 460; *In re* Vanvaver, 88 Tenn. 334. Such order must be obeyed until overruled or set aside. Thus, where an order was irregular, one who failed to obey it, trusting entirely to the success of his attorney's efforts to have the order set aside, is guilty of contempt, though such efforts proved successful. Shults v. Andrews, 54 How. Pr. 378. But where the court is without jurisdiction to make the particular order its violation is not a contempt. McKinney v. Railroad, 140 Ind. 95 Thus, where a statute provided that in the absence of suitable provision by the county of a place to hold court, the judge of said court might direct the sheriff to provide the same and the expense so incurred should be a charge upon the county treasury, it was held that the judge after certifying the expenses incurred, has not, either inherently or under the statute, the power to order the treasurer to pay the same, and the latter is not guilty of contempt in refusing to obey such order. *Ex parte* Widber, 91 Cal. 367. Where a resident of a foreign state petitions for a writ of *habeas corpus* to obtain possession of his child, which is in the custody of his wife, its mother, in Pennsylvania, an order by the court requiring the wife and a relative to take the child to such foreign state "for the purpose of having a writ of *habeas corpus* served on them," if made, is void, and such persons are not guilty of contempt in disobeying it. Commonwealth v. Sager, 160 Pa. St. 399.

Since equity has no jurisdiction to enjoin the holding of an election, a writ issued for that purpose is void, so that a disregard thereof is not contempt. Darst v. People, 62 Ill. 306. Since an order requiring county officers to collect a tax, made in an action to which the officers were not parties, and in which they in no way appeared, was not binding on them, they were not guilty of contempt in refusing to obey it. McKinney v. Railroad, 140 Ind. 95. Where the court acts without jurisdiction in the appointment of a receiver for a partnership, a person cannot be adjudged guilty of contempt for refusal to obey an order requiring him to deliver to the receiver funds in his hands belonging to the partnership. State v. Winder, 14 Wash. 114. Where the board of supervisors have no jurisdiction to inquire into the authority of certain persons claiming to act as railroad commissioners, an attachment for the arrest of such persons for disobeying a summons to appear before a committee of the county board and produce certain documents was vacated. Faulkner v. Morey, 22 Hun (N. Y.), 379.

Under proceedings for contempt, therefore, of an order of court, the party in contempt may bring into question the jurisdiction of the court to make the order, though such order has not been appealed from and stands unreversed. The reason for this is that the contemnor of an order of court may show in defense that the court was without jurisdiction to make such order, and that hence there was, in legal effect, no order. The case of Forrest v. Price, 52 N. J. Eq. 16, makes this excellent statement of the rule: "It is no excuse in a proceeding for contempt that the orders contemned are erroneous in law. The method of correcting such error is by appeal, not by disobedience. Where a person is proceeded against for disobedience to an order or judgment, he cannot allege in defense that the court erred in that order or judgment. To be successful he must go further and make out that there was, in legal effect, no order, by showing that the court had no right to judge between the parties upon the subject."

JETSAM AND FLOTSAM.

WOMEN AS LAWYERS.

"Sir John Cockburn," says the *London Law Journal*, "moved the following resolution in Gray's Inn Hall on the 'Ladies' Night' of the Gray's Inn Debating Society: 'That the time has arrived when women should be admitted into the legal profession.' Mr. Rentoul, K. C., M. P., who opposed the resolution in an amusing speech, urged that a handsome lady barrister would exercise an unfair influence upon juries. He stated that a barrister was once engaged in a running down case, in which defeat was staring him in the face. His client and his witnesses, being members of the costermonger fraternity, had cut anything but an impressive figure in the witness-box. It suddenly occurred to him that his two handsome sisters had come to see him conduct the case. To their utter amazement, he called them as witnesses, but a few irrelevant questions to them without disclosing his relationship to them, asked them whether they saw the accident, and immediately they replied 'No' brought the examination to a close. 'These fascinating ladies,' said Mr. Rentoul, 'made a visible impression upon the jury; they gave tone to all the other witnesses, and my friend won his case.' Notwithstanding Mr. Rentoul's eloquence and wit, the resolution moved by Sir John Cockburn was carried. Mr. Merlin presided over the discussion, in which several ladies took part."

UNIVERSAL CONGRESS OF LAWYERS.

The largest congress of American lawyers ever assembled met at Denver, Colo., during the week of August 19. There was present at this meeting 311 members of the American Bar Association. The largest previous meeting was in 1896, when 296 were present. The association took in 227 new members at Denver. The total membership of the organization is now 1,802, representing thirty-nine states and territories. At St. Louis where the association will meet in 1903 during the progress of the Louisiana Purchase Centennial Exposition, the largest assembly of lawyers and jurists in the history of the world will take place. Mr. Charles Claflin Allen, the vice-president of the American Bar Association for Missouri, at the recent meeting at Denver, presented the following memorial, which was unanimously adopted:

"*To the American Bar Association:* In 1803 the United States purchased the Louisiana territory from France; in 1903 the Centennial of that purchase will be celebrated in the City of St. Louis, Missouri. After the purchase treaty was signed, Napoleon said to Marbois: 'This acquisition of territory strengthens forever the power of the United States.' His prophetic words have been realized. The Louisiana Purchase paved the way for the acquisition of Oregon, California and Texas; enabled the United States to span the continent from the Atlantic to the Pacific, and made her territory the meeting ground for the Occident and the Orient. The wilderness of 1803 has developed into fourteen states and territories, including the great state of Colorado, in which this meeting of the American Bar Association is held. The price paid by the United States for the territory was $15,000,000. Its taxable wealth to-day exceeds six thousand millions; and St. Louis, with the gen-

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erous aid of congress, is prepared to devote a sum equal to the price of the purchase, solely to the celebration of its centennial in 1903. The resources of this great domain are wonderfully varied and marvelous in their extent. Perhaps few people, even within the limits of the purchase territory itself, realize that it produces one-half of the cotton raised in the United States, that a billion bushels of corn a year is not an extraordinary crop, that its wheat crop often amounts in value to $200,000,000; its hay crop to $150,000,000; that the cattle, horses and mules upon its ranges are valued at a thousand million dollars. This wonderful development in material resources has been accompanied by a corresponding development in the mental and spiritual life of its inhabitants. Universities, colleges, scientific and normal schools in many of the states are supported at the expense of the state. Private institutions of learning are numberless; and public schools, which must be in the future, even more than in the past, the conservators of the liberties of the people, can be seen from every hill top. Medical schools and law schools are to be found in many of the cities in the Louisiana Purchase, some of them ranking with the best professional schools in the country. The Centennial Exposition to be held in 1903 is in charge of the Louisiana Purchase Exposition Company, and the plans of the management contemplate a World's Fair greater and more wonderful than any ever held. It has an appropriation from congress of $5,000,000, the largest aid ever given by the United States to a like purpose, and it has the promise of full support by the government. It will not be like any of its predecessors in architecture, landscape, or design, or the arrangement of its exhibits. It will be a stupendous monument to the material growth and commercial and manufacturing development, not only of the Louisiana Purchase and the United States, but of the whole world. But it will be more than that. It is part of the plan to gather together the learned men of the world in the several departments of the arts and sciences, including the science of jurisprudence. There will be held in the City of St. Louis, Missouri, during the Centennial Exposition of the Louisiana Purchase, a universal congress of lawyers. This congress will be composed as follows: 1. Lawyers and jurists from every nation of the world. 2. Teachers of law, and persons learned in special branches of jurisprudence. 3. Persons learned in ancient law, including teachers of the history of law, and students of the laws of people and nations now extinct. The foregoing summary is an outline of the underlying idea of the plan. The character, constitution and management of the congress itself will be developed hereafter, and chiefly, it is hoped, by the American Bar Association. The committee on education of the Louisiana Purchase Exposition Company, upon whom falls the duty of preparing for this congress, adopt the definition of Justinian: 'Jurisprudence is the knowledge of things divine and human; the science of the right and the wrong.' The one great object is to make the congress of lawyers as universal in scope as that definition. Therefore, the Louisiana Purchase Exposition Company, acting through its committee on education, extends to the American Bar Association, as the great body of representative lawyers and jurists from all parts of the United States, an invitation to unite with the Louisiana Purchase Exposition Company in securing a universal congress of lawyers to meet at St. Louis, Missouri, during the exposition of 1903. To that end the American Bar Association is requested to appoint a committee of one hundred or more representative lawyers from different states and territories of the United States, and from the foreign countries, if desired, whose duty it shall be to plan, and, subject to the supervision of the Louisiana Purchase Exposition Company, arrange for the holding of such universal congress of lawyers."

BOOKS RECEIVED.

Hornbook Series: Admiralty Law, by Robert M. Hughes, M. A., of the Norfolk (Virginia) Bar. Sheep. Price, $3.75. West Publishing Co., St. Paul, Minn., 1901. Review will follow.

Hornbook Series: Equity Jurisprudence, by James W. Eaton, Esq., of the Albany Bar. Sheep. Price, $3.75. West Publishing Co., St. Paul, Minn., 1901. Review will follow.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCOUNT—Executors and Administrators—Final Account—Setting Aside Fraud.—A probate court has authority to set aside and annul an order allowing a guardian's final account obtained through fraud, and to re-examine the same, as if no such order had been made. The fact that consent by the ward to such allowance was procured through the aid of a written consent and acquittance obtained from the ward after his majority does not prevent the probate court from re-examining such order; and it may disregard such written consent and acquittance if the same were procured by fraud, and examine such account *de novo*.—LEVI V. LONDINI, Minn., 86 N. W. Rep. 333.

2. BENEFICIAL ASSOCIATIONS—Local Lodge—Suspension—Effect.—Where the supreme lodge of a beneficial association has designated the financial secretary of the local lodge as the proper person to receive payment of assessments, the failure of such secretary to transmit moneys received by him from an assured in payment of assessments, and the suspension of the local lodge for such non-payment, will not forfeit his benefit certificate, since the officer's negligence is not chargeable to the assured, but is that of an agent of the supreme lodge, notwithstanding a provision in the by-laws that the officers shall be agents of the members and not of the supreme lodge.—BRAGAW V. SUPREME LODGE KNIGHTS AND LADIES OF HONOR, N. Car., 38 S. E. Rep. 905.

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3. BILLS AND NOTES—Acceptance—Consideration.—Where drafts given for the future delivery of coal were discounted by a bank, with the knowledge of the consideration therefor, it can enforce them, as against the acceptor, when discounted before maturity, and before a breach of the agreement to deliver.—TRADESMEN'S NAT. BANK v. CURTIS, N. Y., 60 N. E. Rep. 429.

4. BILLS AND NOTES—Usury—Tender.—Where the amount due on a usurious note cannot be definitely determined till an accounting, an actual tender of the amount admitted to be due by the debtor, in an action to restrain its collection, coupled with an offer in the bill to pay the amount legally due, constitutes a sufficient tender.—PURVIS v. WOODWARD, Miss., 29 South. Rep. 917.

5. BREACH—Damages—Contract.—Where defendant contracted to pay for advertising by allowance on the price of certain goods purchased, and, after an agreement for the purchase of such goods had been made at a cash price, refused to perform on learning that the purchaser intended to apply on the price the sum due for advertising, such agreed price may be recovered in money.—HAND v. GAS ENGINE & POWER CO., N. Y., 60 N. E. Rep. 425.

6. BUILDING CONTRACTS—Breach of Contract—Damages.—Where one claims damages from a contractor because of the failure to erect a store and office building within a given time, and the evidence supports such claim, the proper measure of damages is the rental value of the building for the time elapsing between the time fixed for its completion and the time when it was delivered and turned over.—CANNON v. HUNT, Ga., 38 S. E. Rep. 963.

7. BUILDING CONTRACT—Effect of Rescission.—Where an owner of a building repudiates the contract for its erection, and refuses to allow the contractor to go on with the work, it gives the contractor immediate right of action, and relieves him from obligation of producing certificate of engineer, which, under the terms of the contract, was necessary as a condition of payment.—SMITH v. WETMORE, N. Y., 60 N. E. Rep. 419.

8. BUILDING CONTRACT—Liability of Surety.—A provision in a surety bond to secure fulfillment of a contract to erect a church that "alterations increasing its cost to $300 are allowed" restricted permissible changes in the plans to that amount, and if such changes increased the cost to a larger sum, such changes would constitute a departure from the contract, and would release the surety company; following previous decision of this case in 83 N. W. Rep. 487.— NORWEGIAN EVANGELICAL LUTHERAN BETHLEHEM CONGREGATION v. UNITED STATES FIDELITY & GUARANTY CO., Minn., 86 N. W. Rep. 880.

9. CARRIERS—Loss of Freight—Agreed Valuation.—A railway company, in its capacity as a common carrier, may, as the basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and *bona fide* agreement as to the value of the property to be transported; and, in such case, the latter, when loss, damage, or destruction occurs, will be bound by the "agreed valuation." But a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an "arbitrary preadjustment of the measure of damages," will not, though the shipper assents in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value. Under section 2318 of the Civil Code, a carrier failing to comply with the requirements of the next preceding section, as to tracing "freight" which has been lost, damaged, or destroyed, and giving information with respect thereto, becomes liable for the negligence of a connecting carrier.—CENTRAL OF GEORGIA RY. CO. v. MURPHEY, Ga., 38 S. E. Rep. 970.

10. CARRIERS—Passengers—Destination—Failure to Stop.—Upon the trial of an action brought by a woman against a railroad company for damages alleged to have been sustained by her in consequence of having been carried beyond her destination and landed at night at or near a given town, where she, with no companion except her little child, was compelled to walk some distance in order to secure shelter and protection until the following morning, evidence that it was not the custom for ladies to walk about at that time of night without an escort in that town, or that it would be rather imprudent for a lady to walk a given distance in that place "in the dark" with no companion except a little child, was inadmissible; it not appearing that either the plaintiff or defendant had any knowledge of these facts.—DORSEY v. CENTRAL OF GEORGIA RY. CO., Ga., 38 S. E. Rep. 958.

11. CARRIERS — Trespassers — Wrongful Ejection.—Plaintiff was stealing a ride beneath a freight car, and while the train was moving about five miles an hour the brakeman threw a rock at him and cursed him and told him to get off, and the flagman said, "Give it to him," and plaintiff was injured by jumping off. Held, that the company was liable for the wrongful manner in which the ejection was accomplished.—COOK v. SOUTHERN RY. CO., N. Car., 38 S. E. Rep. 925.

12. CONFLICT OF LAWS — Usury.—Where money is loaned in Virginia on real estate security situated in North Carolina, the security being the basis of the loan, the rate of interest is governed by the law of North Carolina, and not by that of Virginia.—FAISON v. GRANDY, N. Car., 38 S. E. Rep., 897.

13. CONTRACT—Extension—Construction.—When the maturity of an obligation for the delivery of a specified quantity of a given commodity is extended by a contract in which it is expressly stipulated that the value of such commodity shall be that which it bore in a named market on a given day, and shall be determined in a designated manner, the holder of the obligation is bound to settle by the terms of such contract.—MCLELLAND v. SINGLETARY, Ga., 38 S. E. Rep. 942.

14. CONTRACT—Extension of Time—Construction.—Where, by the terms of a contract, payments are to be made on the 1st day of every month, but the party to whom they are due has notified the other that he does not intend to be exacting about it, and, in point of fact, during perhaps six consecutive months no payment is made on the 1st day of the month, the party owing the payments will not be held to have forfeited his rights under such contract by failure to pay upon the 1st day of the seventh month.—PRENTISS v. LYONS, La., 29 South. Rep. 994.

15. WRITTEN AND PRINTED WORDS—Construction.—The insertion of written words in a printed form, evidencing a contract, is entitled to more weight in its construction than the printed or typewritten provisions of the same.—SPRAGUE ELECTRIC CO. v. BOARD OF COM'RS OF HENNEPIN COUNTY, Minn., 86 N. W. Rep. 882.

16. CONTRIBUTORY NEGLIGENCE—Exercise of Reasonable Care.—In a personal injury action it is held, that the fact that plaintiff had no prior actual knowledge of the location of, or the danger causing her injury, is not conclusive that she was not guilty of contributory negligence. The rule in such cases is that if the person have no actual knowledge of the danger causing the injury, and could not by the exercise of reasonable care have discovered it, he cannot be said to be guilty of contributory negligence. But, if ignorant of the danger, and the exercise of reasonable care would have made it known, and there be a failure to exercise such care, he is chargeable with negligence, and to the same extent as though perfectly familiar with the location and danger.—RUSSELL v. MINNEAPOLIS ST. RY. CO., Minn., 86 N. W. Rep. 846.

17. CORPORATION—Forfeiture of Charter—Action.—A corporation is not to be deemed dissolved, or its charter forfeited, by reason of any misuser or nonuser of its franchise for the statutory period until the default and forfeiture have been judicially determined and

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adjudged in a proper proceeding for such purpose.—BLOCH v. O'CONNOR MIN. & MFG. CO., Ala., 29 South. Rep. 925.

18. CRIMINAL EVIDENCE—Deceased Witness—Former Trial.—Secondary evidence of what the deceased or absent witness testified upon a former trial is only admissible upon a second trial between the same parties or their privies, and with relation to the same subject-matter; and, therefore, in a trial under an indictment for murder, testimony of what a deceased witness testified on the trial of a person other than the defendant, for the same homicide, is inadmissible.—SIMMONS v. STATE, Ala., 29 South. Rep. 929.

19. CRIMINAL EVIDENCE—Insanity as a Defense—Proof.—Though the United States Supreme Court hold that if, from all the evidence, the jury have a reasonable doubt of the prisoner's sanity, they must acquit, one will not be deprived of his life without due process of law, in violation of Const. U. S. Amend. 14, if he is executed under a conviction had at a trial in a state court, where, in accordance with the decision of the state supreme court, he is required to establish his insanity by a preponderance of the evidence.—COMMONWEALTH v. BARNER, Pa., 49 Atl. Rep. 60.

20. DEED—Loss—Copy — Admissibility.—Defendant asserted title under a sheriff's deed, and averred that the original was lost, and offered in evidence the registration books, which contained a copy, which was not under seal, but which recited that it was given under the grantor's hand and seal. The copy was in the exact form prescribed by the legislature for sheriffs' deeds, which was defective in not requiring a seal. Held, that the recital in the copy was not sufficient to warrant the presumption that the original was under seal, and the copy was properly excluded.—STRAIN v. FITZGERALD, N. Car., 88 S. E. Rep. 929.

21. DEFECTIVE STREETS—Contributory Negligence.—One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages resulting from a hurt thus occasioned, although the same may be in part attributable to the latter's negligence.—CITY OF COLUMBUS v. GRIGGS, Ga., 88 S. E. Rep. 953.

22. EMINENT DOMAIN—Reassessment by Jury—View.—On appeal from the award of appraisers fixing damages for the condemnation of a railroad right of way, neither party is entitled, as a matter of right, to have the jury view the premises, but such matter is entirely within the discretion of the court, and its action thereon is not cause for reversal, unless an abuse of discretion is shown.—CHICAGO, I. & E. RY. CO. v. WINSLOW, Ind., 60 N. E. Rep. 466.

23. EQUITY—Marshaling Assets — Judgments—Mortgages.—Where a judgment is a lien on several distinct tracts of land, part of which is subject to a subsequent mortgage, and the mortgagee tenders the amount of the judgment to the judgment debtor and requests an assignment for the purpose of preventing an execution sale of the mortgaged land, without first exhausting the other lands, and the judgment creditor refuses, an execution sale of the land at much less than its value, which is not necessary to protect the judgment, may be set aside in equity.—JAMES v. MARKHAM, N. Car., 88 S. E. Rep. 917.

24. EXECUTION—Exemptions — Evidence.—In an order to maintain a claim to chattels which is founded solely on the contention that they are the product or increment of duly-exempted personalty, it is incumbent upon the claimant to prove affirmatively that the subject-matter of the claim was obtained in exchange for exempted property or the proceeds thereof, or by labor exerted in connection with the use or consumption of such property, so that the newly-acquired personalty could with fairness and reason be said to take the place of that which had been set apart.—CULVER v. TAPPAN, Ga., 88 S. E. Rep. 944.

25. EXECUTORS AND ADMINISTRATORS — Liability for Rent.—The occupancy of a dwelling house by a woman after the death of her husband does not render his estate liable for the rent of such house.—CARTER v. TIPPINS, Ga., 88 S. E. Rep. 946.

26. EXECUTORS AND ADMINISTRATORS—Sale of Realty—Action to Set Aside.—In an action to set aside a sale of real estate by an administrator, on the ground of defects in the sale proceedings and of fraud in making the sale. Held, where an administrator is licensed to sell the land of his intestate by a probate court having jurisdiction of the settlement of the estate, and which appointed him, it is immaterial, in an action to set the sale aside, whether there was or was not a proper petition for the license.—SMITH v. BARR, Minn., 86 N. W. Rep. 342.

27. FIRE INSURANCE—Policy — Buildings Included.—Plaintiff owned a manufacturing plant, and the dry house was situated about 12 feet from the main building, and an engine house about 4 feet from the dry house, both of which were connected with the main building by a movable bridge. Held, that a fire insurance policy on the main building, and all additions thereto adjoining and communicating, covered the engine house and dry house.—MARSH v. NEW HAMPSHIRE FIRE INS. CO., N. H., 49 Atl. Rep. 88.

28. GUARDIAN AND WARD — Appointment—Review.—Where, in proceedings instituted upon the petition of the testamentary guardian for his appointment to that trust, the next of kin appeared and objected to such appointment, and also filed a petition setting forth that such testamentary guardian was not a suitable person to discharge the trust, a determination by the probate court in such a case that the guardian was competent and suitable is reviewable, and, upon proper appeal being taken, is entitled to be heard upon its merits in the district court.—IN RE LA PLANT, Minn., 86 N. W. Rep. 351.

29. HIGHWAYS—Road Supervisors—Failure to Repair—Personal Liability.—A road supervisor, liable, under Code, § 1557, for all damages resulting from a defect in a highway which is allowed to remain after a reasonable time for repairing the same after the receipt of a written notice thereof, is not personally liable for failure to repair a defect in a highway where notice thereof has not been given to him.—SELLS v. DERMODY, Iowa, 86 N. W. Rep. 325.

30. HOMICIDE—Insanity as a Defense — Evidence.—Insanity, to be a defense to a homicide, must be so great as entirely to destroy accused's perception of right and wrong, and amount to delusion controlling his will, and make the commission of the act a duty of overwhelming necessity.—COMMONWEALTH v. BARNER, Pa., 49 Atl. Rep. 60.

31. HUSBAND AND WIFE—Separate Estate — Debts of Husband—Trust Deed.—Where a married woman executes a trust deed to secure the payment of her husband's debts, it is not void, but voidable, and the defense of coverture is lost when it is not set up before sale under the trust deed.—ROGERS v. SHEWMAKER, Ind., 60 N. E. Rep. 462.

32. INJUNCTION—Mandatory.—Where, in a suit for injunction, the court found as conclusions of law, to which no exception was taken, that defendant railroad company had no right to any way obstruct plaintiff's driveway under defendant's track, a mandatory injunction was properly granted restraining defendant from obstructing such driveway.—LAKE ERIE & W. R. CO. v. ESSINGTON, Ind., 60 N. E. Rep. 457.

33. INTOXICATING LIQUORS — Unlawful Resale — Recovery of Price.—Where intoxicating liquors are sold in Massachusetts with intent by the buyer to resell them in another state, contrary to the laws of that state, the seller's mere knowledge of the buyer's intent will not prevent recovery of the purchase price.—GRAVES v. JOHNSON, Mass., 60 N. E. Rep. 889.

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34. JUDGMENT—Collateral Attack.—If a judgment be absolutely void for defects patent on the face of the proceedings, the party oppposing its effects as to him is not driven to a direct action in the court which rendered it to secure the declaration of its nullity.—DECUIR v. DECUIR, La., 29 South. Rep. 982.

35. LICENSE—Unlicensed Persons—Recovery of Compensation.—A person who acts as agent of an insurance company, in soliciting, receiving, and forwarding to the company applications for life insurance, during a period when he does not have the license required by Rev. St. ch. 49, § 78, and amendments, cannot recover of the company the compensation for such services provided in the contract between him and the company.—BLACK v. SECURITY MUT. LIFE ASSN., Me., 49 Atl. Rep. 51.

36. LIFE INSURANCE — Action on Policy—Defenses.—In an action on a life insurance policy, the answer denied performance of its conditions by insured, and set up that the policy had been issued on the express condition that failure to pay the premiums should render it void, and alleged default therein. The answer failed to allege service of the notice required by Laws 1892, ch. 690, § 92, to pay the premium, as a condition precedent to the forfeiture of the policy. Held, that a notice and affidavit setting forth a substantial compliance with the statute were inadmissible in evidence, because of failure to plead the same.—FISCHER v. METROPOLITAN LIFE INS. CO., N. Y., 60 N. E. Rep. 481.

37. LIFE INSURANCE—Debtor and Creditor—Insurable Interest.—Insurance of his life by a debtor in favor of his creditor does not constitute a wagering contract, since the creditor has an insurable interest in the debtor's life.—BELKNAP v. JOHNSON, Iowa, 86 N. W. Rep. 207.

38. LIMITATION OF ACTIONS—New Promise—Letters.—Where letters acknowledged to have been written by the defendant are relied on to create a new promise to pay an existing open account, which on its face is barred by the statute of limitations, such letters must, to have such effect, with reasonable certainty of themselves, connect the debt with the promise, and sufficiently identify the debt. By their words they must acknowledge the particular debt as an existing liability in order to remove the bar of the statute.—SLACK v. SEXTON, Ga., 38 S. E. Rep. 946.

39. MORTGAGE—Assumption—Failure to Pay—Damages.—Defendant, having bought land of plaintiff and assumed a mortgage on it and other lands belonging to plaintiff, which other lands were subject to junior mortgages, is not liable to plaintiff for the full amount of the mortgage on his failure to pay it, and the sale under foreclosure thereof not only of plaintiff's lands, but of that bought by him from plaintiff.—FOLKEN v. HAHN, Iowa, 86 N. W. Rep. 258.

40. NEW TRIAL—Sufficiency—Newly-Discovered Evidence.—In a suit to set off plaintiff's interest in certain land and quiet his title thereto, which he claimed to have purchased with the proceeds of other land, evidence of the purchaser as to the price at which such other land was sold, which was less than plaintiff claimed, and insufficient to enable him to make the payments as claimed, was not cumulative, where there was no definite evidence on that point at the trial.—MALLY v. MALLY, Iowa, 86 N. W. Rep. 262.

41. NUISANCE—Abatement—Jurisdiction. — Save and except as to those things which are by the common or statute law declared to be nuisances *per se*, or which are in their very nature palpably and indisputably such, neither the municipal authorities of any city of this state, nor any department thereof which has been given the power to abate nuisances, has the legal right summarily to compel the abatement of a particular thing or act as a nuisance without reasonable notice to the person alleged to be maintaining or doing the same of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance.—WESTERN & A. R. CO. v. CITY OF ATLANTA, Ga., 38 S. E. Rep. 296.

42. NUISANCE—Public—Successive Offenses.—Where, by an ordinance of the city of New Orleans, the doing of a certain act is prohibited as a public nuisance, and violation of the ordinance made punishable by fine or imprisonment, and each day's continuance of the nuisance is made a separate offense, a party convicted by a recorder upon separate and distinct and successive charges for violation for successive days of the ordinance, and separately sentenced upon each charge, cannot, by *certiorari*, have the sentences set aside as being an illegal division into different offenses of a single offense, where in none of the complaints is the party charged with more than one day's infraction of the ordinance.—STATE v. BAKER, La., 29 South. Rep. 940.

43. PLEADING AND PRACTICE — Trial — Findings of Fact—Correction—Nunc Pro Tunc Entry.—Where a case was tried and special findings of fact and conclusions of law filed at the May term of court, and the findings of fact were wholly insufficient to support the conclusions of law, amended findings of fact, filed in conformity with the motion of the successful party after the expiration of the next succeeding term of court, and after the period within which a motion for a new trial by the defeated party might have rightfully been made, were unavailing to support the judgment, though such findings were filed as of the date of the filing of the previous findings.—APPLE v. SMITH, Ind., 60 N. E. Rep. 456.

44. PRINCIPAL AND SURETY—Indemnity Bond—Construction.—Where a bond of a surety company, given for the faithful performance of the duties of a bank cashier, in its form and essence resembles an insurance contract, and differs materially from the ordinary forms, and is capable of two constructions, it will be construed most strongly against a forfeiture of the indemnity for which it was given.—BANK OF TARBORO v. FIDELITY & DEPOSIT CO. OF MARYLAND, N. Car., 38 S. E. Rep. 909.

45. QUO WARRANTO—Right of Action.—A judgment of ouster on an information in the nature of a *quo warranto* cannot be entered against one who, though once an unlawful incumbent of a public office, is not at the time the information is filed exercising the duties of the office, or claiming any title thereto.—HOLMES v. SIKES, Ga., 38 S. E. Rep. 978.

46. RAILROADS—Fencing—Injury to Cattle on Track.—Failure to keep a fence in such condition as will prevent cattle from going upon its right of way, does not subject a railroad company to the payment of damages for killing cattle thereon by the operation of its trains, unless such killing was negligently done.—GEORGIA SOUTHERN & F. RY. CO. v. WISENBAKER, Ga., 38 S. E. Rep. 956.

47. RAILROADS—Injuries to Persons on Track—Contributory Negligence.—Where trainmen in control of a railroad train back it down opposite a danger point in the street of a city without precautions of any kind to signify its approach, or to warn or protect citizens at the precise moment that a passenger train is moving in the other direction on a parallel track, and in so doing it strikes and kills a person occupying the open space between the two lines of track, the company is responsible for the injury, although the person injured may have contributed to some extent by imprudently backing in a moment of forgetfulness into the open space taken up by the overlapping of cars outside the rails.—LAMPKIN v. MCCORMICK, La., 29 South. Rep. 952.

48. SALE—Breach of Warranty—Evidence.—In an action by a purchaser to recover damages for a breach of warranty in the sale of a coal-burning engine with a straw-burning attachment, it appeared that the engine, as a coal burner, was a complete machine irrespective of the straw burner device. The measure of damages was the difference in value, for any purpose,

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between the engine delivered and the combination sold, had it been as warranted.—BENSON v. PORT HURON ENGINE & THRESHER CO., Minn., 86 N. W. Rep. 327.

49. SALES—Insolvency—Fraudulent Intent.—Where an insolvent firm executed mortgages covering its entire stock to a bank, which mortgages were not recorded, and subsequently purchased goods of plaintiff, and before the delivery thereof agreed with the bank that it should collect all accounts of the firm, and apply the proceeds on the mortgages, the sellers were entitled to rescind the sale on the ground that the purchase was with the fraudulent purpose of not paying for the goods.—DEERE v. MORGAN, Iowa, 86 N. W. Rep. 271.

50. SURETY AND SURETYSHIP—Building Contracts.—The creditor has the right to sue the debtor and his surety, and if the surety is entitled to the benefit of discussion, he may, after judgment, have the property of the principal first seized and sold.—BRINK v. BARTLETT, La., 29 South. Rep. 868.

51. TAXATION—Remainders—Present Value.—Present value of remainders created in a trust fund not subject to be devested is determinable by aid of the table of annuities, and is not within the provision of the transfer tax act (Laws 1896, ch. 908, § 22), providing that an interest limited, conditioned, or dependent upon the happening of a contingency, by reason of which its market value cannot be ascertained at the time of the transfer, shall be taxable when the person beneficially interested shall come into actual enjoyment thereof.—IN RE DOWS' ESTATE, N. Y., 60 N. E. Rep. 459.

52. TAXATION—Collection—Injunction.—A tax collector who is attempting to collect an amount claimed to be due for taxes upon property which is not required by law to be returned for taxation in the county in which he holds his office, and which has been lawfully returned for taxation in another county, is proceeding without authority of law, and may be restrained by injunction at the instance of the person from whom the amount is sought to be collected.—PENICK v. HIGH SHOALS MFG. CO., Ga., 38 S. E. Rep. 974.

53. TELEPHONE AND TELEGRAPH COMPANIES—Injury to Employee—Assumption of Risk.—The fact that a lineman knew that a pole which he was about to use did not belong to the telephone company by which he was employed did not relieve the company from liability for defects in such pole, where the lineman was not chargeable with notice of an arrangement by which his employer did not have the right to inspect or repair the poles.—MCGUIRE v. BELL TEL. CO. OF BUFFALO, N. Y., 60 N. E. Rep. 423.

54. TRADE MARK—Validity—Descriptive Words.—A name, device, or symbol cannot be adopted as a trade-mark unless it expresses and identifies either the origin or ownership of the article to which it refers. Words merely descriptive of the character, quality, or composition of an article cannot be monopolized as a trade-mark.—J. R. WATKINS MEDICAL CO. v. SANDS, Minn., 86 N. W. Rep. 340.

55. TRUST—Acceptance—Estoppel to Question.—A debtor transferred all his stock, fixtures, and accounts by bill of sale to one who agreed to pay debts due certain creditors mentioned, and to take possession of the property, and apply the proceeds. Held, that a valid trust was thereby created as to the personalty, good between the parties to it, though partly in writing and partly oral, and cannot be repudiated by the trustee as made with the intent to defraud creditors.—NEBENHEIMER v. SMYTH, N. Y., 60 N. E. Rep. 448.

56. TRUSTS—Application of Income—Rights of Creditors.—Testatrix's husband contested, on the ground of incapacity, the validity of a codicil revoking provisions of the will creating a trust fund for his benefit. A compromise was entered into, with the approval of the surrogate, by which it was agreed that the amount as specified in the will should be invested, and the income paid to him for a period not to exceed five years, the other provisions of the will and the codicil to be unchanged, and the will to be admitted to probate. Held, that the income of the money invested by the trustees in pursuance of the compromise is to be considered as proceeds of the trust fund under the will, and not subject to judgments against him, where it is no more than necessary for his support.—EVERETT v. PEYTON, N. Y., 60 N. E. Rep. 423.

57. VENDOR'S LIEN—Foreclosure—Bill to Redeem—Averments.—In order to maintain a bill to enforce the statutory right of redemption, it must aver that the complainants therein were of a class of persons privileged by the statute (Code, § 3505) to exercise the right of redemption; and a bill which avers that the complainants were defendants in a chancery suit, wherein the sale from which the redemption is sought was decreed, for the satisfaction of a vendor's lien, but does not aver or show that the complainants in said suit were debtor defendants, is subject to demurrer.—HENDERSON v. HAMBRICK, Ala., 29 South. Rep. 928.

58. WATERS AND WATER COURSES—Riparian Owners—Nonuser.—All persons having lands on the margin of a flowing stream have, by nature, certain riparian rights in the water of that stream, whether they exercise those rights or not, and they may begin to use them when they choose. It matters not how much the owner of land upon a stream has actually used the water, or whether he has used it at all, his right to it remains unaffected for any period of time.—REEVES v. BACKUS BROOKS CO., Minn., 86 N. W. Rep. 887.

59. WILLS—Precatory Trusts.—Where a testatrix directed that the residue of her property should go "to my three sons and their wives, jointly, to be held by them as a joinfure," "to be equally divided between them, share and share alike, for the use, benefit, and support of said legatees and their children now in life, and such as may hereafter be borned to them, or each of them, with the request that they (the sons and their wives) hold the same for their (the grandchildren's) use and benefit," such provision, though couched in words of recommendation only, would be construed to impose a trust of the property on the parent in favor of the grandchildren.—ALLEN v. MCGEE, Ind., 60 N. E. Rep. 460.

60. WILLS—Precatory Trusts.—It is held by the court that the words in item 4 of the will, "I wish that the property, so as above given to said three wives of my three sons, be for the education of their children and the support of their families, respectively," created a trust upon the estate bequeathed to the wives to the extent of securing the education of the children of the three sons, thus referred to, of the testatrix, and the support of their families. Each wife may hold her share in trust separately from the others.—CLIFFORD v. STEWART, Me., 49 Atl. Rep. 52.

61. WILLS—Presumption of Revocation—Evidence.—There is no presumption of the continued existence of a will and codicil from the proof of their execution, so as to show their existence at the time of the death of testatrix, but the presumption that decedent had destroyed such will and codicil arises where, after death, they are not found after search.—IN RE KENNEDY'S WILL, N. Y., 60 N. E. Rep. 442.

62. WRONGFUL DEATH—Action—Distribution of Proceeds.—Construing sections 3828 and 3829 of the Civil Code together, and in the light of the decision of this court in Mott v. Railroad Co., 70 Ga. 680, 48 Am. Rep. 595, and of legislation since that decision, the children mentioned therein are the minor children of the deceased father. Consequently, when a widow recovers a judgment against a railroad company for the negligent homicide of her husband, his children, who were adults at the time of his death, are not entitled to share in the proceeds of the judgment.—COLEMAN v. HYER, Ga., 38 S. E. Rep. 962.

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Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 13, 1901

The conflict between the laws of different sovereign jurisdictions, especially between the states of the American commonwealth where intercourse is so constant and intimate, has given rise to questions of peculiar difficulties, and has necessitated the frequent exercise of principles of comity, which to-day have become extremely liberal and generous. A most important extension of these principles has been their recent application by the courts in permitting receivers appointed by the courts of one state to sue in a foreign jurisdiction, in cases where the rights of resident creditors are not involved. This exception to the general rule, which denies to a receiver the right to sue outside of the jurisdiction of the court appointing him, is well illustrated by the recent case of Iowa & California Land Co. v. Hoag (Cal.), 64 Pac. Rep. 1073. In that case an Iowa court appointed a receiver for an Iowa corporation and empowered him to collect the mortgage securities belonging to the corporation wherever they might be. It was held that such trustee might sue in a California court to foreclose such a mortgage in that state, although Iowa courts have denied a like privilege to the same officers appointed by courts of other states. This decision seems somewhat in line with the Biblical injunction to return good for evil, and the California court is to be commended for its exceedingly just and liberal attitude. The Iowa courts, however, follow the earlier rule laid down in the leading case of Booth v. Clark, 17 How. (U. S.) 322, where the court, speaking through Wayne, J., said: "A receiver has no extra-territorial power of official action, none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property, none which can give him, upon principles of comity, a privilege to sue in a foreign court or another jurisdiction." The following authorities support the general rule thus announced: Hazard v. Durant, 19 Fed. Rep. 471; Farmers' Insurance Co. v. Needles, 52 Mo. 17; Bartlett v. Wilbur, 53 Md. 485; Holmes v. Sherwood, 16 Fed. Rep. 725; Mosely v. Burrow, 52 Tex. 396; Ayres v. Siebel, 82 Iowa, 347.

The court in the principal case in justifying its position uses the following language: "The earlier rule denied to such officers any standing in a foreign court, but the courts of late, influenced by a spirit of comity, have inclined to much more liberal views, and it may fairly be said that the prevailing doctrine permits the maintenance of such actions by foreign receivers and like officers, where the rights of domestic creditors are not interfered with. Toronto General Trust Co. v. Chicago, B. & Q. R. Co., 123 N. Y. 37, 25 N. E. Rep. 198; Comstock v. Frederickson, 51 Minn. 350, 53 N. W. Rep. 713; Boulware v. Davis, 90 Ala. 207, 8 South. Rep. 84, 9 L. R. A. 601; Winus v. Manufacturing Co., 48 Kan. 777, 30 Pac. Rep. 163; Hurd v. City of Elizabeth, 41 N. J. Law, 1; Wilson v. Keels, 54 S. Car. 545, 32 S. E. Rep. 702; Gilman v. Ketcham, 84 Wis. 60, 54 N. W. Rep. 395; Sands v. E. S. Greeley & Co., 31 C. C. A. 424, 88 Fed. Rep. 130; Parker v. Mill Co., 91 Wis. 174, 64 N. W. Rep. 751; Beach, Rec. (Alderson's Ed.) § 665; Smith, Rec. p. 165; High, Rec. § 241. The modification of the rule, as has been said, rests upon the principle of comity—a principle which the court was reluctant to apply in this particular case, by reason of the fact that the Supreme Court of Iowa, in Ayres v. Siebel, 82 Iowa, 347, 47 N. W. Rep. 989, had refused to recognize the principle, and denied to a foreign trustee the right to maintain an action in its courts. Mutuality of operation is of the essence of comity, and, therefore, since a California trustee would not be permitted to maintain his action in the courts of Iowa, little reason could be perceived for the invocation of the principle of comity to permit an Iowa trustee to maintain a like action in the courts of this state. In the later case of Hale v. Harris, 83 N. W. Rep. 1046, the Supreme Court of Iowa evinces a disposition to modify its view in this regard. But, apart from that, we think that the rule permitting the maintenance of such actions in our courts, where the rights of domestic creditors are not interfered with, is both just and reasonable, and should be enforced without distinction; and therefore regardless of the rule which may prevail in Iowa, and

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of the fact that the trustee in this case is a trustee under the laws of Iowa, as we are not hampered by the principle of *stare decisis*, and as the rights of domestic creditors are not involved, we hold that he may, as matter of comity, maintain this action."

The exception intimated by the court that comity will not be extended to the detriment of creditors resident in a foreign jurisdiction is very important and is well sustained by authority. Bartlett v. Wilbur, 53 Md. 485; Hunt v. Insurance Co., 55 Me. 290; Chicago R. R. Co. v. Packet Co., 108 Ill. 307; Hurd v. City of Elzabeth, 41 N. J. Law, 1; Humphreys v. Hopkins, 81 Cal. 551. Thus in the last case it was held that while a receiver would be recognized on principles of comity, yet comity will not in any case be extended to the detriment of a resident creditor, and in that case a resident creditor was allowed to attach property which had been in the actual possession of a foreign receiver, and afterwards brought into California.

NOTES OF IMPORTANT DECISIONS.

LYNCHINGS—LIABILITY OF COUNTY.—Among the remedies for uncontrolled passion manifested in lynchings are laws making the people of the locality where lynchings occur liable for money damages for such lawless deeds. The state of Ohio has such a law which has been sustained by the supreme court. Charles W. Mitchell was lynched in Urbana, June 4, 1897. Benjamin F. Church was appointed administrator for his estate. He brought suit against Champaign county under the anti-lynching law for $5,000 damages. The verdict of the trial court was for the plaintiff. The case has been carried through all intermediate courts to the supreme court, in every one of which the verdict of the trial court has been sustained. This settles the law for Ohio. It remains to be seen how effective this remedy will be in preventing lynching.

MARRIED WOMAN — PRESUMPTION — PAST CHILD BEARING—WIDOW OF 56 WHO HAS HAD A CHILD.— In the recent case of White v. Edmond (1901), 1 Ch. 570, by the will of a testator certain leaseholds were bequeathed to trustees in trust for his daughter Anna for life, and upon her decease, for her children who should attain twenty-one years, and if more than one, in equal shares as tenants in common. The daughter Anna had married and had one son. She subsequently lived with her husband twenty-four years without having had any other children. The son was now thirty-four years old and he and his mother now claimed that the trustees should convey the property to them on the ground that it must now be presumed that the mother was past child bearing. Buckley, J., held that they were entitled to the conveyance. He held that the principles which had been laid down in regard to spinsters applied also to a widow who had had a child.

TRIAL AND PROCEDURE — REOPENING OF CASE AFTER JUDGMENT.—To reopen a case after judgment for the purpose of hearing further evidence, either on one side or the other, would, in the ordinary course of events, be a very dangerous precedent. But in a recent case, which calls for no report upon the merits, Farwell, J., considered that the peculiar circumstances justified him in so doing. The plaintiff had fainted at the close of her examination-in-chief, and was unable to be cross-examined. The learned judge therefore ruled her evidence out *in toto*. Another witness for the plaintiff gave evidence, but her solicitor, a most important witness, failed to answer when called, and judgment was given for the defendant just before the court rose for luncheon. During the interval the solicitor arrived, having been traveling up from the country since early morning. On satisfying the court that he had come by the first possible train after he had received intimation of the trial, the learned judge withdrew his judgment, and consented to take his evidence, the defendant's counsel offering no opposition to such a course. In the result judgment was given for the plaintiff, and in all probability the costs of an appeal were thus saved. There is authority for the proposition that a judge may rehear a matter before the order is drawn up (*Re* Roberts (1887), W. N. 231) if attention is called to something which has not been sufficiently considered, but it is doubtful if the discretion of the court has ever previously extended so far as to admit the evidence of a new witness after judgment.—*Solicitors' Journal*.

SALES—ANTICIPATORY NOTICE OF BREACH—DAMAGES.—The important question of the measure of damages for the breach of a contract of sale where the seller notifies the buyer previous to the day of delivery that he does not intend to fulfill the contract, was discussed and decided by the Supreme Court of Massachusetts, in the case of Emory Mfg. Co. v. Smelting Works, 60 N. E. Rep. 377. In this case the contract provided for the sale and delivery of goods on February 1st. The court held that the measure of damages for non-fulfillment was the differences between the contract and market price on that date, and not on January 25th when the seller notified the purchaser that it would not keep the contract. The court said:

"Even in England, where perhaps the courts would go further than we do in the way of allowing an anticipatory notice that the defendant will not perform his contract to be treated by the plaintiff as a breach, it seems to be settled that 'the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time

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when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance.' Frost v. Knight, L. R. 7 Exch. 111, 112; Johnstone v. Milling, 16 Q. B. Div. 460, 470, 473. *A fortiori*, the same is true when, as in this case, the promisee, had he wished to do so, would not have been allowed to treat the notice as a breach. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; O'Brien v. Boland, 166 Mass. 481, 484, 44 N. E. Rep. 602. A notice which gives the promisee no right to damages cannot bind him as conclusive that the contract will not be performed, and so put upon him a responsibility to see that the damages are no greater than they need be. It is a mere prophecy, and as such may be disregarded. Until the moment when a refusal to perform is a wrong, he has a right to expect that when the time comes a wrong will not be done. Sedg. Dam. (8th Ed.) § 224."

CORPORATIONS — DIVIDENDS — SUCCESSIVE OWNERS OF STOCK.—Whether dividends declared on corporate stock belong to the person owning the stock at the time when the dividends are declared, or the owner at the time when they are payable, was the question for decision in the recent case of Clark v. Campbell, 65 Pac. Rep. 496. The court held that under the facts in this case where the mining stock was deposited under a binding escrow agreement that it should pass to a certain person on the payment of a certain price within a certain time and the price is paid in such time, dividends declared before the price is paid do not belong to the purchaser. This decision is undoubtedly in line with the general rule supported by the authorities. By the declaration of a dividend the earnings, to the extent declared, are separated from the general mass of the property and appropriated to the stockholders existing at the time of the declaration, although the dividend may be payable at some future date. The dividends immediately upon being declared are no longer represented by the corporate stock but became the debt of the company payable to the steckholders who, in relation to the amount of the dividend so declared, become the creditors of the corporation. The following authorities sustain the general rule: 36 Cent. L. J. 456, with full citation of authorities; 2 Thomp. Corp. §§ 2172-2176; Dow v. Mining Co., 31 Cal. 630, 648; Jones v. Railroad Co., 57 N. Y. 196; Boardman v. Railway Co., 84 N. Y. 157; Cook, Stock & S. § 541; Jermain v. Railroad Co., 91 N. Y. 483; *In re* Kernochan, 104 N. Y. 618, 11 N. E. Rep. 149; Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732; Hopper v. Sage, 112 N. Y. 532, 20 N. E. Rep. 350, 8 Am. St. Rep. 771.

GRAND JURY—INDICTMENT.—In connection with the charge of bigamy which has been made against Earl Russell, his counsel made an extraordinary application to the recorder on Monday last at the Central Criminal Court. He asked the learned judge to order that a bill of indictment, which was about to be preferred against the earl, should not be preferred at the present sessions, and that the recognizances of the witnesses and of the defendant should be enlarged until next sessions. Probably such an application has never before been made in an assize court. At common law everyone has a right to prefer a bill of indictment against any person before a grand jury. This right has been modified in the case of certain offenses by the Vexatious Indictments Act, 1859. That act, however, does not in any way affect the procedure in the case of bigamy or any other felony. So that by common law a bill for bigamy might have been preferred before the grand jury by any person, and the recorder would have been acting contrary to law if he had attempted to stop that person from so doing. Of course, if a person does prefer a bill before a grand jury, he must be prepared with evidence to support it, and unless witnesses have been bound over to appear, there is no legal machinery by which he can get them before the grand jury. The judge who presides over a court of assize has, no doubt, power to enlarge the recognizances of the witnesses. If he did so before a bill was found this would indirectly prevent a bill from being preferred. This, however, is hardly ever done before a bill is found, and then always on the application of the crown. For the prisoner to make such an application is probably unheard of. After a bill has been found it is most common for a prisoner to ask for a postponement of the trial. If this application is granted, then the recognizances of the witnesses are enlarged to the next assizes, as a matter of course. But before a bill of indictment is found against an accused person, it is submitted that his counsel has no *locus standi* in the court at all, and neither he nor his counsel may address the court or make any application to the court in reference to the charge. In the recent case the application was refused, and a true bill was found. The recorder then stated that he intended to inform the lord chancellor of the fact, and the recognizances of the witnesses and of the defendants were enlarged. It seems probable, therefore, that, for the first time for sixty years, as stated in these columns last week, we are to see a trial of a peer by the house of lords.—*Solicitor's Journal.*

LICENSE—RECOVERY OF COMPENSATION FOR SERVICES PERFORMED WITHOUT A LICENSE.— An important principle of law is disclosed in the decision of the court in the recent case of Black v. Mutual Life Association (Me.), 49 Atl. Rep. 51. In the Public Laws, 1895, of the state of Maine, appears this provision: "And if any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he forfeits not more than fifty dollars for each offense; but any policy issued on such application binds the company if

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otherwise valid." In the case just referred to, the plaintiff had acted for some time as agent of an insurance company, in soliciting, receiving, and forwarding to the company applications for life insurance, but during the whole of that period failed to take out a license as required by the above statute. In a suit by the agent to recover compensation for his services, the company set up the defense that it was not liable on its contract of service with such agent because such services were rendered in direct contravention of an express statute. The court allowed the defense and denied the agent any relief. The decision in this case does not on first thought appeal to our sense of justice, but when we remember the general rule that when a license is required for the protection of the public and to prevent improper persons from engaging in a particular business, a contract made by such unlicensed person is void, the court's decision is above criticism; in fact, is to be commended when we recognize the common weakness of courts to do justice in the particular case rather than adhere to some principle whose application seems to work a hardship. The court said in part: "It must be held that the plaintiff cannot recover for the services performed by him in direct contravention of the statute. The purpose of the statute is undoubtedly for the protection of the public. It is clearly not for revenue. The license fee required was only the sum of two dollars. True, the statute referred to provides that a policy issued in such a case shall not thereby be void, but the contract of insurance is not the one under consideration here. It is the contract between the company and the plaintiff by virtue of which the latter performs services in obtaining applications for insurance which the statute prohibits unless the person performing such service has a license therefor."

The authorities are not uniform. In Bowdre v. Carter, 64 Miss. 221, it was held that a contract by a merchant who has not paid his privilege tax is invalid. To same effect Rand v. Tuell, 89 Me. 443; Stanwood v. Woodward, 38 Me. 192; Harding v. Hagar, 60 Me. 340; Taleafero v. Moffett, 54 Ga. 150. *Contra:* Shepler v. Scott, 85 Pa. St. 329; Jones v. Berry, 23 N. H. 209.

WILLS—PRECATORY TRUSTS.—A woman left a will giving all her property in equal shares to the three wives of her three sons, and then adds this clause: "I wish that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families, respectively, and I enjoin upon them so to use and expend it."

The court in the recent case of Clifford v. Stewart (Me), 49 Atl. Rep. 52, held these words to constitute a precatory trust for the benefit of the children of the three sons of the testatrix. The language of Savage, J., who delivered the opinion of the court, is interesting on this point:

"It is not necessary for us to consider critically the doctrine of implied or precatory trusts. That words of trust and confidence, expressions of recommendation and desire, as well as words of direction and command, in a will, have many times been deemed to indicate an intention on the part of a testator to clothe a legacy with a trust, requires no citation of authorities to show. It is likewise true that similar, and even identical, expressions in other wills have been held to create no trust. Words seemingly imperative have been held to be advisory merely, and words of advice have had given to them the force of injunctions. The test is one of intention in the testator, and this intention is to be gathered from the whole will,—the context, as well as the particular words of recommendation and confidence. * * * That intention must be found by the court as a fact. It is not to be guessed at. The crucial test, after all, is whether the testator actually intended his language to be imperative, whether he intended to govern and control the action of the legatee, to impose an obligation or duty upon him in the use of the property, or whether he intended his words to be merely advisory, no matter how urgently expressed, still leaving it to the discretion of the legatee whether that advice should be followed or not. Warner v. Bates, 98 Mass. 274; Whipple v. Adams, 1 Metc. 444; Barrett v. Marsh, 126 Mass. 213; Van Amee v. Jackson, 35 Vt. 173; Harper v. Phelps, 21 Conn. 257; Bohon v. Barrett's Ex'r, 79 Ky. 378; Murphy v. Carlin, 113 Mo. 112, 20 S. W. Rep. 786; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. Ed. 138; Knight v. Boughton, 11 Clark & F. 513; 1 Perry, Trusts, 109; 2 Story, Eq. Jur. § 1059; 1 Jarm. Wills, 385. While the use of the word 'enjoin,' especially if qualified by other expressions in a will, does not necessarily mean that a trust is thereby created (Lawrence v. Cooke, 104 N. Y. 632, 11 N. E. Rep. 144), yet here in just the manner in which and the place where it is used, 'enjoin' is both emphatic and significant. It is a mandatory word,—in legal parlance, always (Bouv. Dict.); in common parlance, usually (Webst. Dict.). We cannot resist the conclusion that the testatrix intended to create a trust upon the estate bequeathed to the wives to the extent of securing the education of her sons' children and the support of their families, whatever might be the exigencies of life. Blouin v. Phaneuf, 81 Me. 176, 16 Atl. Rep. 540; Chase v. Chase, 2 Allen, 101; Colton v. Colton, *supra*. We do not think it was intended that the wives should be at liberty to withhold the application of the property from the expressed uses to which the testatrix said she wished it to be applied. The bequest then created a trust in the share given to each of the wives."

REPLEVIN—RIGHT OF JOINT OWNER IN CROPS TO REPLEVY HIS INTEREST.—In an action of replevin it is of course the general rule that the plaintiff must show in himself the right of exclusive possession as against the defendant. A tenant in common, therefore, of a chattel cannot, as a general rule, bring an action for replevin

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either against his co-tenant or against a stranger. An exception to this rule is well illustrated by the decision in the recent case of Pitman v. Baumstark, (Kan.), 64 Pac. Rep. 968. In this case a tenant who owned an undivided two-thirds of a crop, which had been placed in stacks, transferred the same to another, after which it was seized at the instance of a creditor of the tenant, and the vendee of the tenant then brought an action to recover possession of the same. Held, that the vendee, although only a part owner of the crop, was entitled to maintain replevin as against the creditor of the tenant. The court makes the following argument in support of the exception:

"It is a general rule that a part owner of property cannot maintain replevin against his co-owner for his undivided interest, for the reason that one part owner has as much right to the possession of the common property as the other. An exception to this rule is made where the shares of the party constitute a mass of uniform quality and value, susceptible of a fair and equal division by count or measurement. This rule is peculiarly applicable in cases like the present, as was held in Piazzek v. White, 23 Kan. 621, 33 Am. Rep. 211. There it was ruled that: 'When a mixture of cereal grain occurs by consent of the owners, or under circumstances in which the mixture would be reasonably expected by the parties, and the property mixed is of the same nature and value, although not capable of an actual separation by identifying each particle, yet, if a division can be made of equal value, as in the case of corn, oats and wheat, the law will give to each owner his just proportion, and such owner may recover his share by replevin.' See, also, Young v. Miles, 20 Wis. 615, Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Kaufman v. Schilling, 58 Mo. 218; Grimes v. Cannell, 23 Neb. 187, 36 N. W. Rep. 479; Wells, Repl. § 209; Shinn, Repl. § 247."

Authorities sustaining the general rule that one joint owner cannot, for his share, maintain replevin against the other before a division of the property are as follows: Hill v. Robinson, 16 Ark. 90; Mills v. Malott, 43 Ind. 248; Bowen v. Roach, 78 Ind. 361 (execution sale of interest in crop); Cross v. Hulett, 53 Mo. 397; Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Barnes v. Bartlett, 15 Pick. 71; Reynolds v. McCormick, 62 Ill. 412; Frane v. Young, 24 Iowa, 375; Davis v. Lottich, 46 N. Y. 393; Busch v. Nester, 70 Mich. 525; Hunt v. Chambers, 21 N. J. Law, 620; Withman v. Withman, 57 Me. 447; Hewett v. Hatch, 57 Vt. 16. Neither can one of two joint owners maintain replevin against a stranger; he must join his co-tenants in the action; Reimheimer v. Hemmingway, 35 Pa. St. 432; McArthur v. Lane, 15 Me. 245; Hocker v. Johnson, 66 Me. 21; Kimball v. Thompson, 4 Cush. 441; Titsworth v. Fraumthal, 52 Ark. 254; Phipps v. Taylor, 15 Oreg. 484; Kindy v. Green, 32 Mich. 310.

INSANITY AS A DEFENSE IN CASES OF HOMICIDE.—The plea of insanity as a defense to prosecutions for homicide is made so frequently that the rule has become well settled in this country that insanity, to be a defense to a homicide, must be so great as entirely to destroy accused's perception of right and wrong, and amount to a delusion controling his will, so as to make the commission of the act a duty of overwhelming necessity. This rule was adhered to as the wise result of long experience and observation on the part of the courts, in the recent case of Commonwealth v. Barner (Pa.), 49 Atl. Rep. 60. The instruction of the trial court, on the question of insanity, in cases of homicide, in the case of Sayers v. Commonwealth, 88 Pa. 291, was especially commended by the court for its marked accuracy:

"If the prisoner at the bar at the time he committed the act had not sufficient capacity to know whether his act was right or wrong, and whether it was contrary to law, he is not responsible. * * * The test in this instance, as you perceive, is the power or capacity of the prisoner to distinguish between right and wrong in reference to the particular act in question. * * * If the prisoner, although he labors under partial insanity, hallucination, or delusion, did understand the nature and character of his act, had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and knew that if he did the act he would do wrong and would receive punishment; if, further, he had sufficient power of memory to recollect the relation in which he stood to others and others stood to him; that the act in question was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty,—he would be responsible. * * * The jury must, therefore, even though they believe the prisoner labored under a diseased and unsound state of mind, be satisfied that this deceased and unsound state of mind existed to such a degree that, although he could distinguish between right and wrong, yet with reference to the act in question his reason, conscience, and judgment were so entirely perverted as to render the commission of the act in question a duty of overwhelming necessity. But there is another species of delusion, entirely distinct from those which we have just considered, which is recognized by the law, and which, when the jury believe that it clearly exists, will entitle the prisoner to acquittal. I refer to that delusion by reason of which the prisoner commits the act under a fixed, *bona fide* belief (which is a delusion) that certain facts existed which were wholly imaginary, but which, if true, would have been a good defense. * * * We say to you, as the result of our reflections on this branch of the subject, that if the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will or subjugate his intellect, and was not actuated by anger, jealousy, revenge, and kindred evil pas-

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sions, he is entitled to an acquittal. As the law presumes sanity to be the normal condition of the prisoner, and insanity an abnormal condition, the burden rests upon him to prove his insanity, as an excuse for an act which would otherwise be criminal. The evidence, therefore, which is intended to establish this defense must be satisfactory to the jury, and the conclusion such as fairly results from the evidence."

A still more interesting point was also passed upon and discussed by the court, *i. e.*, whether the accused is required to establish his insanity by a preponderance of the evidence, or whether if from all the evidence the jury have a reasonable doubt of the prisoner's sanity, they must acquit. The latter is the rule announced by the United States Supreme Court, but the former rule has been adhered to firmly and consistently by the courts of Pennsylvania. The prisoner insisted that unless the court followed the rule as laid down by the Federal Supreme Court, he would be deprived of his life without due process of law. The court met that objection as follows:

"It is also contended on behalf of the prisoner that the court erred in requiring him to establish his insanity by a preponderance of evidence. It is conceded that such is the doctrine of this court, as laid down in numerous cases. It is maintained, however, that the rule is not in accord with the trend of modern judicial decisions, and that the reasoning on which it is based is fallacious. It is claimed that the true rule in such cases is that if, from all the evidence, the jury have a reasonable doubt of the prisoner's sanity, they must acquit. Such was held to be the correct doctrine by the Supreme Court of the United States in Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. Rep. 353, 40 L. Ed. 499. It is also contended that unless this court enforces that rule, and the prisoner is tried and convicted in conformity with it, he will be deprived of his life, within the meaning of the fourteenth amendment to the federal constitution. We are not prepared to adopt the views suggested. By repeated decisions of this court, the rule enunciated by it has been affirmed, and we are not convinced that it is erroneous. The decisions of the Supreme Court of the United States on the subject are not of binding authority upon this court. Nor will a failure to comply with them, and a conviction and execution of the prisoner in accordance with our own decisions on the subject, impinge the federal constitution, by depriving him of his life without due process of law. Such, we believe, is well-settled law."

BANKRUPTCY—ALIMONY NOT A PROVABLE DEBT.—Neither alimony in arrear at the time of an adjudication in bankruptcy, nor alimony accruing subsequently thereto, is a provable debt in the sense of the bankruptcy act of 1898, or barred by a discharge. Such was the decision of the United States Supreme Court in the case of Audubon v. Shufeldt, decided May 20, 1901, and finally putting an end to another of the many controversies and discussions which the new bankrupt act has provoked among the judges of the United States District and Circuit courts. The conflict of authority among these courts on this question was sharp and about equally divided. The following authorities were in line with the decision of the supreme court: *In re* Shepard, 97 Fed. Rep. 187; *In re* Anderson, 97 Fed. Rep. 321: *In re* Nowell, 99 Fed. Rep. 931. The opinion of Judge Lowell in the last case cited is especially commended by the supreme court. Authorities taking an opposite view are as follows: *In re* Houston, 94 Fed. Rep. 119; *In re* Van Orden, 96 Fed. Rep. 86; *In re* Challoner, 98 Fed. Rep. 82. Justice Gray in delivering the opinion said in part:

"Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit. Barber v. Barber (1858), 91 How. 582; Linde v. Linde, (1901), 181 U. S. 183. But its obligation, in that respect, does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it and subjected to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate, to which the wife is equitably entitled, than as strictly a debt; alimony, from time to time, may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by the court of a different jurisdiction. Under the bankrupt act of 1867 it was held by the District court of the United States for the Southern District of New York, in an able opinion by Judge Choate (which is believed to be the only one on the subject under that act), that a claim for alimony, whether accrued before or after the commencement of the proceedings in bankruptcy, was not a provable debt nor barred by a discharge. *In re* Lachemayer (1878), 18 Nat. Bankr. Reg. 270, 14 Fed. Cas. 914. In Romaine v. Chauncy (1892), 129 N. Y. 566, it was held by the Court of Appeals of New York that alimony was an allowance for support and maintenance, having no other purpose, and provided for no other object; that it was awarded, not in payment of a debt, but in performance of the general duty of the husband to support the wife, made specific and measured by the decree

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of the court; and that a court of equity would not lend its aid to compel the appropriation of alimony to the payment of debts contracted by her before it was granted. In Barclay v. Barclay (1900), 184 Illinois, 375, it was adjudged by the Supreme Court of Illinois that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy, and the court said: "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court."

In England it seems to be the law also that alimony is neither discharged nor provable in bankruptcy. Linton v. Linton (1885), 15 Q. B. D. 239; Hawkins v. Hawkins (1894), 1 Q. B. 25; Watkins v. Watkins (1896), Prob. 222; Kerr v. Kerr (1897), 2 Q. B. 439.

ESTOPPEL AS A SPECIES OF CONTRACT.

1. *In General.*—An estoppel may be defined as an admission or declaration which the law does not permit him who has made it to deny or disprove, for his own benefit and to the injury of another.[1] The doctrine that "what I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asservation."[2] And proceeds upon the ground that he who has been silent as to his alleged right when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent.[3] The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. * * * A change of position would involve fraud and falsehood. This remedy is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit.[4]

The primary ground of the doctrine is, that it would be a fraud to assert what one's previous conduct had denied, when on the faith of that denial others have acted.[5] Estoppels bind only parties and privies,[6] but not one, not *sui juris*, as an infant.[7] And strangers are not permitted to take advantage of them.[8]

Estoppels must be mutual, both parties being bound or neither.[9] But the law does not carry the doctrine of mutuality to extremes: as, for example, a deed poll estops the maker,[10] and so does a bond sealed only by one party,[11] while still the grantee or obligee incurs no responsibility in form of specialty—his liability, if any, being on a promise created for him by the law.[12] But on this promise, quite different in legal contemplation from one by deed, the law may found an estoppel.[13] So that though there is a sort of mutuality it is imperfect. But representations may constitute an estoppel, although not made to any particular person, if made to all persons likely to come into contractual relations with another, and relied upon by one of them in good faith.[14]

2. *By Record.*—An estoppel by record takes place where there has been a litigation, and therein a matter pertaining to the question or the cause was admitted by the party

[1] 2 Parsons on Contracts, 787.
[2] Harlan, J., in Kirk v. Hamilton, 102 U. S. 76.
[3] Morgan v. C. & A. R. R. Co., 96 U. S. 720.
[4] Dickerson v. Colgrove, 100 U. S. 580; Baker v. Humphrey, 101 U. S. 499.
[5] Hill v. Epley, 31 Pa. 331.
[6] Deery v. Crag, 5 Wall. 805; Ketchum v. Duncan, 96 U. S. 666.
[7] Sims v. Everhart, 102 U. S. 313.
[8] McDonald v. Gregory, 41 Iowa, 513; Stoddard v. Burton, 41 Iowa, 582; Hill v. Morse, 61 Me. 541; Massure v. Noble, 11 Ill. 531; Simpson v. Pearson, 31 Ind. 1.
[9] Chope v. Lorman, 20 Mich. 327; Schuhman v. Garratt, 16 Cal. 100; McDonald v. Gregory, 41 Iowa, 513; Stoddard v. Burton, 41 Iowa, 582.
[10] Blake v. Tucker, 12 Vt. 39.
[11] Cole v. Raymond, 9 Gray, 217; Goodrich v. Bryant, 5 Sneed (Tenn.), 325.
[12] Parker v. Lincoln, 12 Mass. 16; Goodwin v. Gilbert, 9 Mass. 510.
[13] Johnson v. Thompson, 129 Mass. 398.
[14] Anglo American Sav. & L. Assn. v. Campbell, 13 App. D. C. 581, 43 L. A. R. 622.

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or adjudged by the court; while the record of it remains unreversed he cannot deny it either in the same, or any other proceeding between the same parties.[15] In the ordinary case of money paid under compulsion, while not legally due, it can be recovered back by suit, but it cannot be when the compulsion was by process of law. Then the remedy is to obtain a reversion of the record, and if this cannot be done the injury is without remedy.[16] If in a suit involving a contract a party sets up that it is rescinded, and the case goes to judgment on such theory, he cannot, in any subsequent litigation with the same party claim the right to carry it out as still operative.[17] On the same principle one cannot both rely on the nullity of a judgment and have the proceeds of a sale under it.[18] A party who, to procure the opening of a default, stipulated that judgment might be entered against him if it was found that he was personally liable for the debt, cannot, when such fact is shown, interpose other defenses.[19] And it has been held that the plaintiff cannot ratify and adopt an entry in the journal of defendant's testator as showing a sale to such testator of notes payable to plaintiff on a third trial of the case when he has insisted that such entry was unauthorized.[20]

3. *By Deed or Bond.* The doctrine of this subtitle is, that a seal when attached to an instrument imparts to it the *status* of absolute verity, both as to the direct stipulations,[21] and as to those recitals which in any way qualify it or give it effect,[22] but not as to those which are merely collateral and immaterial.[23] The estoppel binds the parties in all controversies respecting the matter of the particular contract and third persons as to whatever they claim under it, but neither third persons otherwise, nor the parties as to any disconnected matter.[24] The consideration of such instrument being immaterial may, for any collateral purpose, as for instance in a suit to recover the purchase money of land conveyed by a deed in question be inquired into;[25] but the consideration cannot be inquired into for the purpose of rendering the instrument void, for thereby the estoppel of the seal would be contradicted.[26]

Estoppels are not created by implications, or by anything short of express terms, or, at least, their equivalents in meaning.[27] It is common, therefore, to say that general expressions will not suffice, there must be an affirmance of a particular thing.[28] For instance, a quitclaim deed of lands carries a strong implication that the grantor has some interest in them, but it affirms nothing of this in particular. So, though it passes whatever interest the grantor may chance to have, it works no estoppel, and should he afterwards acquire a title, he may, under it, hold the lands against his former grantee the same as against any third person.[29] But a covenant of warranty in a deed of lands contains within itself the assertion that there exists no adverse right or title or possibility of title; so that, should the grantor afterward come into possession, by whatever means of an adverse title or claim, the estoppel in his warranty will preclude his setting it up, and it will inure to the benefit of his grantee under this warranty.[30] And if one who executes a warranty mortgage without title subsequently acquires the title, such

[15] Morris v. Shannon, 12 Bush, 89; Jenkins v. Rosenberg, 105 Ill. 157; Whitehurst v. Rogers, 38 Md. 503; Hill v. Morse, 61 Me. 541; Smith v. Denman, 48 Ind. 65; Bender v. Belknap, 23 La. Ann. 764; Way v. Stebbins, 47 Mich. 296; Beals v. Hill, 58 N. H. 61.

[16] Marriot v. Hampton, 7 Term Rep. 269.

[24] Ottawa v. Nat. Bank, 105 U. S. 342; Crane v. Morris, 6 Pet. 598; Clamorgan v. Greene, 32 Mo. 285; Douglass v. Scott, 5 Ohio, 194.

[25] Thompson v. Allen, 12 Ind. 539; Thayer v. Viles, 23 Vt. 494; Irvine v. McKeon, 23 Cal. 473.

[26] Farrington v. Barr, 36 N. H. 86; Goodspeed v. Fuller, 46 Me. 141; McConnell v. Brayner, 63 Mo. 461.

[27] Carroll v. Smith, 111 U. S. 556.

[28] 2 Smith, Lead. Cas. (2d Ed.) 457.

[29] Robertson v. Wilson, 38 N. H. 48; Kinsman v.

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acquisition inures to the benefit of the mortgagee, and the mortgagor will be estopped from denying that he had title at the time of the execution of such mortgage.[31] And so the covenants of warranty in a mortgage estop the mortgagor from denying the title which the mortgage purports to incumber.[32] A vendee who accepts a conveyance of land subject to a mortgage thereon, the deed containing a covenant whereby such vendee assumes and agrees to pay the mortgage, is estopped from asserting that the obligation secured thereby is usurious.[33] And an owner of land who recognizes a plat made by a third person, and conveys lots according to the description therein as abutting upon the grounds designated in the plat as a private alley, is estopped with his grantee to deny the easement over such alley in favor of the owners of such lots.[34]

So it has been held that an heir at law who, by his own deed duly executed on a sufficient consideration, recognizes the existence and validity of a will executed by his ancestor, cannot afterwards question the validity of such will.[35] And one who joins with his wife in a trust deed on land paid for by himself and taken in the wife's name, with intent on his part to defraud his creditors, is estopped to claim a homestead in the land as against money used in improvements placed thereon to secure which the trust deed was given.[36] A general warranty deed made by an heir apparent for his expectancy, though void as a conveyance as being for a mere possibility not coupled with an interest, acts as an estoppel in favor of a purchaser for value in possession, and is binding upon his heirs as though it were an advancement.[37]

So a grantor who conveys land by a warranty deed is estopped from claiming, as against a remote vendee deriving title under mesne conveyances, a portion thereof when a line is run in accordance with the calls of the several deeds shows it to be within the vendee's property.[38] And the grantor in a deed of land to his brother absolute on its face is estopped to claim title as against the judgment creditors of the grantee, whose judgments are docketed in the county in which the land is situated, when he allowed the deed to remain on record for many years, during which time the debts for which the judgments were recovered were created.[39]

The sureties upon a contractor's bond, executed to prevent the filing of claims against a county for materials and labor, are estopped to deny its validity when the claimants have accepted and acted upon it until they have lost their right to establish a mechanic's lien, and to recover from the contractors because the latter had become insolvent.[40] And in a suit upon the bond such sureties are estopped to say that they did not possess the statutory qualifications.[41] So a surety who executes a bond and returns it to the principal or his agent for delivery to the obligee is estopped to set up any condition not known to the obligee upon which his signature had been obtained.[42] The sureties upon a bond given to indemnify an officer who has seized goods under an attachment are bound by the recital therein that the officer has attached the goods and can not object that the attachment was invalid for want of a sufficient return.[43]

4. *Equitable, or in Pais.*—It may be truly said that this estoppel creates a species of contract of the executed sort, therefore not requiring a consideration and not commonly the foundation for a suit. The law always assumes that the parties are under the mutual duty to deal honestly with the facts. The one receiving the benefit affirms, equally with the other, the truth of that in return for which it is given. And the latter by bestowing it in reliance on the assumed fact does an "act detrimental but for such fact;" that is, from which detriment will flow to him if the fact is overthrown. Hence, as between the parties and those claiming under them, the fact must thereafter be conclusively held to be as thus affirmed. As, for instance, one

[31] Pancost v. Travelers' Ins. Co., 79 Ind. 172; Boone v. Armstrong, 87 Ind. 168; Thalls v. Smith, 139 Ind. 496.
[32] Boone v. Armstrong, 87 Ind. 168; Scobey v. Kinningham, 131 Ind. 552.
[33] Scanlon v. Alexander, 71 Minn. 351.
[34] Smith v. Young, 160 Ill. 168.
[35] Medlock v. Merritt, 102 Ga. 212.
[36] Ritch v. Oates, 122 N. Car. 631.
[37] Buford v. Adair, 43 W. Va. 211.
[38] Rudd v. Monarch, 32 S. W. Rep. 1083.
[39] Greer v. Mitchell, 42 W. Va. 494.
[40] Carnegie P. & Co. v. Hulbert, 70 Fed. Rep. 209.
[41] Carnegie P. & Co. v. Hulbert, 70 Fed. Rep. 209.
[42] United States v. Boyd, 8 App. D. C. 440.
[43] Briggs v. McDonald, 166 Mass. 37.

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who accepts a benefit is thereby estopped to deny the existence or validity of that in return for which it came to him.[44] And one accepting the damage money for laying out a way over his land is precluded from questioning the validity of the proceedings under which the way was layed out.[45] And one who has received from a corporation a loan, and secured such loan by a mortgage, cannot in a suit to forclose such mortgage deny the power of the corporation to make the loan.[46] And, likewise, the acceptance of what is given under an award estops the acceptor to controvert its validity.[47] To constitute this charaeter of an estoppel, there must be: (*a*) A representation or a concealment of material facts. (*b*) The representation must be made with knowledge of the facts. (*c*) The party to whom it is made must be ignoraut of the truth of the matter. (*d*) It must be made with the intention that the other party shall act upon it. (*e*) The other party must be induced to act upon it.[48] There can be no estoppel where there is no fraud, but there may be fraud although there was no preconceived design to mislead or deceive. It may consist in the denial of what has been previously affirmed.[49]

It is well settled that one's misrepresentations estop him only when the circumstances of the case make some sort of a demand upon him for the truth.[50] If one is asked about a thing by another who, as he reasonably supposes, has no interest in it, or intention of acting on the information, he is not estopped though he give a false answer and the person to whom it is given acts thereon.[51] And simply to refuse information will not necessarily work an estoppel where misleading the questioner would,—as, declining to disclose, to a person inquiring for his own guidance, the nature of one's title to property in possession.[52] Information imparted must, to work an estoppel, be to one having a right to it;[53] or, if to the community at large, be appropriated by one having some right. It is immaterial whether the misrepresentation is by words,[54] or by conduct,[55] or by silence when duty requires the person to speak.[56] The misrepresentation, to work an estoppel, must be distinct and unequivocal, not admitting of an interpretation by which its effect would be less.[57] As, for instance, a mortgagor who makes no objection to a sale of the land on foreclosure, and states to the one who becomes the purchaser thereat that he has no claim upon the land, is estopped subsequently to claim that the mortgage was void because of usury.[58]

And it has been held that one who mortgages and conveys land, falsely representing that he is of age, and after coming of age stands by for several years, knowing that the land is being conveyed to subsequent purchasers, is estopped to disaffirm his conveyance.[59] And where an infant was in business as a merchant, and bought goods on credit from the plaintiffs, who did not know he was an infant, and before the goods were paid for mingled them with other goods so they could not be identified, and fraudulently conveyed the entire stock of goods to his father, it was held that after all the goods were sold under attachment it was proper for a court of equity to take charge of the fund realized at such sale, and apply it in payment of plaintiff's demand against the infant.[60] But where both parties meet upon equal terms and possess the same opportunities of knowledge, and there is neither a false statement nor a fraudulent conceal-

[44] Miller v. McManis, 57 Ill. 126; Helena v. Turner, 36 Ark. 577; Bynum v. Miller, 86 N. Car. 559; Stone v. Gilman, 58 N. H. 135; Hooker v. Hubbard, 112 Mass. 239.

[45] Hartshorn v. Patroff, 89 Ill. 509; Chatterton v. Parratt, 46 Mich. 432.

[46] Pancoast v. Travelers' Ins. Co., 79 Ind. 172; St. Joseph Fire, etc. Co. v. Hauck, 71 Mo. 465.

[47] Kellogg v. United States, 1 Ct. of Cl. 310.

[48] Hosford v. Johnson, 74 Ind. 479; Karnes v. Win-

[52] Cunningham v. Milner, 56 Ala. 522.

[53] Sullivan v. Park, 33 Me. 438.

[54] Kirkpatrick v. Brown, 59 Ga. 450; Sherrill v.

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ment, there can be no equitable estoppel.[61] Ordinarily, if a person is mistaken as to a fact, and states what he believes to be true, no estoppel will follow though an innocent party accepts and acts upon the erroneous utterance to his injury.[62] The general rule seems to be that estoppel by representations cannot arise unless they were made with actual knowledge of the facts.[63]

But an apparent exception to this rule seems to exist where representations are made without knowing whether they are true or false, the law seeming to hold the party to the same consequences as if possessed of actual knowledge. Upon this question of knowledge the following instruction was approved in a recent Missouri case: "Although you may find from the evidence that defendant did not know that said representations were untrue, yet if you believe from the evidence that, pending the negotiations for the purchase of said land, and for the purpose of effecting the trade and inducing said agent to make it, defendant made said representations as of his own knowledge (and they were untrue), but did not know whether they were true or false, and knew or had reason to believe that said agent relied on said representations as true, and said agent did so rely on them, and was thereby deceived and induced to trade for or purchase said land, you will find for plaintiff."[64]

The principle at the basis of all estoppels *in pais* is that, whenever one of the innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.[65]

CHAS. W. MCKINNEY.

Evansville, Ind.

[61] Sims v. City of Frankfort, 79 Ind. 446.

[62] Thrall v. Lathrop, 30 Vt. 307; Turner v. Ferguson, 58 Tex. 6; Colbert v. Daniel, 32 Ala. 314; Davis v. Davis, 26 Cal. 23; Holmes v. Crowell, 73 N. Car. 613; Wright v. Thomas, 26 Ohio St. 346.

[63] See Dougherty v. Yates, 35 S. W. Rep. 937.

[64] Caldwell v. Henry, 76 Mo. 254.

[65] Preston v. Witherspoon, 109 Ind. 457; Hirsch v. Norton, 115 Ind. 341; Manifold v. Jones, 117 Ind. 212.

CONTRACT—EXECUTORY CONSIDERATION.

MARTIN v. MELES.

Supreme Judicial Court of Massachusetts, May 22, 1901.

Defendants and eight other firms engaged in the manufacture of leather agreed to contribute a certain sum to defray expenses to be incurred by a committee in defending certain suits growing out of letters patent for a system of tanning. Plaintiffs were appointed the committee, and incurred obligations in conducting the litigation. Held, that defendants' promise to contribute was not void as without consideration, since either plaintiffs' promise to conduct the litigation, or other subsequent acts, were sufficient to support the defendants' promise.

HOLMES, C. J.: This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others: "January 21, 1896. We, the undersigned manufacturers of leather, promise to contribute the sum of five hundred ($500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses, under the direction of the committee, in defending and protecting our interests against any demands or suits growing out of letters patent for chrome tanning, and in case of suit against any of us, the committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants who were not members. They went on with their work, undertook the defense of suits, and levied assessments which were paid, the defendants having paid $750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money, but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

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If, then, the committee's promise should be regarded as the consideration, as in Institute v. French, 16 Gray, 196, 201 (see Institute v. Haskell, 71 Me. 487), its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustee to apply the funds received for a mere benevolence to the purposes of the trust imposes no new burden upon them. Johnson v. University, 41 Ohio St. 527, 531. See Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. Rep. 352. Neither would it raise the question whether the promise to receive a gift was a consideration for a promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachussetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. Cottage St. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. Rep. 197. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. Bragg v. Danielson, 141 Mass. 195, 196, 4 N. E. Rep. 622. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. Sherwin v. Fletcher, *ubi supra*.

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the committee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his Me. 487),—or of fraud. Windram v. French, 151 Mass. 547, 553, 24 N. E. Rep. 914, 8 L. R. A. 750. In Cottage St. Church v. Kendall, 121 Mass. 528, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether the facts were such that reliance upon the promise would be presumed. In Academy v. Gilbert, 2 Pick. 579, 13 Am. Dec. 457, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See Academy v. Cowls, 6 Pick. 427, 438, 17 Am. Dec. 387; Ives v. Sterling, 6 Metc. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it seems to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the court to leave things where it found them. *In re* Hudson, 54 Law J. Ch. 811; Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. Rep. 352. As against the former view if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See Academy v. Cowls, 6 Pick. 427, 438, 17 Am. Dec. 387. But if that were true, it would follow that as to the future conduct of the committee their promise not their performance was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definite decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay.

NOTE.—*Executory Consideration of Contracts.*—It is a rule of law well settled by authority that mutual and concurrent promises afford sufficient legal consideration for the support of each other. Boles v. Vincent, 24 Iowa, 387; Morrill v. Colehour, 82 Ill. 618; Grimley v. Davidson, 133 Ill. 116; Nunnally v. White, 60 Ky. 584; Ames v. Taylor, 149 Me. 381. Thus where several persons are interested in a purchase, and liable for the purchase money, a promise, on the part of one, to pay the money yet due, is a sufficient

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is not sufficient consideration for a contract. Sullivan v. Sullivan, 99 Cal. 187. The following cases will show the distinction to be observed in this connection. An agreement by an officer not to move property seized by him on execution and intrusting it to the custody of another is a sufficient consideration for an agreement by the latter to keep the property safely, and have it forthcoming at the sale on execution. Ames v. Taylor, 49 Me. 381. A owning a majority of the stock of a corporation, contracted with B, an employee, that the latter should have the earnings on 300 shares of stock after a certain date, but the shares were not to be transferred until A could part with them and still retain control of the corporation. Held, that the contract imported a valid consideration in B's implied agreement to render future services. Price v. Minot, 107 Mass. 49. A promise to contribute to the expense of an enterprise is a sufficient consideration for a promise to share in the proceeds. Britenstool v. Michaels, 56 N. W. Rep. 607. A judgment debtor's agreement to grind corn at a fair price in payment of the judgment, is a sufficient consideration for the creditor's agreement to deliver him sufficient corn for that purpose. Oldham v. Kerchner, 79 N. Car. 106.

Of course it is necessary that there should be mutuality of promises. A promise is never a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement. Bailey v. Austian, 19 Minn. 535; Tewkebury v. O'Connell, 21 Cal. 60; Henry County v. Drainage Co., 52 Ill. 454; State v. Holcomb, 46 Neb. 612. Thus where an agreement is made by a single individual for the donation of money to a religious institution without any undertaking on the part of the donee to make any return therefor, the agreement by the institution to receive and invest the money, and apply the interest to the payment of expenses, does not furnish a sufficient consideration to support the agreement. 2 Denio (N. Y.), 403. But, although that is the case where the subscription is individual, yet the court further held that where several persons subscribe to raise money for an object in which all feel an interest, *e. g.*, to support a religious or literary institution, the mutual promises of the several subscribers form a valid consideration for the promise of each. Nelson, C. J., said: "The substance of the contract between the parties, leaving out the particulars, is this: The defendant agrees to pay the plaintiff for the benefit of the institution they represent, $8,000, in four annual payments, provided they will procure subscriptions and contributions which, with his, shall amount to $50,000 before a given time; and shall afterwards invest the same as specified. The plaintiffs consent and perform the conditions. It seems to me that the labor and expenses of procuring the subscriptions and investing the fund, constitute damage and loss to the plaintiffs, which bring the cases within the very definition of a good consideration for the promise." (See sec. 346, vol. 11, Cent. L. J.)

A conditional promise is a sufficient consideration for an act, though the condition calling for performance is not satisfied. Gutlon v. Marcus, 165 Mass. 335; Patton v. Mills, 21 Kan. 163; Lenz v. Brown, 41 Wis. 172. Thus the agreement of one of several plaintiffs to assign to one of several defendants the securities and claims on which an action is brought is sufficient consideration to sustain said defendant's promise to pay a certain sum, if defendants prevail in said action. Gray v. Bowen, 23 N. Y. Sup. Ct. Rep. 67.

Sometimes, as in the principal case, it may be difficult to determine whether there were any valid mutual promises. In that case a consideration may be found for the promise of one party in the subsequent performance on the part of the other. Thus, subsequent performance of services and expenditure of money, in prosecution of the employment to procure for a person a purchaser for his land, is a sufficient consideration for a previous promise by the owner to make the person so employed a compensation if the owner himself sold the land. Goward v. Waters, 98 Mass. 596. So also that large class of agreements where a father promises to deed land to a son if he returns or a parol agreement between father and son that, on condition that the son will enter on certain land and improve it, the father will deed him the same, are sustained by sufficient consideration, where the son acts upon the promise and enters upon and improves the land. Lobdell v. Lobdell, 33 How. Pr. (N. Y.) 347; Rumbolds v. Parr, 51 Mo. 592. So also where two parties had, and believed they had, a similar interest in the settlement of a question, and one promised the other to share equally in the expenses if he would commence and carry through the suit in his own name, and the promisee, on the faith of such promise, did commence and carry through the suit, it was held that the promise was founded on a sufficient consideration. Dorwin v. Smith, 35 Vt. 69.

A fortiori, if the performance of one promisee not founded on his mutual promise will furnish sufficient consideration for the promise, the performance by one of several mutual promisors, as in the principal case, will bind the others. Thus in the case of Sterling Wrench Co. v. Amstutz, 53 Ohio St. 484, 34 N. E. Rep. 794, solvent stockholders of an embarrassed company having agreed to contribute to a fund to pay off the company's debts, one of them agreed that, as part of his contribution, he would cancel a note held by him against the corporation and a part or all of the other contributing shareholders, for a corporate debt. The other contributors performed the agreement on their part. Held, that they and the corporation could plead the contract in bar of an action on such note. In Nunnally v. White, 60 Ky. 584, one left property to his children, and, at the death of any of them without issue, the share of that one was to be divided among the rest. In consideration of love and affection, a contract was signed by which the interests of all the others under this clause were agreed to be released so far as regarded the shares of two of the devisees. Held, that the execution of this contract by one of the covenantors, by filing a disclaimer, would suffice to bind the rest, even conceding that they would not be otherwise bound. So also in McCandless v. Allegheny Bessemer Steel Co., 152 Pa. St. 189, 25 Atl. Rep. 579, a contract by persons whose property was threatened by a mob to reimburse the sheriff for money expended for the wages and sustenance of special deputies to be employed by him to guard the property, which contract was carried out in good faith by the sheriff, is not void for want of consideration. It must be borne in mind in considering this last case that the agreement with the sheriff was not merely to pay him for the performance of duties devolving upon him by virtue of his office, for in such case, as we have already seen, the agreement would have no consideration. But the rule is otherwise as to matters not within the scope

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of the officer's public duties, as, for instance, the employment of special deputies.

JETSAM AND FLOTSAM.

ARIZONA'S NEW CORPORATION LAW.

The last session of the Arizona legislature passed a general incorporation law which has drawn the attention of incorporators from the several eastern states, and is promising to make Arizona a formidable rival of West Virginia, Delaware, Maryland and South Dakota, which states have heretofore had a monopoly on business in this line. All the good features of the corporation laws of these states are included in the new law, as well as numerous other advantages to the incorporator. Private property is exempted from corporate debt, no annual or other reports are required, there is no annual or other tax upon the corporation, none of the incorporators need appear or be residents of the territory, and the amount of the capital stock does not increase the cost of incorporating. It is only necessary that the corporation appoint a resident of Arizona as its agent. Over three thousand companies have been incorporated under Arizona's favorable laws, the bulk of which are eastern companies and California and Texas Oil companies.

THE "ALTRUISTIC" NEGLIGENCE CASE LAWYER.

The "ambulance-chaser" has often been condemned, and deservedly so. It is the daily experience that as soon as an accident occurs, a half dozen or more so-called lawyers appear and offer their services at any price to the suffering person or to his heirs. But the lawyer who is an "ambulance chaser," but who devotes his main practice to a recovery for suffered injuries, at the hands of corporations, finds favor in the eyes of Justice Woodward of the Brooklyn appellate division, judging by a deliberate address, devoted to this subject by him, under the title "The Ethics of the Law of Negligence."

He insists that there are few higher duties than those of the attorney who appears in the courts in the advocacy of a cause involving negligence. "His labors" (says the justice) "are at once egoistic and altruistic; he is seeking the amelioration of the pain and suffering of his client, and of those depending upon him for their support and maintenance, at the same time, that he is building a barrier against future pain and suffering on the part of those who must fall victims to the carelessness of those intrusted with duties to the public, unless they are held to a rigid accountability for their aggressions upon individuals."

Our modern industrial development, with its network of machinery in all directions, has gradually filled the courts, and the reports with a class of negligence cases, which will soon crowd out all other ordinary litigation. The accident case lawyer has become a distinct class, like the patent or admiralty lawyer, harmony with the principles of ethics, and has for its object the lessening of pain, and the increase of pleasure, both for individuals and society.

Thus a new place has been found for the accident lawyer, whose labors are at once "egoistic and altruistic," avenging, through the instrumentality of the law, the killing and maiming of the individual—an ethical crime against society.—*National Reporter.*

LAWYERS' FEES.

William O. Inglis, in *Munsey's Magazine*, writes interestingly about the fees of lawyers. "The highest fee," says Mr. Inglis, "ever received by a lawyer is credited to William G. Moore, of Chicago. A few years ago Mr. Moore was recognized by his professional brethren as a brilliant man with a good practice, who was yet to distinguish himself. He conceived the plan, which he perfected after much study, for bringing all the American tin plate manufacturing concerns into one corporation. With infinite patience and labor, with courage and audacity that no obstacle could balk, he succeeded in organizing the American Tin Plate Company. He fee was said to be five million dollars, and the report of the Industrial Commission at Washington appears to verify this. Of course, a great part of the lawyer's reward was in the form of stock of the new company. About a year ago, Andrew Carnegie was at odds with his chief associate, Henry C. Frick, and the latter began a suit in which all the chief stockholders of the Carnegie companies became parties. A disastrous legal fight was threatening, one that would do infinite harm to the great steel business. After the rival interests had spent two hundred and fifty thousand dollars in legal fees, James B. Dill, a New York lawyer, succeeded in showing these men that they were at odds over a matter of ten million dollars, and that they would lose a great deal more than that in keeping up the fight. He pointed out a plan of reorganization and consolidation that would yield a profit of a hundred millions. Mr. Dill's advice was followed with complete success. Mr. Dill received a check for one million dollars as his fee. That is enormous, but if a lawyer helped any man to make a profit of a thousand dollars, the gainer would hardly think ten thousand dollars an exorbitant fee for the advice.

"James C. Carter, that rugged, forceful man who appears in the United States Supreme Court at Washington more often than any other New York advocate, derives an income of a hundred thousand dollars a year from his law practice. His retainer is never under five thousand dollars, and he receives at least five hundred dollars for each day or part of a day that he spends in court. Joseph H. Choate, now our ambassador to Great Britain, had a similar scale of fees while practicing law in New York. Messrs. Cromwell & Sullivan recently received two hundred thousand dollars for their services to the Northern Pacific Railroad. Edward Lauterbach's fee for reorganizing the Third Avenue Railroad Company was

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"Perhaps the most remarkable fee on record was the quarter of a million dollars paid to the late William M. Evarts, a few years ago, for saying 'yes.' The question submitted to him was whether a great corporation had the legal right to exist. The late Benjamin Harrison received two hundred and fifty thousand dollars for acting as counsel for Venezuela in the arbitration proceedings at Paris concerning the boundary dispute with British Guiana. John E. Parsons received the same amount for reorganizing the sugar trust under the laws of New Jersey. Thomas B. Reed, formerly speaker of the house of representatives, is guaranteed an annual income of fifty thousand dollars by the law firm of Simpson, Thatcher & Barnum, of New York, and he probably earns twice that amount.

"In another branch of the profession, Messrs. Weeks, Battle & Marshall are said to have received fifty thousand dollars for the defense of Roland Molineaux. Austin G. Fox and Daniel Rollins received fifty thousand dollars for their services as special deputies to the attorney-general of the state of New York, in connection with certain prosecutions which grew out of the Lexow investigation in New York.

"A comparison of these fees will show that the great financial rewards in the law business are those which go to legal advisers for the exercise of the creative faculty, rather than to the advocates who plead at the bar. In the struggle to obtain practice, even the firms whose names are widely known do not disdain methods that would make a layman stare. Sons of presidents of trust companies are eagerly welcomed as partners in law firms. They bring business. There are great firms in the Wall street district that have social attaches. They bring business. Not infrequently it happens that mediocre lawyers are taken into firms, not for their own ability—which might perhaps be worth a thousand dollars a year—but for the social influence of their wives, which brings practice worth fifty times that amount into the hands of their husband's associates.

"There is another side, that of the men who do not reach the high places, for it is only the giants that receive these enormous fees. Like most other cities New York is overcrowded with lawyers, and, lest the young man contemplating the law as a profession be too optimistic, it should be said that more than half the lawyers of New York have a hand-to-mouth struggle for existence. Notwithstanding the enormous incomes of the leaders of the bar, the average net earnings of the lawyers of New York are said to be less than a thousand dollars a year."

JUSTICES WITH A BIAS.

Of course, what astronomers call "the personal equation" must enter into the decisions of every judge, although, no doubt, he is the greatest who can reduce it to a minimum. We have long been proud of the impartiality of our English bench, and our judges in the high court are aware that the human element must enter into all administration of justice. They have therefore hesitated to upset the decisions of justices unless a real probability of bias has been shown. As Blackburn, J., stated the law in Reg. v. Rand, L. R. 1 Q. B. 230: "Wherever there is a real likelihood that the judge would from kindred or any other cause have a bias in favor of one of the parties it would be very wrong of him to act," but if the circumstances only give rise to a suspicion of favor the court will not interfere.

The question of pecuniary interest is somewhat different from that of bias. It is based upon the principle that no man should be a judge in his own cause, and it is clear law that direct pecuniary interest, however small, in the subject of the inquiry will disqualify a person from acting as a judge in the matter, unless, of course, he has been relieved by statute from the disqualification.

It must be remembered, however, that notwithstanding relief by statute or that the pecuniary interest is merely indirect, yet any substantial interest in the result of the hearing, such as to make it likely that the justice will have a bias, will disqualify him from acting. That is a fundamental proposition which has been laid down and acted upon for many years by the courts. Unlike many legal doctrines it is clear and simple, and its application to particular cases is generally by no means difficult to an unprejudiced outsider. Of course, each case must depend on its own facts; but the difficulty usually arises in the mind of the person interested rather than in any complexity of the law. Of course the defeated party can hardly fail to take a prejudiced view, and he often sees favor and bias where neither exists. On the other hand, the justice who has a real bias equally fails to recognize that he is doing anything wrong in adjudicating on the question, while in some men the mere likelihood of bias produces the effect of making them endeavor more anxiously to hold the balance straight.

From the cases it is almost impossible to lay down any narrower propositions than those broad ones above quoted, and the case law serves merely the purpose of illustrating these principles. We may refer to a few by way of example. In Reg. v. Hain, 12 T. L. R. 328, it appeared that three justices on the licensing committees had been directors and shareholders in a company having for its object the establishment of a boarding house or hotel. The manageress had applied for a license and it appeared that she did so in pursuance of a resolution passed at a meeting of the company at which these justices as directors had been present. The justices when appointed on the confirming committee had resigned their seats as directors and sold their shares, so that they had ceased to have any pecuniary interest, although some of their relatives, however, still had shares. A divisional court, consisting of Russell, L. C. J., and Wright, J., held that it was clear that these justices had resigned their seats on the board of directors for the express purpose of being free to support, as justices, the application for the license, therefore it could not be said that the granting of the license was an unbiased judicial decision. Russell, L. C. J., added that it was perfectly possible that they had acted in what they honestly thought would be for the best interests of the neighborhood.

That case was one of indirect pecuniary interest. In Reg. v. Fraser, 57 J. P. 500, we have an illustration of bias arising from quite a different cause. In that case the justice was a member of a temperance society, which society was opposing the renewal of a license. The justice was present at the meeting of the society at which some allusion was made to the opposition, but he had left before the resolution to oppose was brought on. He was, however, held to be disqualified.—*Justice of the Peace.*

SOME IOWA FIGURES.

Iowa statisticians have recently been very busy computing the proportion of lawyers to laymen, and

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the latest enumeration of attorneys shows the following comparison:

	Population.	Lawyers.	People per Lawyer.
Sioux City,	33,111	121	273
Des Moines,	62,139	178	399
Keokuk,	14,073	32	357
Cedar Rapids,	25,656	71	361
Council Bluffs,	25,802	67	384
Muscatine,	14,073	32	440
Davenport,	35,254	78	452
Fort Dodge,	12,162	26	467
Ottumwa,	18,197	36	502
Burlington,	23,201	40	564
Dubuque,	36,295	63	576
Clinton,	22,698	38	597

CORRESPONDENCE.

To the Editor of the Central Law Journal:

In your issue of the 30th ult. some comment is made upon the tendency of recent decisions to restrict the privilege of newspaper publication concerning pending cases. In that connection I call your attention to the case of Morse v. Montana Ore Purchasing Company, decided by the United States District Judge Hiram Knowles on December 10, 1900, and reported in 105 Fed. Rep. at p. 337 *et seq.*, where a new trial of a case involving many hundred thousand dollars was granted because of the publication of certain articles in a local newspaper during the trial of said cause. From an examination of the opinion in this case it will be seen that Judge Knowles takes the broad view that such publication constitutes good ground for a new trial, irrespective of whether the same actually influenced the jury sitting in the cause, provided it had that tendency. This is undoubtedly in line with the great weight of modern authority on the subject.

Helena, Mont. C. A. SPAULDING.

HUMORS OF THE LAW.

Magistrate—The charge is interfering with an officer. Roundsman McCarthy, you will please state exactly what the defendant did.

Roundsman McCarty—Oi wor passing his fruit sthand, yer anner, an' Oi shwoiped a banana, when th' dago troid t' tek it from me, yer anner."

"The fact is," explained the police official, "I have made a mistake, and the reporters are asking all sorts of embarrassing questions. What ought I to do?"

The lawyer looked at him in astonishment.

"How long have you been in politics?" he asked. "Don't you know nothing at all about the game? Why, the only thing for you to do is to get on your dignity and haughtily decline to talk for publication."

A man who had been convicted of stealing a small amount was brought into court for sentence. He looked very sad and hopeless and the Court was much moved by his contrite appearance.

"Have you ever been sentenced to imprisonment?" the judge asked.

"Never! Never!" exclaimed the prisoner, bursting into tears.

"Don't cry, don't cry," said the judge, consolingly; "you are going to be now."

A New York lawyer tried jumping from a railroad train running at the rate of fifty miles an hour. Strange to say, he didn't move for a new trial.

One of Mr. Fred. W. Lehmann's cases having been decided by Division No. 1 of the Missouri Supreme Court, which consists of four judges, was transferred to the court *en banc* for lack of unanimity in the decision. When the distinguished St. Louis attorney arose to argue the case *en banc* he prefaced his remarks by saying that he did not controvert the fact that the decision rendered in Division No. 1 was wholly impartial, "because," he said, "there were just two judges on each side of the case, and Solomon himself could not have decided justice more equally between the parties litigant, or rendered a more impartial decision."

Lord Russell of Kilowen (when Sir Charles Russell) was once examining a witness. The question was about the size of certain hoof prints left by a horse in sandy soil.

"How large were the prints?" asked the counsel. "Were they as large as my hand?" holding up his hand for the witness to see.

"Oh, no," said the witness, honestly, "it was just an ordinary hoof."

Then Sir Charles had to suspend the examination while everybody laughed.

"Gruggs walks as if he owned the whole blamed town."

"Yes; and he ain't even a police commissioner."

BOOKS RECEIVED.

La Tradition Romaine Sur La Succession Des Formes Du Testament Devant L'Histoire Comparative. Par Edouard Lambert, Professeur D'Histoire Du Droit, Charge De Lenseignement Du Droit Civil, Compare a L'Universite De Lyon. Paris V. Girard & E. Briere, Libraires-Editeurs. 16 Rue Soufflot, 16. 1901.

The American State Reports, Containing the Cases of General Value and Authority, Subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated. By A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. LXXIX. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1901. Sheep. Price, $4.00. Review will follow.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMIRALTY—Liability of Charterer or Owner for Collision.—Liability for damage caused by negligence of the officers and crew of a vessel, who are appointed and paid by charterers, is not, as between the charterers and the owners, imposed upon the owners by a clause of the charter party requiring the owners to "pay for the insurance on the vessel."—THE BARNSTABLE, U. S. S. C., 21 Sup. Ct. Rep. 684.

2. APPEAL—Decision Not Final—Order for Remanding of Case to State Court.—A decision of the circuit court of appeals reversing a decree of the circuit court which denied a motion to remand a case to the state court, and ordering the circuit to remand the case, is not appealable to the Supreme Court of the United States under the act of Congress of March 3, 1891, ch. 517, as such a decision is not a final judgment.—GERMAN NATIONAL BANK V. A. J. SPRECKERT, U. S. S. C., 21 Sup. Ct. Rep. 688.

3. APPEAL—Venue—Change.—Where a judge, in vacation, of his own motion ordered a cause transferred to another county, the court to which the venue was changed having jurisdiction of the subject-matter, plaintiff waived any objection to the change by voluntarily appearing and proceeding with the trial.—CHENEY V. CRANDELL, Colo., 65 Pac. Rep. 56.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS — Liability of Assignee — Stock in Insolvent Bank.—Under Rev. St. U. S. § 5151, making the stockholders of national banks individually responsible for the debts of the bank, to the extent of their stock, an assignee for the benefit of creditors of a stockholder is bound to pay the assessment levied by the receiver of the bank after its insolvency, though it is levied after the assignment.—GRAHAM V. PLATT, Colo., 65 Pac. Rep. 30.

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS — Omissions in Deed—Misstatements.—Where defendants exaggerated and willfully misstated the value of their property, but there was no evidence that in the execution of the assignment for creditors in question there was any fraud on account of these misstatements, nor anything in the conduct of the defendants to show fraud, there was no error in refusing to submit the question of fraud to the jury.—FRIEDENWALD CO. V. SPARGER, N. Car., 39 S. E. Rep. 64.

6. BILLS AND NOTES—Payment—Pledge.—A pledgee of a negotiable promissory note, who has received the proceeds of a collateral note and applied the same upon the debt secured by such collateral note, in ignorance of the fact that the sum so received and applied was the proceeds of such note, and has not altered his position by reason of such ignorance, cannot thereafter enforce the payment of such collateral note.—SECOND NAT. BANK OF WINONA, MINN., V. SPOTTSWOOD, N. Dak., 86 N. W. Rep. 359.

7. BOUNDARIES — Survey of Lands — Division of Quarter Section.—Where plaintiff owns the east half being the meander line of a stream or lake, so that there is more land in the east half than there is in the west half.—EDINGER V. WOODKE, Mich., 86 N. W. Rep. 397.

8. CHATTEL MORTGAGES — Breach—Fraud—Maturity of Debt.—Where plaintiff induced defendant to execute a mortgage by promises to extend time for the payment of indebtedness, and to furnish him further goods and extend him further credit, plaintiff at the time intending not to keep any of such promises, but to immediately enforce such mortgage, there was a fraudulent misrepresentation of an existing fact, which would avoid the mortgage.—CROWLEY V. LANGDON, Mich., 86 N. W. Rep. 391.

9. CHATTEL MORTGAGES — Injunction Restraining Foreclosure.—Under Code, § 4283, providing that the right of a chattel mortgagee to foreclose may be contested by any one interested, and the proceeding transferred to the district court, for which purpose an injunction may issue, a chattel mortgagee claiming a prior lien is not entitled to an injunction to restrain the foreclosure of another chattel mortgage, as an adequate remedy at law, by replevin or garnishment, existed against the second mortgagee, such mortgagee being solvent.—MCCORMICK HARVESTING MACH. CO. V. DE LA MATER, Iowa, 86 N. W. Rep. 365.

10. CHATTEL MORTGAGES — Private Sale—Validity.—Section 4520, Rev. St., provides, *inter alia*, that there shall be but one action for the recovery of any debt secured by mortgage upon personal property, while section 3890, Rev. St., provides that a chattel mortgage may be foreclosed by notice and sale as in subsequent sections provided, or by an action in the district court. The Revised Statutes thus provide two methods or proceedings for the foreclosure of a chattel mortgage, and those methods are exclusive.—REIN V. CALLAWAY, Idaho, 65 Pac. Rep. 63.

11. CONSTITUTIONAL LAW — Title of Act—Trading Stamps.—The title of Act No. 35 of 1900 is both inadequate and misleading, and fails to express the object of any provision in the act which is susceptible of independent enforcement. The act, therefore, contravenes article 31 of the constitution, and is void.—STATE V. WALKER, La., 29 South. Rep. 978.

12. CONTRACTS—Contract Partly Performed—Waiver of Further Performance.—An action of covenant on a contract to recover the price of articles delivered under it may be brought, although there has not been full performance, where that which has been delivered has been accepted in part performance, and further performance has been waived.—DISTRICT OF COLUMBIA V. CAMDEN IRON WORKS, U. S. S. C., 21 Sup. Ct. Rep. 680.

13. CONTRACT—Written—Parol Evidence.—Held, that a prior or contemporaneous oral agreement, made by a mortgagee or his agent, that upon payment of two notes the mortgage would be released, is not admissible in evidence when the mortgage provided absolutely that it should be security for four notes.—FIRST NAT. BANK OF LANGDON V. PRIOR, N. Dak., 86 N. W. Rep. 362.

14. CONTRIBUTORY NEGLIGENCE—Railroad Injury.—Where plaintiff's intestate seated himself on the end of a railroad tie while acting as flagman, and, while asleep thereon, was struck by defendant's engine, the whistle of which had been sounded and the bell rung when the engineer discovered the deceased, and the brakes applied when it was seen the deceased did not move out of danger, a nonsuit was properly granted, as deceased was guilty of contributory negligence.—STEWART V. SOUTHERN RY. CO., N. Car., 39 S. E. Rep. 60.

15. COUNTIES—Support of Sick Person—Allowances—

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for as they may deem just. Plaintiff furnished such attendance to a person, and the board made him an allowance, whereupon he brought an action for a larger amount. Held that, in the absence of a showing that the board had abused its discretion in making the allowance, plaintiff could not recover.—BOARD OF COMRS. OF RIO GRANDE CO. v. LEWIS, Colo., 65 Pac. Rep. 50.

16. COUNTIES—Warrant — Acceptance — Estoppel.—Where a county, on issuing a warrant for a claim allowed in part, customarily indorsed it on the back as in full satisfaction of the claim presented, and the board reduced plaintiff's claim, and issued the customary warrant for a part of it, and plaintiff accepted it with knowledge of the custom and without protest, he was estopped from suing for the balance.—BOARD OF COMRS. OF LA PLATA CO. v. MORGAN, Colo., 65 Pac. Rep. 41.

17. CREDITORS' BILLS — Fraudulent Preferences by Insolvent Corporation—Right of Creditors to Share Pro Rata.—Preferences by confessed judgments and assignments, which are constructively, but not actually, fraudulent against other creditors of an insolvent corporation, though set aside in a suit by the other creditors, will not preclude those who have taken the invalid preferences from sharing with the unsecured creditors *pro rata*.—UNITED STATES RUBBER CO. v. AMERICAN OAK LEATHER CO., U. S. S. C., 21 Sup. Ct. Rep. 670.

18. CRIMINAL LAW — Attempt to Assist Prisoner—Information.—A conviction for conveying into jail instruments useful to enable a prisoner to escape, as prohibited by Comp. Laws 1897, § 11,315, cannot be sustained on evidence that saws and files concealed in articles sought to be delivered to prisoners were brought into the sheriff's office in the jail building, but were discovered by him, and not delivered to the prisoners.—PEOPLE v. WEBB, Mich., 86 N. W. Rep. 406.

19. CRIMINAL TRIAL—Juries — Exclusion on Account of Race or Color.—Refusal to quash an indictment, or to sustain a challenge to the array of grand and petit jurors, because no member of the race to which defendant belonged was on the grand jury which found the bill of indictment, is not error, no discrimination against defendant's race being shown.—STATE v. BROWNFIELD, S. Car., 39 S. E. Rep. 3.

20. CRIMINAL TRIAL—Murder—Verdict.—On a trial for murder, all 12 of the jurors must concur to find a verdict for manslaughter. Nine jurors concurring, cannot find a verdict.—STATE v. BIAGAS, La., 29 South. Rep. 971.

21. CRIMINAL TRIAL — Remarks of Counsel.—Where the accused in a criminal trial considers that the conduct or language of the prosecuting officer is improper, he should invoke the action of the trial judge. Failing to do so, he will not be heard to complain in this court.—STATE v. PROCELLA, La., 29 South. Rep. 967.

22. EXECUTORS AND ADMINISTRATORS — Claim—Res Judicata.—Where, on the motion of an executrix to "disallow, dismiss, and quash" a claim filed against the estate, and all proceedings with reference to its presentment, it was adjudged that all proceedings "be, and the same are hereby, quashed and held for naught," such judgment will be considered as rendered on a point involving the procedure, since it does not appear on what ground the judgment was rendered, and hence it is not *res judicata*, so as to bar another action on the same claim.—PRUITT v. MULDRICK, Oreg., 65 Pac. Rep. 20.

23. EXECUTORS AND ADMINISTRATORS—Claims—Services.—Claimant brought an action against an estate to recover for services rendered deceased, with whom he lived during certain years of his minority, and the court charged that it was not necessary to show that, a given time before the rendition of the services, a contract was entered into on a particular day, on the one part, to perform services in order to authorize a recovery, but that the jury must be satisfied, by a fair preponderance of the evidence, that the services, if any, were performed by claimant in the expectation that they would be paid for, and that deceased received the benefit thereof expecting to pay for them. Held, that such instruction was correct.—HOOKER v. VAN SLAMBROOK, Mich., 86 N. W. Rep. 402.

24. EXECUTORS AND ADMINISTRATORS—Interest on Funds—Final Discharge—Fraud.—A court of equity will not set aside a final decree discharging an administrator for failure to account for interest on funds belonging to the estate, and used by him in his own business, without disclosing such use in his final report, when such report indicates accurately a large balance constantly in his hands, and, notwithstanding this, those interested in the estate consent to his discharge without investigation.—TUCKER v. STEWART, Iowa, 86 N. W. Rep. 371.

25. FEDERAL JURISDICTION—Federal Question—Other Grounds Broad Enough to Support Judgment.—A decision by a state court that a corporation is estopped to set up the invalidity of a statute, even if it is unconstitutional, by the action of its board of directors, cannot be reviewed on writ of error from the Supreme Court of the United States to the state court, since the non-federal ground is broad enough to support the judgment.—HALE v. LEWIS, U. S. S. C., 21 Sup. Ct. Rep. 677.

26. GARNISHMENT—Liability of Corporation—Fraudulent Conveyance.—Where a debtor is one of the organizors of a corporation, and transfers his stock of goods to the corporation in exchange for its stock, his creditors cannot attach the corporation as garnishee, on the grounds that the transfer of the property by the debtor and the receipt of the goods by the corporation were fraudulent as to creditors, since the property, in its new form (the stock), is still subject to levy and sale to satisfy the debt owing the creditors.—PLAUT v. BILLINGS-DREW CO., Mich., 86 N. W. Rep. 396.

27. HIGHWAYS—Land Companies—Irrevocable Dedication of Streets.—Where an improvement company laid off land into numbered city lots and streets, making a plat thereof, and sold lots as marked and numbered on the plat, with reference thereto in the deeds, such acts constituted an irrevocable dedication of the streets in favor of purchasers of the lots against the improvement company's successors in interest, who had notice of the plats and sales made thereunder, though no registration of the plat was made.—COLLINS v. ASHEVILLE LAND CO., N. Car., 39 S. E. Rep. 21.

28. LANDLORD AND TENANT — Farm Lease—Re-entry by Landlord—Lessee's Right to Crops.—Under a lease of farm land for the sole purpose of raising crops, the land had no building, was inclosed by fences, and was occupied by the lessee to put in the crops. The lease contained no express covenants as to husbandry. The lessor claimed to have repaired the fences, and forbade the lessee to take off the crops. The lessee harvested the crops, and the lessor replevied them. Held, that the repairing of the fences by the landlord did not justify the conclusion that he had taken possession.—SOMERS v. LOOSE, Mich., 86 N. W. Rep. 386.

29. LANDLORD AND TENANT—Summary Remedy of Forcible Entry and Detainer.—The fact that plaintiff received rent in advance from a prospective tenant does not affect her right to possession of the premises as against the present tenant, who refused to vacate after the expiration of his term on notice to quit.—TWISS v. BOEHMER, Oreg., 65 Pac. Rep. 18.

30. LIBEL AND SLANDER — Damages.—In fixing damages to be awarded for slander, the court will take into consideration the fact that the objectionable words were uttered in the heat of passion by one who for the time believed that he had a grievance, and that it was probably so understood by those who heard him.—GERMANN v. CRESCIONI, La., 29 South. Rep. 968.

31. LIBEL AND SLANDER — Proof of Publication—Evidence.—Upon proof of the publication of the libel, the

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burden is upon the defendant to show that the same was published upon grounds for belief of its truth, and for good motives to justify the same, which presents a question of fact for the jury, rather than for the court.—STATE v. SHIPPMAN, Minn., 86 N. W. Rep. 431.

32. LIMITATIONS—Action on County Recorder's Bond. —Code Civ. Proc. § 338, subd. 1, prescribing a three-years limitation to action "on liability created by statute," and not section 337, prescribing a four-years limitation to action on a written undertaking, applies to an action on a county recorder's official bond because of his failure to collect and turn over legal fees.—SONOMA COUNTY v. HALL, Cal., 65 Pac. Rep. 12.

33. MASTER AND SERVANT—Injury to Railroad Employee—Negligence of Fellow-Servant.—The plaintiff, while at work clearing a wrecked train from the defendant's railway tracks, was injured by the alleged negligence of his fellow-servants, which caused the roof of a disabled car to fall upon him. Held that, upon the evidence in this case, it was a question for the jury whether or not the work was being executed under such conditions and circumstances as to expose the plaintiff to the peculiar hazards of railroad service, within the meaning of Gen. St. 1894, § 2701, making railway companies liable to an injured employee for the negligence of his fellow-servant.—KRUEZER v. GREAT NORTHERN RY. CO., Minn., 86 N. W. Rep. 415.

34. MASTER AND SERVANT — Railroads—Assumption of Risk—Doctrine Inapplicable.—Priv. Laws 1897, ch. 56, §§ 1, 2, provide that any employee of a railroad company, who shall suffer injury, or the personal representative of any such employee who shall have suffered death, in the course of his employment, by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company. Held, that the doctrine of assumption of risk was rendered inapplicable by the statute in the case of an engineer injured through the company's failure to affix handholds to the tender, of which defect the engineer was aware.—COLEY v. NORTH CAROLINA R. CO., N. Car., 39 S. E. Rep. 43.

35. MASTER AND SERVANT — Risk — Vice-Principal—Negligence—Evidence.—Plaintiff and three other employees of the defendant railway company were in charge of W, and plaintiff was injured while the gang were attempting to load a heavy timber on a car under W's orders. Held that, in the absence of evidence that W had authority to discharge plaintiff, the defendant was not liable for the negligence of W as a vice-principal.—BRYAN v. SOUTHERN RY. CO., N. Car., 38 S. E. Rep. 914.

36. MECHANICS' LIENS — Assignment — Complaint.— In an action to foreclose mechanics' liens on several assigned claims, an allegation that the claims and demands of the persons entitled to perfect liens had been assigned to plaintiff constituted a sufficient averment of the assignment, without alleging in terms an assignment of the right to file liens for the several demands, since the assignment of the claim carried with it the right to the lien.—EAGLE GOLD-MIN. CO. v. BRYARLY, Colo., 65 Pac. Rep. 52.

37. MINING CLAIM — Ejectment — Relocation in Pursuance of Conspiracy.—An action of ejectment to recover mining property cannot be maintained on the ground that defendants have acquired it by a relocation in pursuance of a conspiracy with plaintiff's partner, whereby that partner, who was not one of the relocators, ceased to do the necessary work on the mine and abandoned its possession, since these facts, whatever equities they may raise as against the defendants, give plaintiff no legal title to the mine or any part thereof.—LOCKHART v. JOHNSON, U. S. S. C., 21 Sup. Ct. Rep. 665.

38. MORTGAGE — Foreclosure — Purchase by Junior Lienor—Redemption.—Under Code, § 4056, providing that the mode of redemption by a lienholder from a mortgage foreclosure shall be by paying the necessary amount into the clerk's office, a lienholder purchasing certificates of sale acquires none of the rights of a redemptioner, but holds subject to redemption, unaffected by any other incumbrances he may have. —JACK v. COLD, Iowa, 86 N. W. Rep. 574.

39. MORTGAGES — Foreclosure — Redemption.—Pub. Acts 1899, Act No. 200, authorizing a redemption from a mortgage foreclosure sale of real estate within six months, does not authorize the redemption of mortgage property sold under a decree rendered prior to the time the act went into effect.—MICHIGAN TRUST CO. v. LIBBY, Mich., 86 N. W. Rep. 394.

40. MUNICIPAL CORPORATIONS—Defective Sidewalk—Notice to Municipality.—The provision of the statute requiring notice of an injury caused by a defective village sidewalk to be served on the village within a certain time, may be waived by the town council.—FOSTER v. VILLAGE OF BELLAIRE, Mich., 86 N. W. Rep. 383.

41. MUNICIPAL CORPORATIONS — Injury on Streets — Defective Sidewalk—Notice to City. — Rev. Charter Grand Rapids, tit. 4, § 8, which is not retroactive, and which requires notice of an injury arising from a defective sidewalk to be presented to the common council within sixty days, and requires suit to be brought within one year after the council has had reasonable time to investigate the claim, does not apply to a claim for injuries received before the charter went into effect.—BROFFEE v. CITY OF GRAND RAPIDS, Mich., 86 N. W. Rep. 401.

42. MUNICIPAL CORPORATIONS—Railway Franchise—Acceptance—Liquidated Damages—Deposits.—A street railway franchise provided that it should be void unless accepted within ten days unless the grantee should deposit with the clerk of the village within 30 days after acceptance a certified check for $2,000, returnable on completion of the railway within the time provided, and in case of a default to be forfeited to the village. The ordinance required construction and equipment on or before November 10, 1897; otherwise the ordinance was to be void, at the option of the village board. Plaintiff's assignor sought and obtained a franchise under the ordinance, and complied with the terms thereof by depositing the $2,000 check, but never entered on the construction of the road. Held, that the village was entitled to retain the amount deposited as liquidated damages.—WHITING v. VILLAGE OF NEW BALTIMORE, Mich., 86 N. W. Rep. 408.

43. NUISANCE—Per Se—Abatement.—A privy is not a nuisance *per se*, but may become so under some circumstances. The question whether it is a nuisance is a question of fact.—TEINEN v. LALLY, N. Dak., 86 N. W. Rep. 356.

44. PARTITION—Commissioners—Powers—Unauthorized Sale.—Where a decree of sale for partition was made, and four commissioners appointed to make the sale, but no further action was ever taken by the court, a deed by one of the commissioners never reported to or confirmed by the court, conveyed no title. —VANDERBILT v. BROWN, N. Car., 39 S. E. Rep. 86.

45. PARTNERSHIP—Partners—Open Account — Interest.—Charges of interest on balance of account between partners or joint debtors are not allowable in the case of a continuous open account without any settlement or balance being ascertained.—MCFARLAND v. MCCORMICK, Iowa, 86 N. W. Rep. 368.

46. PLEADING AND PRACTICE—Jury—Verdict.—A finding by a jury expressed in the words, "We, the jury, find for the plaintiff nominal damages," without naming any amount, is not a lawful verdict.—SELLERS v. MANN, Ga., 39 S. E. Rep. 11.

47. PLEADING AND PRACTICE—Justices of the Peace—Service of Summons—Sufficiency.—A summons and warrant of attachment were sued out and issued by a justice of the peace December 6, 1898. The summons was returnable December 10, 1898, and the warrant January 4, 1899. On the return day of the summons the sheriff returned it with the indorsement "Not found." No alias summons were sued out, nor order made for

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service by publication. The publication of the warrant was made for four weeks, as required by Code, § 350. On the return day of the warrant the justice tried the action, the defendant not appearing, and rendered judgment for plaintiff. Held, that the judgment was void, the service of summons not being sufficient, under sections 214, 217-219, directing that service of summons shall be made by delivering a copy thereof, or by publication, when the person on whom service is to be made cannot be found within the state; nor was it rendered sufficient by publication of the warrant of attachment.—DITMORE v. GOINS, N. Car., 39 S. E. Rep. 61.

48. PLEADING AND PRACTICE—Misconduct of Jurors.—In a personal injury action two jurors, without the knowledge of the court, visited a railroad yard and examined a car and track not involved in the accident, for the purpose of testing the credibility of a witness. Held, that under the circumstances the trial court was justified in granting a new trial on the ground of misconduct of the jurors.—PIERCE v. BRENNAN, Minn., 86 N. W. Rep. 417.

49. PRINCIPAL AND AGENT—Estoppel to Deny.—Where a party purchases a promissory note, and permits the payee thereof to collect all interest, as well as the principal, and fails to notify the maker of such note of his ownership, he is estopped from denying agency after the note has been fully paid.—MORGAN v. NEAL, Idaho, 65 Pac. Rep. 67.

50. RAILROADS—Lease—Liability of Lessor for Lessee's Negligence.—A railroad leasing its road to another company is liable for injuries caused by the lessee's negligence in the operation of the road, in the absence of any evidence showing a release from such liability.—PERRY v. WESTERN NORTH CAROLINA R. CO., N. Car., 39 S. E. Rep. 27.

51. REAL PROPERTY—Boundaries—Property Included.—A devise giving "all the lands included under the name of the Arnold, the Geer and the Jones lands, all east of the R · · · road," passes no part of the Arnold land west of said road.—PEEBLES v. GRAHAM, N. Car., 39 S. E. Rep. 24.

52. SALES—Conditional—Machinery—Personal or Real Property.—Where machines sold by plaintiffs under a written contract that, until paid for, the title should remain in the vendor, were placed by the vendee in a building which he had purchased of defendant under a contract that, in event of failure to pay the purchase price, defendant was entitled to a surrender of the property, with all improvements, but were not attached to such buildings, such machines did not become a part of the realty.—HARRIS v. HACKLEY, Mich., 86 N. W. Rep. 869.

53. SCHOOL DISTRICTS—Directors—Right to Office—Mandamus.—Plaintiff alleged that at a regular school election he received a majority of the votes for director. The defendants, members of the school board, refused him a certificate of election, or to recognize him as a member of the board. They claimed the office vacant, and had called another election to fill the vacancy. Held, that the complaint did not state a cause of action against the school district, since the district was not responsible for and could not control any of the wrongful acts complained of.—SCHOOL DIST. NO. 15, IN PHILLIPS CO. v. FLANIGAN, Colo., 65 Pac. Rep. 24.

54. SCHOOL DISTRICTS—Orders—Guaranty of School Officers.—Where an order purports upon its face to be issued by a school district, and is signed by the school officers, in the ordinary place for signatures, and at the left, in fine print, are the words, "Issued by authority of officers of said district, and payment guaranteed," and a space left underneath for the signatures of the guarantors, held, that the purchaser took the order subject to the authority of the school district to issue.—BAILEY v. TOMPKINS, Mich., 86 N. W. Rep. 400.

55. STREET RAILROADS—Interference with Tracks—Injunction.—A street railway company which has constructed, and is legally operating, a line of railway in the streets of a city, is possessed of such a property interest as gives it a legal right to maintain an application to restrain a similar company from interfering with its line of tracks already laid, and from constructing a line of road over its private property without authority of law. To such an application the city is not a necessary party defendant.—ATLANTA RY. & POWER CO. v. ATLANTA RAPID-TRANSIT CO., Ga., 39 S. E. Rep. 12.

56. TAXATION—Assessment—Foreign Corporations—Steamboat Lines.—Where a tax is laid on the capital stock of a non-resident steamboat corporation operating within a state, such proportion of the whole value of its capital stock as the value of its tangible property within the state bears to the value of all its tangible property can be taxed as capital stock within the state.—COMMISSIONERS OF BEAUFORT CO. v. OLD DOMINION S. S. CO., N. Car., 39 S. E. Rep. 18.

57. TAXATION—Exemption.—Where a ditch company made deeds vesting in consumers the right to the perpetual use of a certain quantity of water, the whole system to be turned over to the holders of the water rights when the practical carrying capacity of the ditch should be disposed of, but the title was retained, and the company had not sold all its water rights, the ditch was not exempt from taxation, under Const. art. 10, § 3, and Mills' Ann. St. §§ 2897, 5766, exempting ditches, canals, etc., from taxation when owned and used by individuals or corporations, so long as they shall be owned and used exclusively for irrigating purposes, but not where the water is sold for the purpose of deriving revenue.—MURRAY v. BOARD OF COMRS. OF MONTROSE CO., Colo., 65 Pac. Rep. 26.

58. TAXATION—Foreign Bank Balance.—Where there was a balance to the credit of a California corporation in a New York bank, such balance due was properly taxed to the corporation in California.—PACIFIC COAST SAV. SOC. v. CITY AND COUNTY OF SAN FRANCISCO, Cal., 65 Pac. Rep. 16.

59. TAXATION—Tax Sale—Purchaser—Tax Certificate—Assignment.—Mills' Ann. St. § 3888, provides that any person may deposit the amount due on a tax certificate, where the property has been bid in by the treasurer for the county, within a certain time, whereupon the certificate shall be assigned to such person. Section 3898 provides that such certificate shall be assignable by indorsement. Held, that an assignment of a certificate to property bid in by the treasurer by writing on the back and attaching a formal assignment under seal to the face thereof was sufficient.—BOARD OF COMRS. OF RIO GRANDE CO. v. WHELEN, Colo., 65 Pac. Rep. 38.

60. TRUST DEED—Payment by Trustee—Interest.—Where the president of a corporation held property in trust as security for the payment of its indebtedness to him, with the right to apply the rents and profits on such indebtedness, he was entitled to interest thereon up to the time that the funds in his hands were sufficient to meet his claims.—WILLIAMS v. DES MOINES LOAN & TRUST CO., Iowa, 86 N. W. Rep. 366.

61. VENDOR AND PURCHASER—Mistake in Conveyance.—Where a purchaser of land at a foreclosure sale is in possession at the time a third party acquires a warranty deed thereto from an adverse claimant, such grantee cannot claim title as an innocent purchaser.—BANKS v. ALLEN, Mich., 86 N. W. Rep. 333.

62. WATERS AND WATER COURSES—Irrigation—Appropriation of Water.—An appropriator of water is not confined to an appropriation simply for the amount of land irrigated during the first year of his diversion. The extent of an appropriation of water is determined by the reasonable necessity for the use of the water, by the intention of the appropriator, followed by a reasonable diligence in executing such intent, and by the beneficial purpose for which the appropriation is made.—ELLIOTT v. WHITMORE, Utah, 65 Pac. Rep. 70.

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GEORGE ARNSLIE,
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Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 20, 1901

No more difficult problem of government exists than the effort to subject all property equally to the burdens of taxation. The most lamentable weakness in the whole system of taxation is that upon personal property. The statement can be made without fear of contradiction that the great majority of taxpayers make no return whatever on mortgages, bonds and other intangible securities. This practice of evasion, seemingly legitimated by the unanimity with which it is practiced were it not for the strict oath still required to be taken, practically exempts the holders of these securities from taxation.

An effort has recently been made in the city of Chicago to meet this weakness and failure of the tax system by encouraging the taxpayers of the city to report any discrepancy in their neighbor's return of personal property. The newspapers of Chicago took up the idea with avidity and succeeded in making up several sensational "scoops" over the affair, and withal the result was quite successful at least from the city assessor's standpoint. "Some kind friend," as the informant of the assessor was invariably referred to, was quite active all over the city. One man's assessment was raised from nothing to twelve thousand dollars, and one lady who was congratulating herself on escaping taxation was assessed on information of "some kind friend" for two hundred and fifty thousand dollars, the value of certain stocks and bonds held by her. These are but examples of many increases of assessments ranging from one thousand to one hundred thousand dollars.

That the result of this experiment is not everywhere regarded as an enthusiastic success, we note the recent comment of the St. Louis *Post-Dispatch* as follows:

"The success of the higgledy-piggledy, called the tax system, has come to depend upon 'some kind friend.' He is the uncommissioned attache of the assessor's office. This some 'kind friend is no doubt a very useful person. He should be suitably rewarded with money enough to keep him from want, and the hearty contempt of all decent people. But what kind of a 'system' is it that can be made to work, even roughly, only by resorting to espionage, treachery and plain sneaking; which puts a premium upon perjury; tempts men to spy upon one another, and surrounds friends with an atmosphere of mutual suspicion. Considerations of even the lowest plane of morality require a reform in this formless system. If enough thought is given to the subject it can be reduced to reason and order."

Undoubtedly the present system of taxation has resulted in dulling and debauching the moral sense of the people. It puts a tax on honesty and a premium on the most unscrupulous liar. It is not necessary, however, to offer proof of the utter failure of this system. No fact is better known nor more thoroughly regretted by the people. They simply await the suggestion of a remedy. Of the many suggestions for the solution of this difficulty which have so far been offered, three stand out with special prominence—the single tax, the income tax and the graduated business tax. The latter suggestion contemplates an assessment on the amount of sales or gross earnings of all business enterprises.

It is not our province, however, to advocate any particular suggestion, such questions partaking more of a political than of a legal nature, but we desire to call attention of the bar to the serious aspect which the question is rapidly taking and the natural attitude of the American people in looking to the legal profession for a practical solution of difficulties of this character rather than to the theoretical speculations of political scientists and public economists.

A dangerous advance of paternalistic tendencies is noticeable in the frequent successful attempts of legislatures to enact sumptuary laws under the vague, uncertain and seemingly all-comprehensive authority of the police power. An instance of this is to be noted in the case of State v. Crescent Creamery Co., 86 N. W. Rep. 107, where the Supreme Court of Minnesota held that section 7002 of the General Statutes of 1894, which prohibits the sale of cream that contains less than twenty per centum of fat, is a valid exercise of the police power and therefore

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constitutional. It is the general concensus of opinion that it is not the proper function of government to regulate the morals and conduct of its citizens in their relations and intercourse with one another by sumptuary legislation;—its sole legitimate object is to protect them in their life, liberty and property. Beyond what is necessary for this protection the greatest freedom of contract and of business dealings is to be permitted. Sumptuary legislation makes the government the parent of a great family and its citizens nothing but weaklings under its custody and control, whereas, in its true aspect, it should be nothing but the servant and retainer of a strong people. The police power, therefore, as an attribute of sovereignty, is to be used only for the purpose of affording protection to the life, liberty and property of the whole community, and not for the prevention of fraud or unfair dealings between individuals. In the adulteration of food products this distinction can be easily recognized. There is first that adulteration of food products which is injurious to the general health and that which is not. In the former case the adulteration endangers the life of the community and is a proper subject of legislative regulation under the police power. In the second class of cases, where no injury to the health or life of the community is threatened, and especially, as is often the fact, where the adulterated product is itself beneficial and wholesome, little reason and authority can be seen for the interference of the legislature any more than in any of the other innumerable instances in which man takes advantage of his neighbor by misrepresentation and fraud. The ordinary remedies at law are sufficient to protect and compensate the unfortunate victim in such cases, and where the law affords no remedy, the stern rule of *caveat emptor* impresses him with the fact that this life is in large measure the survival of the fittest, in which to be successful all the senses must be awake and active, and prevents him from falling into that languid dependence upon the strong arm of the government, which is so disastrous to all ambition and achievement.

NOTES OF IMPORTANT DECISIONS.

HUSBAND AND WIFE — "FAMILY EXPENSE STATUTES"—LEASE.—Of late years there has been an increasing reaction against the earlier tendency in this country of surrounding the debtor who was a man of family with almost insurmountable barriers in the way of special privileges and exemptions. The belief is growing that the creditor has some rights which ought to be respected and enforceable even against heads of family, and especially creditors who have provided the family with the necessaries of life. Illinois has a statute which looks in this direction. It provides as follows:

"The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued, jointly and separately."

The U. S. Circuit Court of Appeals was recently called upon to construe this statute in the case of Walker v. Houghteling, 107 Fed. Rep. 619, where they held that where a house was rented to defendant under a written lease signed by defendant, and the premises were occupied as a dwelling by defendant and wife, the contention that an action could be maintained only on the lease, and against defendant alone, because the instrument was in writing and signed by defendant, and not as an action for use and occupation, under the statute, against defendant and wife, could not be sustained, since the statutory action was not merely remedial, but created a liability against the husband and wife, independent of any relation of landlord and tenant. The court said in part:

"The family expense statute under consideration, on the contrary, is not simply remedial. It creates a right in favor of the creditor, and a liability against the husband and wife. It introduces into the law a new character of obligation. It is, in no sense, an additional method of enforcing the relation of landlord and tenant, which was the sole purpose of the common-law action for use and occupation. The existence of the lease, in an action like this, is, of course, a material fact. It tends to show the value of the use and occupation. It may, by virtue of its force as a contract, set a limitation upon the amount that can be recovered. But it is not the basis of the suit. The suit is founded upon the provision of the statute that the wife, as well as the husband, shall be liable for family expense; and upon the fact that the use of a dwelling house is, within the meaning of this statute, a family expense. The circumstance that the subject-matter is the use and occupation of real estate is an incident only; the determinative fact is that, like flour and groceries, this use was for family purposes."

HOMESTEAD — INVESTMENT OF PROCEEDS OF SALE OF HOMESTEAD.—An interesting question in the law of homestead recently arose for decision in the case of Chamberlain v. Leland (Tex.), 62 S. W. Rep. 740. In this case defendant and wife occupied town property as a homestead, and

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after the death of the wife, and defendant was no longer the head of a family, he sold the homestead, and moved on a 2,200-acre tract which he owned, and applied the proceeds of the homestead to the payment of a mortgage on that tract, and thereafter sold 2,000 acres of it, but continued to reside on the remaining 200. *Held*, that defendant was not entitled to a homestead in the 200 acres. The court said in part:

"At the time Leland sold his city homestead, it was exempted from forced sale, although he was not then the head of a family, because it had been exempted during the existence of his family, which was dissolved by death of his wife and the majority of his son. Under the rule laid down in Taylor v. Boulware, 17 Tex. 74, the exemption continued to Leland, notwithstanding the family was extinct. When Leland moved upon the 200 acres of land now claimed for a homestead, he could not acquire an exemption in that place, because he was not then the head of a family, unless it be true that his former homestead was in fact converted into and became the land now claimed by him. In the case of Schneider v. Bray, 59 Tex. 668, the owner of the homestead exemption, a widow, whose family was dissolved by the death of her husband, exchanged the exempted homestead for a place in Blossom Prairie, in Lamar county, Tex., with the intent to immediately occupy it as a home, and did in fact move upon it as such, and continued to reside thereon. This court held that the home which was acquired in exchange for that which was exempted took the place of the former homestead, and was itself protected from forced sale. In the case of Watkins v. Davis, 61 Tex. 414, a widow whose family had consisted of herself and husband continued to occupy the homestead after the death of her husband, and, contemplating the purchase of the land in suit, sold her home, and invested the money received in the new home, to which she immediately removed, and continued to occupy as a home. The court held that this was, in effect, an exchange of one place for the other; that it came within the rule announced in Schneider v. Bray, and the new homestead was exempted from the claims of creditors. In the case before the court, Leland owned the land in controversy before he sold his homestead. Consequently he did not exchange his home in the city for the land sought to be protected from sale, as was the case in Schneider v. Bray. Neither did he buy the property now in question with the proceeds of the home which he had in Waco, as in Watkins v. Davis. It follows that the property now claimed by him does not represent that which he had previously occupied, and the facts of this case bear no such analogy to the cases cited above as will justify the application of the same rule of law to the decision of this case. We are of the opinion that the cases of Schneider v. Bray and Watkins v. Davis, before cited, have gone quite far enough in that direction, and should mark the limit of the rule of law announced in those cases."

CORPORATIONS—SALE OF ASSETS—RIGHTS OF CREDITORS.—An interesting discussion on the right of a corporation to sell its assets to another company in fraud of its creditors is to be noticed in the recent case of Hurd v. New York Laundry Co., 60 N. E. Rep. 327, where the New York Court of Appeals held that a corporation cannot, where the rights of a creditor have intervened, with the consent of its stockholders, sell its plant and retire from business, taking the stock of the purchasing corporation in payment therefor, such stock being issued to an individual stockholder, without any agreement on his part to pay the corporate debts. The court said:

"Stripped of all speculations and assumptions, we have here the case of a corporation which is in debt. While so indebted its officers enter in to an agreement under which substantially all its of assets are transferred to another corporation, which is thereafter to continue the business. In payment of this transfer the purchasing corporation issues some of its capital stock, not to the selling corporation, nor yet to its officers as trustees, but to the principal stockholder as an individual. When the creditor undertakes to assert his rights the stock is reissued to the late treasurer of the selling corporation, who has become the president of the purchasing corporation, and he distributes the same without regard to the claims of creditors. This is the transaction that is sought to be defended under the authority of Holmes & Grigg Mfg. Co. v. Holmes & Wessel Metal Co., 127 N. Y. 252, 27 N. E. Rep. 831. The statement in the opinion in that case, to the effect that a corporation has power, with the consent of all of its stockholders, to sell its plant to another corporation and to retire from business, taking payment in the stock of the other corporation, was entirely correct as qualified by the facts before the court. No rights of creditors intervened, the stockholders had all consented, and the question arose between the parties to a promissory note given for some of the stock. Here we have an entirely different condition of things. The stockholders consent, but the creditor objects. When he demands payment of his claim he is referred to the empty shell, which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation. When he seeks to follow this fund, he is told that the capital stock of the defendant in the hands of those who may be *bona fide* holders is his only resort. This is not the law. In the recent case of Cole v. Iron Co., 133 N. Y. 164, 30 N. E. Rep. 847, Judge Finch, speaking for this court, said: 'As against the creditor, the transfer to the Millerton Company was illegal and in fraud of his rights. The assets of a corporation are a trust fund for the payment

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of its debts, upon which the creditors have an equitable lien, both as against stockholders and all transferees, except those purchasing in good faith and for value. Bartlett v. Drew, 57 N. Y. 587; Brum v. Insurance Co. (C. C.), 16 Fed. Rep. 143; Mor. Priv. Corp. § 791. The Millerton Company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National Company, to make it utterly insolvent, and to deprive its creditors of the trust fund upon which they had the right to rely, and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee.'"

THE NON-LIABILITY OF CHARITABLE AND ELEEMOSYNARY INSTITUTIONS FOR NEGLIGENCE CAUSING PERSONAL INJURIES OR DEATH.*

Missionary Societies, Churches and Cemeteries.—With respect to corporations created for the promotion of religion and benevolence by the establishment of hospitals, asylums and other institutions, within whose walls persons inclined to a life of charitable works may follow that life by caring for and relieving pain and disease, and wherein the gifts of private benevolence are accumulated for the purpose of organizing such relief upon some definite plan and with a veiw to the perpetuity of the relief dispensed, substantially the same immunities and exemptions have been extended by the courts as in the case of charitable institutions maintained by state, city and county taxation. Individual and collective private philanthropy and benevolence are encouraged upon like grounds of public policy. It is said in support of such immunity, first, that if a liability were admitted the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent as the result of negligence for which he was in no wise responsible; and second, that since the trustees cannot divert the fund by their direct act from the purposes for which it was donated, such fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund or their agents or employees.

I find that in one instance immunity from liability in tort was extended to a missionary society, but this seems to have been, in part at least, in consequence of certain statutory provisions directing that the rector, warden and vestrymen, or the trustees, consistory, or session, of any church, congregation or religious society, incorporated under the laws of New York, shall administer the temporalities thereof and hold and apply the estate and property belonging thereto, and the revenues of the same, for the benefit of such corporation, according to the rules and usages of the church or denomination to which said corporation shall belong, and making it unlawful to divert such estate, property, or revenue, to any purpose except the support and maintenance of such church, or religious or benevolent institution or object connected with the church or denomination, to which such corporation shall belong.[1] As indicated by the corporate title and admitted by the pleadings, defendant was a religious corporation duly organized under the laws of New York, and the question for decision presented to the court was whether, under the laws of that state, the plaintiff could maintain an action to recover damages for injuries sustained by reason of the negligence of an employee of the defendant, there being no allegation that such employee was not qualified for the work he was engaged to perform, or that there had been any negligence on the part of the officers of the corporation in his selection. The court observed that there was no allegation in the pleadings that the corporation was possessed of any other funds except those for the support and maintenance of the charity. "It has no capital stock, no financial return is made to its members, and, as far as appears, its officers serve without compensation. Under such circumstances it is merely an instrument of law to accomplish a certain object. The donor of its funds have selected it as a trustee for this object, and the estate, property and revenue in its hands are impressed with the trust for that purpose, and it does not seem to me to be lawful to divert them to any other, and consequently none of these funds can be diverted to the payment of damages for a personal injury received by a stranger at the hands of an agent not shown to be unworthy or unfit for the purpose for

* An article by this writer on "Torts of Charitable Institutions Maintained by Taxation" appeared in the CENTRAL LAW JOURNAL of July 26, 1901.

[1] Chapter 176, Laws 1876, sec. 1. A similar statute exists in Illinois, §§ 42 and 43, ch. 32; Corporations, 1 Starr & Curtis' An. St. p. 623.

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which he was employed."[2] "It is true," the court further remarked, "that most of the adjudged cases are those in which hospitals or other charities of that character were sought to be subjected to liability. But all of them proceeded upon the ground that it would be a diversion of the trust funds if they could be compelled to pay damages out of them, *and in this respect we think that religious corporations are upon the same footing with hospitals, or other charitable institutions.* The objects of the association are certainly as worthy and the trusts as sacred as in any other class of cases, and their liability in such actions as this must be denied." But on the other hand where it appeared that the plaintiff, while attending a church conference was injured without her fault, by falling over a dangerous wall which defendant congregation had constructed on the premises, it was held in Massachusetts that the jury were justified in finding that defendant was guilty of a breach of duty to keep its premises safe for plaintiff and others coming thereon by its invitation. The application of the rules on which defendant's liability depends is not affected by the consideration that this is a religious society and that plaintiff came there solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that plaintiff came by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that, too, although the defendant in giving the invitation was actuated only by motives of friendship and Christian charity.[3] And so a corporation, although much of its work is of a religious and charitable nature, but whose purposes are also social and include the giving of lectures and theatrical and other entertainments for the benefit of its members, the provision of a gymnasium and of athletic sports for promoting the health, and also engaging in the sale of food at a coffee or lunch counter, is not within the exemption which protects public charitable corporations from liability for neligence,[4] in allowing its floor to remain in a defective condition whereby one coming on its premises by invitation was seriously injured, although its general objects are of such a nature as to endow it with legal capacity to take a charitable gift.[5] And the fact that the funds of a cemetary association were actually applied to a considerable extent, in charity, is no more material, in Massachusetts, to relieve a mere religious society from liability, than evidence of a similar application of a part of his income by a private citizen would be in a suit against him.[6]

The Sisters of Charity.—Inasmuch as hospitals and asylums under the control of the religious orders aid to lighten public burdens by relieving the community from the necessity for resorting to taxation to establish and maintain such institutions, justice and sound policy would seem to require that they be extended the same privileges and immunities that would be claimed by the state should it undertake similar enterprises. Therefore, although the facts showed the admission of plaintiff to the "private pay patients' department" of a public charitable hospital conducted by the sisters of charity, under an express contract that she should have a private room and medicines and should be constantly attended by a skillful, experienced and trained nurse, and that the very best of care should be taken of her, for which she agreed to pay, and did pay, the hospital $25 per week and the nurse so furnished to be paid $3 per day additional, but a nurse was furnished who had only been on probation for a course of instruction for a short period of time, and in disregard of the order of her superior, through forgetfulness or gross carelessness, left an uncovered hot water bag in the bed in which plaintiff was to be placed while under the influence of an anaesthetic after an operation, and from

[2] Haas v. Missionary Society of the Most Holy Redeemer, 6 Misc. Rep. 281, 26 N. Y. Supp. 868.

[3] Davis v. Central Congregational Church of Jamaica Plains (Mass.), 34 Am. Rep. 233.

[4] Chapin v. Holyoke Young Men's Christian Assn., 165 Mass. 280, 42 N. E. Rep. 1130.

[5] Goodell v. Young Men's Christian Assn., 29 N. J. Eq. 32.

[6] Donnelly v. Boston Catholic Cemetery Assn., 146 Mass. 163, 15 N. E. Rep. 505, 5 New Eng. Rep. 741. A city owning a cemetery, in a vault erected upon which an employee is injured, owing to the negligence of the superintendent of the cemetery whose orders and directions the employee was bound to obey, was held liable for such injuries, on the ground that the cemetery and vault were a source of benefit and advantage to the corporation, and involved the same responsibility for their unsafe and improper management which pecuniary and proprietary interests entail upon natural persons. City of Toledo v. Cone, 41 Ohio St. 149.

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contact with such hot water bag plaintiff's right leg was so severely burned as to result in an open wound requiring a surgical operation before it would heal, and even after the recovery of the wound proved to be considerably impaired, the court held that a public charitable hospital is not liable even to a pay patient therein through the negligence of a nurse employed in the hospital where there was no negligence in the orginal selection of the nurse. It was also held that the rule of public policy was too firmly established by judical decisions to admit of its disturbance, although no doubt it would be wise to hold even charitable institutions to a higher degree of care. That this immunity is founded on public policy upon which also the very doctrine of *respondeat superior* rests, and should be extended to pay patients on authority of the line of cases holding that the exaction of compensation does not devest the institution of its charitable character. The principle of non-liability in cases wherein it appears that due care was used in the selection of employees and servants, to select only such as were competent and trustworthy, was still further qualified in this decision by the observation that in such selection it is doubtful if the obligation or duty of the hospital extends beyond the employment of competent heads of departments.[7] A corporation organized solely for the purpose of a charity hospital, having no capital stock and declaring no dividends and using its income derived from voluntary contributions, except in certain cases where reasonable amount is charged for board, room and nursing, to those who are able to pay, in the management of the hospital, is not liable for injuries to a pay patient through the negligence of a nurse, where it does not appear that the corporation was negligent in the selection of its servants.[8] The rule is that the receipt of compensation from those who enjoy the comforts of a hospital, library or institution of like charvate gain.[9] But on the contrary such institution is still entitled to all the exemptions extended by the law whether such exemptions be from taxation,[10] or from negligence of its agents or servants resulting in personal injuries.[11] In Connecticut an institution for the deaf and dumb,[12] in Maryland a college,[13] and in Massachusetts an asylum for aged women,[14] were each held not to be devested of their charitable natures by the mere receipt of fees from the beneficiaries, it appearing that there was no pecuniary profit accruing therefrom, and that their essential characteristic was benevolence. The defendant is not liable except for omission to use due care in the selection of its skilled employees, surgeons, and others, even though the injuries complained of occur in consequence of the breach of an express contract.[15]

Privately Endowed Charity Hospitals.—It has been observed above that individual and collective private philanthropy and benevolence are encouraged by the extension to such institutions as are founded thereby, of like exemptions and immunities as are accorded to those founded by individual and collective piety, and upon the like ground that the funds of the institution are impressed with a trust for the purposes contemplated by the donors and cannot be lawfully diverted to any other. In the pioneer case in which liability was denied, the Massachusetts General Hospital was sued for negligent and unskillful treatment of a broken leg, resulting in permanent injuries to the plaintiff, one of the charity patients of the hospital. It appeared that defendant was incorporated by statute, its funds being derived from grants and donations made by the commonwealth from the profits which it was entitled to receive from the Massachusetts Hospital Life Insurance Co., and from other companies doing business in Massachusetts, paid over to it, although no mention is made of any participation in the

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control thereof by the state authorities, and from the grants, donations, bequests and subscriptions of benevolent persons, and from the board of paying patients; its objects being the maintenance of a general hospital for the sick and insane. The plaintiff was cared for and nursed, as a charity extended to him occupying one of the free beds established in the hospital. It also appeared that the corporation had no capital stock and yielded no dividends or profits but held its funds and receipts in trust for the exclusive purpose mentioned in its charter. Liability was denied on the ground that the hospital was a public, charitable institution under the laws of the commonwealth, and that the fact that the trustees through their agents are authorized to determine who are to be the immediate objects of the charity and that no person individually had a right to its benefits did not alter its character. "It might well be questioned," said the court, "whether any contract between plaintiff and defendant could be inferred from plaintiff's admission into the hospital. It has offered him those ministrations which as the dispenser of a public charity it has been able to provide for his comfort, and he has accepted them.[16] The foregoing views acquire additional strength from their reiteration by the federal court in Powers v. Massachusetts Homeopathic Hospital, where it was said that the "person who enters a charitable hospital is not a contractor, neither is the hospital a contractor with that person. The person who enters is a mere licensee who must take the service as he finds it. Pollock on Torts (4th Ed.), p. 473, lays down the law that 'invitation is a word applied in common speech to the relation of host and guest. But a guest, that is, a visitor who does not pay for his entertainment, has not the benefit of the legal doctrine of invitation in the sense now before us. He is in point of law nothing but a licensee. The reason given is that he cannot have higher rights than a member of the household of which he has for the time being become a member or a part. All he is entitled to is plies to a public charity and in this respect a private charity rests upon exactly the same grounds and there is no basis in either to hold that the person who receives bounty is a contractor —a person contracting for services, as one of us engages services when we ordinarly employ a physician."[17]

If, however, there can be any contract inferred from the relation of the parties it can only be on the part of the corporation that it shall use due and reasonable care in the selection of its agents.[18] And where a charitable incorporation created by the legislature for the purpose of treating indigent persons, suffering from diseases of the eye and ear, was sought to be subjected to liability for injuries resulting to a patient from the alleged unskillful performance of an operation, but it appeared that due care had been used in the selection of the agents and servants of the institution, including the surgeon in question, it was held that such liability must be denied.[19] There can be no charge of negligence unless there is a breach of some duty imposed by law, and to ascertain whether there was negligence on the part of the hospital authorities in their care of one claiming to have sustained injuries from such alleged negligence, the duty which the law imposes on them must be considered. * * * In Harris v. Woman's Hospital,[20] the court said that the plaintiff's contention that the hospital should be liable for the actual negligence of its physicians and nurse without regard to the fact that it had exercised due care in their selection was questionable, for upon the authorities in regard to the liability of a corporation for the acts of its servants a distinction is made with reference to charity hospitals, it having been held with good reason that they are not liable for injuries to a patient caused by the injurious acts of their agents where it is shown that they have exercised due care in the selection of such agents. The corporation is not liable for the malpractice of a surgeon or assistant

17 Powers v. Massachusetts Homeopathic Hospital, 101 Fed. Rep. 896, 51 Cent. L. J. 280.

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in charge of the patient,[21] or even for injuries resulting from unsafe and dangerous premises. Such is the practical result of a decision denying a cause of action predicated upon the insecure and insufficient construction of the rooms provided for the custody of plaintiff's intestate, an insane person, whereby he was killed while attempting to get out. Payment of an agreed compensation to the institution for decedent's care and treatment, and the breach of the undertaking of the institution to safely keep him, were all held insufficient to create liability. The defendant institution is a type of many that have sprung up in recent years under private philanthropy, encouraged by enabling legislation, and we may therefore profitably study its description which is given in the opinion of the court, as follows: "The defendant was organized under a statute providing for the incorporation of hospitals or asylums in cases where valuable grants or emoluments have been made to trustees for such purposes, and at the time was maintaining the institution known as Harper Hospital. The organization had its origin in two deeds conveying lands in trust for the founding and maintenance of an hospital in the city of Detroit, for the succor, care and relief of such aged, sick and poor persons who shall apply for the benefit of the same, and who shall seem to any trustee thereof to be proper subjects of such aid as their means will enable them to afford. The particulars of the scheme for founding the hospital and all the details were left to be devised and controlled by the trustees. The trust was accepted by the trustees, and under the laws above referred to the trustees conveyed the property to the defendant corporation, the deed providing that if the legislature should enact a law enabling a corporation to be formed for the purpose named in them, the trustees might convey all the lands and funds to the corporation formed therefor. The corporation receives no compensation and pays no dividens. It is purely an eleemosynary institution, organized and maintained, not for private gain, but for the purpose of giving proper care and medical treatment to the sick. The law under which the defendant is organized recognizes it as a charity, exempts its property from taxation, provides that its funds shall be used faithfully and exclusively for the purpose of its organization. If plaintiff's contention be true, it follows that the charity or trust fund must be used to compensate injured parties for the negligence of the trustees, or architects or builders upon whose judgment reliance was placed as to plans and strength of materials; and also of physicians employed to treat patients, and even for the negligence of nurses and attendants. In this way the trust fund might be entirely destroyed and diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus thwarted for negligence for which the donor is in no manner responsible. If, in the proper execution of the trust, a trustee or an employe commits an act of negligence, he may be held responsible for the negligent act, but the law jealously guards the charitable fund and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the manager of the fund or their employee though such act result in damages to an innocent beneficiary. Those who voluntarily accept the benefit of the charity accept it on this condition. The fact that patients who are able to pay are required to do so, does not deprive the defendant of its eleemosynary character nor permit a recovery for damages on account of the existence of contractual relations. The amounts thus received are not for private gain but contribute to the more effectual accomplishment of the purpose for which the charity was founded. The wrongdoer in a case of injury—but not the trust fund—must respond in damages.[22] The authorities are in fact in perfect accord that a corporation incurs no liability and parts with no exemption with respect to its character as a charity, by reason of requiring payment, and that the frequent reception of money from any particular patient does not change the nature of the service rendered that patient. What-

[21] Eiblee v. Long Island College Hospital, an unreported case cited in 15 N. Y. Supp. 620.

[22] Downs, Admr., v. Harper Hospital, 101 Mich. 555, 60 N. W. Rep. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427.

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ever is received is as a proper contribution to a charity on the part of the person who makes the payment. It is not received as compensation. It is not compensation in the sense of the law.[23] Again, a corporation conducting a home for the support of aged women, which devotes all its funds to the support of such women in its home, and is no source of profit to its members, is a charitable corporation, although it requires a payment of money as a requisite for admitting a woman to its home. The fact that its funds are supplemented by such amount as it may receive from those who are able to pay wholly or partially for the accommodation that they may receive, does not render it any the less a public charity. All sums thus received are held upon the same trust as are the gifts of pure benevolence.[24]

An Exception to the Rule of Respondeat Superior.—The drift of the foregoing cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant and not caused by its own corporate negligence or the failure to perform a duty impressed on it by law. This general conviction rests on sound legal principles, and is strengthened by an able and exhaustive review of all the American, English, and colonial decisions, in a recent Connecticut opinion in which, in support of what may now be appropriately designated, the "American" doctrine. The court said, in part, that "the law which makes one responsible for an act not his own because the actual wrongdoer is his servant, is based on public policy. The liability of a charitable corporation for the defaults of its servants must depend on the reasons of that rule of policy and their application to such a corporation. This rule of public policy modified the development of the law of master and servant from the beginning, and in this way infused into the law of agency a sort of ble for his own act, but on a rule of public policy which, under certain circumstances, estops one from showing that the act in question was not his own. The reasons for the rule have been differently stated by others. In Maximillian v. Mayor of New York,[25] the rule is based on the right which the employer has to select his servants, to discharge them if not competent, and to control them while in his employ. Wharton on Negligence, p. 9157, gives the reason of the policy that he who puts in operation an agency which he controls while he receives its emoluments, is responsible for the injuries it incidentally inflicts, relying on Lord Brougham's statement in Duncan v. Findlater, "I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employment when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it." Defendant does not come within the main reason of the rule of public policy which supports the doctrine of *respondeat superior*. It derives no benefit from what its servants do in the sense of that personal and private gain which was the real reason for the rule. Again, so far as persons injured are concerned, as patients of hospitals, defendant does not set the whole thing in motion in the sense in which that phrase is used as expressing a reason for the rule. Such patient injured by the wrongful act of the hospital servant is not a mere third party, a stranger to the transaction, he is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public. Surely those who accept the benefit assist as truly as the defendant in setting the whole thing in motion. But the practical

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but it rests on public policy too firmly settled to be questioned. We are now asked to apply this rule for the first time to a class of masters distinct from all others who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule and to declare a new public policy, and say that on the whole substantial justice is best served by making the owners of a public charity involving no private gain, responsible not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and benefit. We think the law does not justify such an extension of the rule of *respondeat superior*. It is perhaps immaterial whether we say that public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule, or say that public policy which encourages enterprises for charitable purposes requires exemption from the operation of a rule based on legal fiction, and which as applied to the owners of charitable enterprises is clearly opposed to substantial justice. It is enough that a charitable corporation like defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable on grounds of public policy for injuries caused by personal wrongful neglect of a servant in the performance of his duty by a servant who it has selected with due care, but in such case the servant alone is responsible for his own wrong.[26]

Contrary Conclusion Expressed in Rhode Island.—In an opinion containing an equally exhaustive review of the cases, the Rhode Island court reached a contrary conclusion. The greater part of the opinion was devoted to an effort to show that the recent English cases have abandoned the reasoning of former decisions, on which was based, principally, the theory of liability worked out in McDonald v. Massachusetts General Hospital, *supra*, and that therefore such theory is no longer entitled to the respect formerly given it in this class of cases. The position was taken, that although a hospital is administered as a charity, and its income derived mainly from its endowments and from voluntary contributions, and the physicians and surgeons attendant thereon and the medical and surgical internes, gave their services without compensation, except that the internes, who were required to be in attendance day and night had their board and lodging in the hospital, and patients who were able to pay were required to pay nothing beyond a reasonable amount to cover board, washing, warmth and the services of nurses and wardtenders, and an action for damages against such hospital for injuries caused by the negligence of an unskillful interne therefore within the doctrine of McDonald v. Massachusetts General Hospital that a corporation, or *quasi*-corporation, board or body, having a public trust or duty to discharge gratuitously is not liable for the torts of its servants or employees, if it is personally without fault, yet the authority of that case so far as it rests on the earlier English decisions is so seriously impaired by the more recent expressions of the English courts, that the question arises whether it might not have been better decided on the other grounds suggested in the opinion of the court. The other grounds suggested were two. The first was that the corporation could not be presumed to have agreed to do more than furnish hospital accommodation and these the plaintiff has had, and its liability does not therefore extend beyond the exercise of reasonable care to get such physicians or surgeons as are skillful and trustworthy in their profession. In the case at bar, however, said the court, "the injury was not received from a physician or surgeon but from a surgical interne, and an interne stands on a different footing. It is the duty of the interne, acting on behalf of the hospital, to send for physicians and surgeons promptly in emergencies, and a rule of the hospital prescribes that in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring immediate operations, the interne shall send for the surgeon of the day, and if he cannot be found for one of the other surgeons. Here, then, we have the relation of principal and agent or master and servant. If the interne neglects to call the surgeon in the class of cases designated, his neglect is the neglect of the corporation. Now, the plaintiff contends that his injury was such that under the rule a surgeon should have been sent for immediately and that the interne's neglect to

[26] Hearns v. Waterbury Hospital, 33 Atl. Rep. 95.

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do so cost him his arm. And further, that the corporation did not use proper care in selecting the interne, who was incompetent for his position, and thereby he suffered the injury he complained of. He contends that he was entitled to recover on both these grounds, and if the evidence was sufficient to establish them, we think that he was entitled to recover on both grounds unless the hospital enjoys some peculiar immunity. This brings us to the important question whether the hospital does enjoy any peculiar exemption from liability. The claim that it enjoys such an exemption rests upon two grounds, to-wit, on the ground of public policy and on the ground that the hospital has no funds except such as are exclusively dedicated to the charitable uses for which it was established, and which therefore cannot be applied to indemnify a patient who has been injured by the negligence or malpractice of a physician or surgeon or of a medical or surgical interne. The first is based on the argument that hospitals like the Rhode Island Hospital are public benefits, but that if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they should be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great public charity such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person and any such corporation from liability for its negligence. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court but for the legislature. The second ground is one of the grounds suggested in McDonald v. Hospital, *supra*. The line of earlier English cases on which this decision is based have no value as precedents in any case where there are funds or income which can be applied to the payment of damages, the more modern English decisions uniformly regarding them as overruled. In view of these later decisions the question here is whether a charitable corporation like the defendant which holds its property for the charity, and because it holds its property for the charity, is relieved from all responsibility for the torts or negligence of its officers, trustees, agents or servants. We have come to the conclusion after much consideration that it is not. We understand the doctrine of the recent English cases to be this, that where there is a duty there is, *prima facie* at least, liability for its neglect; and that where a corporation is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation to exercise such care and skill, and the fact that it acts gratuitously and has no property of its own in which it is beneficially interested will not exempt it from liability for any neglect of duty if it has funds, or the capacity of acquiring funds, for the purposes of its creation which can be applied to the satisfaction of any judgment for damages recovered against it. We also understand that the doctrine is that the corporate funds can be applied notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them. We do not understand, however, that the corporate property is all equally applicable. It may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages. But, however that may be, we understand that the defendant corporation is in the receipt of funds which are applicable generally to the uses of the hospital, and we think a judgment in tort for damages against the corporation can be paid out of them."[27] And it was therefore held that the court below erred in directing a verdict for defendant on the ground that said institution was the dispenser of a public charity and dependent for support on voluntary contributions, and consequently for reasons of public policy, exempted from liability for any negligence or unskillfulness of its agents, servants, physicians, surgeons and internes.

[27] Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

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The result reached in this case met with such dissent from the public that at the earliest session of the legislature thereafter the doctrine of McDonald v. Hospital, *supra*, was in effect incorporated into the settled jurisprudence of the state by statute.[28]

WM. B. MORRIS.

[28] Laws, Rhode Island, 1880, ch. 162, § 1. "No hospital incorporated by the general assembly of this state, sustained in whole or in part by charitable contributions or endowments, shall be liable for the neglect, carelessness, want of skill, or for the malicious acts of any of its officers, agents or employees in the management of, or in the care or treatment of, any of the patients or inmates of such hospital, but nothing herein contained shall be so construed as to impair any remedy under existing laws which any person may have against any officer, agent or employee of any such hospital for any wrongful act or omission in the course of his official conduct or employment."

TELEPHONE COMPANIES — ERECTION OF POLES AND WIRES—SUBSURFACE CONDUITS.

NORTHWESTERN TEL. EX. CO. v. CITY OF MINNEAPOLIS.

Supreme Court of Minnesota, May 10, 1901.

1. Held, that under the general laws of this state (section 28, ch. 34, Gen. St. 1866), as amended by chapter 73, Gen. Laws 1881, (section 2641, Gen. St. 1894), telephone companies are given the right to erect poles and wires within the urban ways and streets of this state as well as upon rural highways.

2. That the provisions of the charter of Minneapolis confer upon that city no authority to arbitrarily order a removal of such poles and wires, but only the right to regulate the placing of the same in its streets, and to compel the telephone companies to put their wires in subsurface conduits when reason, convenience, or the good government of the municipality requires.

LOVELY, J.: The public importance of our previous decision upon the control by the municipalities of this state of their streets in the use of the same by telephone companies, as well as the fact that full consideration was not given in the original opinion to the subject of legislative authority for such control, nor to the dependent rights of the telephone companies thereunder, has required a reinvestigation of the whole subject upon reargument. We recognize that important questions other than those actually referred to in the opinion are material to the disposition of the order of the trial court, and have regarded it as our duty to reconsider so much of the subject involved, determinative of this appeal, but not referred to in the opinion, which we think may be embraced comprehensively in the following propositions: (1) Did the telephone company have any right from the State to erect its poles and wires in defendant's streets? If so, what was the nature and extent of such right? (2) Did the city possess a delegated power to control, limit, regulate, or restrict the placing of poles and wires by plaintiff in its streets? And, if so, what were the limitations of such right?

1. What were plaintiff's rights under the general laws of this state? It was claimed that we had overlooked the fact in the previous opinion that under the decisions of this court the city of Minneapolis had no power to make the contract with the telephone company, for the reason that such power must necessarily be derived from the State, where it originally belonged, as an element of its sovereignty, and that the State had never delegated such power to the city, from which conclusion it would necessarily follow that the contract between the city and the company was in excess of authority. The decisions invoked to support this position undoubtedly sustain the view that the plaintiff must necessarily rest its authority upon a prior grant of power from the state. Nash v. Lowry, 37 Minn. 261, 33 N. W. Rep. 787; City of St. Paul v. Chicago, M. & St. P. Ry. Co., 63 Minn. 330, 65 N. W. Rep. 267, 65 N. W. Rep. 267, 649, 68 N. W. Rep. 458, 34 L. R. A. 184. It is not to be questioned that this original element of state control over its public thoroughfares might be legally delegated to municipalities, even to the power of excluding poles and wires entirely from urban streets. In such case the streets cannot be used except by permission of the city, who can restrain such use without reference to public benefits or advantage; and this conclusion presents the necessity of referring to the general legislation of the state, where authority to use such thoroughfares for poles and wires must be found, if it exists.

In 1860 the following statutory provision applicable to telegraph companies was enacted: "Any telegraph company incorporated or organized under the laws of this state, shall have full power and right to use the public roads and highways of this state, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or other fixtures: provided, however, that the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads or highways." This section was incorporated into the revision of 1866, where it continued without change until 1881, when this statute was amended by inserting after the word "telegraph" the words, "or telephone." Chapter 73, Gen. Laws 1881. Section 2641, Gen. St. 1894. In passing, it may be well to say that this court has never recognized any difference in character between telephone and telegraph companies. For the purpose of construing the effect of the legislative enactment referred to, no distinction can be made in favor of telegraph over telephone companies, in their imposition of burdens upon the public thoroughfares of this state.

It is contended by defendant that the legislature

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did not intend to include the streets of a city in the term "road and highways," in the enactment of the amended statute of 1881, which gives the same right to telephone as to the telegraph companies, but that a distinction was intended, and must be now applied, in construing this statute, as between urban and rural highways, limiting such use solely to country roads. The definition of a word in a statute need not be absolutely decisive of its meaning in all cases. The history of the act, its general purpose, the mischief to be cured or benefits to be obtained, according to general understanding, as well as the sense to be derived from its connection in the same or other statutes, may be essential to aid courts in the duty of construction. The approved legal definition of "highway" is "a passage or road through the country, or some parts of it, for the use of the people. It is the generic name for all kinds of public ways." Bouv. Law Dict., "Highways." We might collect authorities without number to show that this term has been applied in judicial decisions, in its generic sense, to city streets. The result of such investigation leads to the conclusion, seemingly too plain for serious discussion, that the word "highway," in actual use, embraces city streets as well as country roads, furnishing the strongest inference that it was intended to apply to both, and that while the word "street" is more often used than "highway" to designate an urban way, yet it was in this statute used for both purposes.

The suggestion that the proviso limiting the erection of posts or poles so that the same shall "in no way interfere with the safety or conveyance of ordinary travel on or over said roads or highways" is more applicable to rural than urban streets is of little significance, or that such restriction is ordinarily a subject of municipal control under charter provisions has no persuasive force in construing into this law the distinction urged. Ordinary travel takes place on city streets as well as rural roads, and the proviso would go on further than to secure the protection when needed.

If we recur to the historical facts which assist in defining the meaning of this law, we find that, so far as the placing of poles and wires on highways is concerned, that right was created by legislative action more than 40 years ago, and it has continued in force and materially aided in the growth of this great commonwealth; and the only change of such right, until 1893, has been an extension of its benefits. For twenty years the telegraph [illegible] of this [illegible] urban districts to which they confined their business, and to which it is now claimed the statute did not refer. In other words, the telephone companies were using, under the benefits of this statute, without apparent objection, the places where it did not, on defendant's theory, apply, and did not use the only places where it did apply, while the telegraph companies were using both for the same purpose; and the inference that follows is obvious, and lies upon the surface. The people understood the law to mean what it said, and had found it sufficient to meet the necessities of the people of this state, and consonant with the demands of growth and progress, and for thirty years and more its benefits as to both kinds of companies were accepted, and it was not amended or changed.

The strongest argument in support of defendants' contention that there was a reserved legislative purpose to exclude urban thoroughfares from the benefits of the statutes is that such a restriction has been practically placed upon the statute by the plaintiff itself. It is urged that plaintiff and others similarly situated have repeatedly sought concessions from municipalities, particularly from defendants, at variance with the right to use their streets, which it now insists upon; that the privilege of placing poles and wires in the streets has never until the present time been demanded as a right, but has been accepted (as under the ordinance of 1883, set forth at length in the former opinion), and the fact that the plaintiff has recognized the power of the city to control this subject is to be given weight; and this, to a certain extent, is true, although to what extent, and how far such privileges have been asked for and received, in the absence of any reliable *data*, it is not easy to determine. There is some logical force in this claim, although it cannot be deemed controlling, nor sufficient to overcome the spirit of the statute expressed in its literal terms; for it is in opposition to the source of the real authority to construe the law, which is judicial, and vested in the courts. If the meaning of the words of the statute were doubtful, the interpretation which the telephone company and the city have placed upon its meaning might be more weighty; but where there is no doubt, or private policy and self-interest dictate the action of either party, such arguments is of very little force. Were it clear that no such authority to use urban ways had been vested in the telephone company by the general statute, its assertion or assumption of such right would not create it, or, if a reasonable construc-

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providing for the organization of corporations, to the effect that no franchise should be granted to telegraph or telephone companies that would authorize them to place their poles and wires in city streets without permission of the municipality. Gen. Laws 1893, ch. 74. And to the same effect is Gen. Laws 1899, ch. 51. The plaintiff was organized as a corporation in 1878. It obtained the benefits of the act of 1860, above referred to, in 1881, which became a contract between the state and the plaintiff by the acceptance of the same. Hence the proviso in the law of 1893 and 1899, being prospective, could not impair rights that had become vested, because forbidden under the clearest prohibitions in the state and federal constitutions; and it is not claimed that these statutes did so, nor is it possible to treat the latter proviso as a legislative interpretation of the original act of 1860, which had been continued in force up to that time, without change, unless the inference follows, for what it is worth, that these restrictive provisions were enacted to impose upon companies organized in the future an obligation which was by the legislature not supposed to be expressed in any previous statute. This inference favors plaintiff's contention.

As a result of this review of the subject, we are led to the conclusion that the plaintiff had a right to use the streets of the city, under proper regulations and restrictions (referred to in the original appeal) by the municipality. What such power of regulation in the city imposed in its relation to the plaintiff is still to be considered. Since the first argument in this case the general statute (section 2641, Gen. St. 1894) has been judicially construed by the United States Circuit Court of this district, and the conclusions expressed above find authority therein, as well as the necessary deduction that any ordinance of the city interfering with or impairing the vested right thus conferred upon the plaintiff by the state violated constitutional rights and was invalid. Abbott v. City of Duluth (C. C.), 104 Fed. Rep. 833.

2. It still remains to consider such provisions of the city charter as affect the subject under the inquiry. Did the city possess a delegated power to limit and regulate the placing of poles and wires by plaintiff in its streets; and, if so, what were the limits upon such right? The provisions of the defendant's charter germane to this subject at the time when the ordinance of 1883 was enacted by the common council in the exercise of the delegation of power to defendant over its streets gave it the right, under subdivision 6, § 5, ch. 4, "to prevent the incumbering of streets, alleys, lanes, sidewalks, public grounds, or wharves with carriages, carts, wagons, sleighs, boxes, lumber, firewood, posts, awnings or any other materials or substance whatever;" and by subdivision 31, § 5, ch. 4, the power "to remove and abate any nuisance, obstruction or encroachment upon the streets, alleys, public grounds and highways of the city;" and by section 1, ch. 8, "the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city." Such was the power delegated to the city council to adopt the ordinance of 1883, set forth at length in the opinion, which conferred upon the plaintiff the right to use and occupy the streets and alleys of the city with its poles and wires. Nothing in the provisions above quoted conflicts with the power to pass such ordinance. On the other hand, under such general provisions, even in the absence of the general statute (section 2641, Gen. St. 1894), it might be held that sufficient power was so delegated for that purpose. In a recent case decided by the United States Circuit Court of Appeals for this circuit, it was held (Sanborn, J.), under a statute where the city of Colorado Springs was empowered to regulate the use of its streets, to provide for the lighting of the same, and to pass all ordinances and to make all rules and regulations demanded or necessary to exercise those powers, that "it had the implied authority to grant the right and privilege to construct a power house to generate electricity on its public grounds," etc. Pikes Peak Power Co. v. City of Colorado Springs (C. C. A.) 105 Fed. Rep. 1. Thirty-four days after the passage of the ordinance under which the city attempted to grant the right to the telephone company to erect its poles in its streets, the charter of the city was amended by adding to section 5, ch. 4, the following authority to be exercised by the council: "To regulate and control or prohibit the placing of poles and the suspending of electric and other wires along or across the streets of said city, and to require any or all already placed or suspended either in limited districts, or throughout the entire city, to be removed or to be placed in such manner as it may designate beneath the surface of the street or sidewalk." This provision does not declare that the power therein conferred is exclusive in the city, nor that the right to remove poles and wires in the streets is to be exercised by the city arbitrarily. If the general statute (section 2641, Gen. St. 1894) is controlling, as we have held above, this provision should be construed so as to harmonize with that statute, and not given such a construction as would give absolute power to the city to remove wires and poles without reason or necessity, for such a view would clearly interfere with plaintiff's vested rights; or if, as we are lead to believe, there was authority under the previous provisions of the charter in force at the time the ordinance of 1883 was enacted and accepted by the plaintiff, it follows, as held in Pikes Peak Power Co. v. City of Colorado Springs, *supra*, that an ordinance of a city passed under legislative authority, within the provision of the federal constitution, "cannot be repealed by later ordinances which would be so clearly a violation of section 10, art. 1, which prevents the passing

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of a law impairing the obligations of a contract, and the fourteenth amendment to the constitution, which forbids the taking of property without due process of law," that, as held in that case, "no argument to the contrary would be worthy of a moment's consideration."

We think much misunderstanding has arisen from the previous opinion, through a failure to realize what was actually determined. We have not held, and do not hold, that the city had the power to confer upon the plaintiff vested rights to irrevocably occupy its streets, in violation of any reasonable right therein by the city. We hold that the only power delegated by the state to the city under any of the charter provisions referred to is the power of regulation, and the necessary control incident to such power. We held in the former opinion, and now hold, that the only contract entered into by the city with the defendant was with reference to the manner and method of placing its poles and wires. Such contract was within the police power of the city, and, the defendant having acted upon the contract by the ordinance of 1883 as to how it should place its poles and wires, the city cannot, without reasonable cause, in the exercise of its power of regulation, revoke its contract as to such matters, and order a different arrangement. The power of regulation, or the police power, as there designated, belonged to the state, and was delegated to the city in its charter; and we think that the charter provisions referred to fully recognize its beneficent authority, which should be exercised in reason and judgment for the best interest and welfare of the municipality, and secures all that is essential to a proper and reasonable control of the plaintiff's business. It is not to be assumed that the legislature, in delegating such powers, intended to violate the organic law, or (what would be, perhaps, as bad in its practical effect) to invest the defendant with the power to confer a monopoly in the use of its streets to a favored corporation, which is the logical and necessary result of defendant's claim. If the claims of the city are well founded upon the issue raised by the demurrer, it can grant a right to-day, and deprive the party to whom it is granted of such right to-morrow. If it can confer the privilege upon the plaintiff of placing overhead wires on the streets, and immediately thereafter compel the plaintiff to replace the same in subsurface conduits in rural neighborhoods, where there is no reason or necessity for such change, which purpose is admitted by the demurrer in this case, it might immediately thereafter compel the removal of the wires so placed in subsurface conduits. Nor is such a result impossible of conjecture. Oscillations of power in local government do not always vibrate from the same center, for history is full of illustrations to show that the guardians of the people may become their oppressors, through injurious monopolies that deprive the people of their privileges. The safeguards of the constitution are the ultimate refuge from such usurpations, and it cannot be believed, when we consider the extreme and justifiable jealously which has existed on the part of the lawmakers to guard against the abuse of power, that they could have intended to confer by doubtful terms an arbitrary right upon any municipality in this state unreasonably to deprive its citizens of the benefits of progress or to grant monopolies.

We have noted the point that the defendant claims that injunction is not the proper remedy; that it was the prerequisite duty of the plaintiff to have applied for permission to place its poles to the city engineer, and, on his refusal, to seek its rights through *mandamus*. This is not a case where ministerial officers have refused to perform a duty imposed upon them by law, but where the city itself, by the enactment of ordinances, prohibits it officers from performing such duties. In such a case injunction is clearly the proper remedy. What we have stated above, in addition to what is held in the original opinion, must be deemed a disposition of the claim that section 5 of the ordinance of 1883 gave the city the arbitrary power to remove poles at its pleasure, and we adhere to our former conclusions in this respect.

While we have not noticed particularly all the points suggested by counsel on the reargument and briefs, they have all been fully considered, and we have covered the propositions which seem to us to be decisive; and have reached the conclusion—which seem to us clear as can be realized in any disputed legal controversy—that the power to place poles and wires in the streets of municipalities in this state has been conferred upon the plaintiff by the legislature; that the question as to the manner in which this power should be exercised to meet the demands of convenience and necessity was within the authority of the city; that the ordinance of 1883 was, to a certain extent, so far as manner and form, at least, are concerned, the subject of contract obligation; and that the subsequent ordinances of May and October, 1899, as alleged in the plaintiff's complaint and admitted by the demurrer, impose such burdens upon the plaintiff as to impair their legal contract rights, and to that extent must be restrained, leaving the question of fact yet to be determined, whenever raised in the proper manner, whether the provisions of those ordinances, or of any other that may be adopted, are within the limits of wholesome and proper municipal regulation. For the reasons stated above, we abide by the former opinion of this court, and the order sustaining the demurrer is overruled, and the case remanded.

START, C. J., dissenting: I cannot assent to the conclusion reached by the court upon several vital questions, in this case. It is not my purpose, however, to discuss them in detail, but to simply state my conclusions.

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I dissent from so much of the decision that is to the effect that telephone companies are given, subject only to a proper exercise of the police power, the right, by Gen. St. 1866, ch. 34, § 28, as amended by Laws, 1881, ch. 73 (Gen. St. 1894, § 2641), to use the public streets of the municipalities of the state, without the permission of the corporate authorities, for the purpose of erecting and maintaining their posts and wires therein, provided such posts be located as in no way to interfere with the safety or convenience of ordinary travel in such streets. It seems unreasonable to conclude that the legislature intended by this statute to repeal, *pro tanto*, existing special laws giving to the municipalities of the state the control of their streets, and to control the perpetual right upon telegraph and telephone companies to enter upon any and all of the streets of such municipalities, without consent of the governing body thereof, and erect and maintain therein their poles and wires, subject to no control or limitation except such as is incidental to the exercise of the police power.

I am of the opinion that the plaintiff has no right to maintain its poles and wires in the streets of the defendant city by virtue of Gen. St. 1894, § 2641, but that its rights therein depend upon the charter provisions and ordinances of the city. The plaintiff, by virtue of the existing charter provisions of the city, on January 24, 1883; the city ordinance of that date, referred to in the record as "Ordinance A;" the amendment of the charter 34 days thereafter (Sp. Laws 1883, ch. 3, § 13); and by its acceptance of the ordinance,—acquired a qualified contract right to maintain its telephone exchange system in the streets of the city. The right, however, to have the poles and wires removed from the surface of the streets, and placed underground, whenever, in the opinion of the city council, public interest so required, was expressly reserved, as a part of the contract. This stipulation is something more than the mere right to regulate and control the streets of the city and the business of the plaintiff in the exercise of the police power. That right is inalienable, and need not be reserved. While the city council, by virtue of this provision of the contract, cannot confiscate the plaintiff's property, nor wholly exclude it from the streets of the city, yet it does commit the question as to when, and to what extent, public safety, convenience, and comfort require that the defendant's poles should be removed from the surface of the streets, and its wires placed underground, to the discretion, judgment, and decision of the city council. It is the arbitrator agreed upon to determine the question, between the city and the plaintiff, whether public interests at any particular time require that the wires be placed below the surface of the street; and its decision, when made, whether it be correct, wise or just, is conclusive, unless it has acted in the premises arbitrarily or dishonestly. When, as in this case, the city council passes an ordinance requiring the wires within a designated district to be placed in subsurface conduits, the ordinance, whether a proper exercise of the police power or not, is valid, and must be obeyed, unless the plaintiff can establish by satisfactory evidence that the city council did not enact the ordinance in the exercise of a fair discretion, but arbitrarily or dishonestly. The allegations of the complaint, liberally construed, are sufficient to bring the case within the rule stated, and upon this ground alone I concur in the conclusion of the court that the complaint states a cause of action.

NOTE.—*The Authority of Municipalities Over Telephone, Telegraph and Electric Companies in Ordering the Removal of Poles or Other Obstructions.*—A question very often litigated at the present time, and on which the authorities are not in unison, is the right of municipalities, under charter provisions giving them power to regulate the use of streets, etc., to compel telephone, telegraph and electric companies to bury their wires, and to prevent the further use of poles or other fixtures on the highway which were erected by these companies under general state authority. It must first be recognized that where a telephone company erects its line in a street by the consent of the state and city, and pays damages therefor, it is not a nuisance. Brown v. Southwestern Telegraph & Telephone Co. (Tex. Civ. App.), 44 S. W. Rep. 59. And it must also be further noticed, however, that a municipality cannot deprive itself, by contract or ordinance, of the right to exercise the police power delegated by the statute to license and regulate the use of it streets by telephone and telegraph companies. Borough of Norristown v. Telephone Co. (Pa. Com. Pl. 1898), 15 Montg. Co. Law Rep. 9.

With these two general principles in mind, let us examine the authorities on the right of a municipality to regulate the erection of poles, and to what extent this right can be exercised under the police power. In Kentucky it was held, under Const., sec. 163, providing that no telephone company shall be permitted to erect its poles along the streets of a city without the consent of the proper legislative body of the city being first obtained, but further providing that when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply, where a city council had, without legislative authority prior to the adoption of the present constitution, attempted to grant the right to erect telephone poles and wires along and over the streets of the city, the city has the right to compel the removal of such poles and wires erected without the consent of the city council after the adoption of the constitution. East Tenn. Telephone Co. v. City of Russellville, 51 S. W. Rep. 308. In Wisconsin. Rev. Stat. 1898, sec. 1778, authorizes telephone companies to locate poles and wires in public streets. A city charter authorized the city council by ordinance or resolution to keep streets free from incumbrances and to regulate their use, and provided that no obstruction should be placed in streets without a written permit from the board of public works, which was given power to regulate the placing of telephone lines in streets, parties aggrieved by a decision of the board having the right to appeal to the city council. Held, that a telephone company has no right to place poles in the streets of said city,

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except under the direction of the board of public works, though neither the council nor the board of public works has passed any ordinance or by-law regulating the placing of telephone poles in streets. City of Marshfield v. Wisconsin Telephone Co., 78 N. W. Rep. 735. But in the case of Michigan Telephone Co. v. Benton Harbor, 80 N. W. Rep. 886, the Supreme Court of Michigan held that Pub. Acts 1895, providing that municipal authorities may regulate or prohibit the use of telephone poles in the streets, does not repeal Acts 1883, providing that telephone companies may maintain wires, with necessary fixtures, along any street or highway in the state, which shall not injuriously interfere with its other public uses, since it only confers such authority on municipalities subject to the general law in reference to their streets.

A franchise granted to a telephone company of constructing and operating its lines along and upon streets is subordinate to the rights of the public in a street for the purpose of travel. Cincinnati Incline Plane Railroad Co. v. Telegraph Association, 12 L. R. A. 541. State legislation, therefore, compelling electric wires in the streets of a city to be placed under the surface of the streets is an exercise of the police power, and not an unlawful attempt to regulate commerce, or an invasion of the rights of a telegraph company. Western Union Telegraph Co. v. New York, 38 Fed. Rep. 552. But it was recently held that a grant to a telegraph company to run and maintain wires over and through streets does not include permission to lay them underground. Commonwealth v. Warwick, 135 Pa. St. 623. This case seems to lead to the dilemma of a company authorized by the state to maintain its wires over the streets being compelled by a municipality to do what they have no right to do under their charter, *i. e.*, to place them under the ground. But it is plain that a municipality cannot be permitted to act arbitrarily in a matter of this kind. Thus, an ordinance providing that no telephone wire shall be stretched across any public street without the consent of the township committee, was held not to be a regulation and restriction within the provisions of the statute giving to telephone companies the right to stretch wires over streets in incorporated cities and towns, under certain conditions, subject to such "regulations and restrictions" as may be imposed by the corporate authorities. Inhabitants of Summit Township v. Telephone Co. (N. J. 1898), 41 Atl. Rep. 146. And again, where an agreement between a city and telephone company as to the mode of use of its streets has expired by limitation, the city cannot oust the company from the use and occupation of the streets until it made to appear that no agreement can be made, and that the company, after such failure to agree, delays unreasonably to apply to the court to fix the mode of use, as prescribed by law. State v. The Central Union Telephone Co., 14 Ohio Cir. Ct. Rep. 272.

The point as to the constitutionality of municipal ordinance, requiring the removal of wires to underground conduits, does not seem to have been raised successfully. Thus, in the case of Geneva v. Telephone Co., 62 N. Y. S. 172, it was held that Laws 1897, authorizing board of public works of the city of Geneva to require telephone companies to move their wires from poles to underground conduits whenever it shall, by resolution, determine that public safety requires such removal, was not unconstitutional, as imposing taxation on such corporations without their consent, or opportunity of being heard.

One of the difficulties of this question is encountered in the construction of the acts of congress authorizing telegraph companies to erect and maintain their lines along the postroads of the United States. The question to what extent this authorization goes in interferring with the right of the state to regulate and maintain its own highways, has been very often raised. For instance, in the first place, it has been held that the Act of July 24, 1866, Rev. Stat., sec. 5263, authorizing telegraph companies to maintain and operate their lines along the postroads of the United States, but so as not to interfere with ordinary travel thereon, applies equally to telephone companies. City of Richmond v. Southern Bell Telephone & Telegraph Co., 85 Fed. Rep. 19. This case, however, was subsequently reversed and the act of congress under consideration held to have no application to telephone companies whose business is that of electrically transmitting articulate speech between different points. City of Richmond v. Southern Bell Telephone & Telegraph Co., 174 U. S. 761. This case seems to have authoritatively settled the question whether the phrase "telegraph companies" when used in this connection includes telephone companies as well. And again it was held that the right given by this statute is permissive only and subject to all state or local legislation regulating its exercise and such permission does not affect the right of a municipality in the exercise of its police powers to enact and enforce ordinances intended to promote the safety and convenience of the public in the use of its streets. Michigan Telephone Co. v. City of Charlotte, 93 Fed. Rep. 11. In a later case it was held that this act does not authorize compulsory proceedings to obtain a right of way over private property for such lines, and condemnation of such right of way can only be made by virtue of some law of the state where the property is situated. The very recent case of City of Toledo v. Telegraph Co., 107 Fed. Rep. 10, seems to have gone further than any other case on this subject, and ought to definitely settle the question of the rights of telephone and telegraph companies operating under the provisions of the act of congress of 1866. In this case it was held that an interstate telegraph company which had accepted the provisions of the act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of such lines and without procuring a permit therefor from the city.

It might be fairly stated to be the rule deduced from the authorities that telephone or telegraph companies operating under provisions of a statute giving them the right to place their wires and fixtures over the roads and highways of the state cannot be arbitrarily deprived of such right by municipal ordinance or regulation. Even where the municipality has power under its charter to regulate the placing of poles and other obstructions on the streets of the city, still such regulation or restriction must be reasonable, and the municipality is not the sole judge of that fact. But where the municipality has no such express power to regulate the use of the streets, it may still prohibit and order the removal of obstructions on the streets of the city under its general police power. But in this case also its action must be shown to be a reasonable exercise of the police power and necessary to protect the property, health or general welfare of the inhabitants of the municipality.

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BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 79.

One of the most pleasant duties of the editor of the CENTRAL LAW JOURNAL, and one which he is called upon to undertake with increasing frequency, and, of course, increasing delight, is the review of each successive volume of the American State Reports. The seventy ninth volume of this excellent series of annotated reports, just received, is a conspicuous example of the superiorities of this series over others of similar character; first, in its judicious selection, of only the best considered cases; second, in its learned and exhaustive monographic notes, treating only the latest and livest questions of law, and third, in its excellent workmanship, delighting the eye and suiting itself admirably to the needs and conveniences of the busy lawyer. Out of many exhaustive monographs we select the following as being of special interest: "What Marriages Are Void," p. 361; "When Does the Title of a Statute Embrace But One Subject, and What May be Included Thereunder," p. 456; "Title Acquired by Purchaser at His Own Execution Sale," p. 947; "What Words Create Conditions Subsequent," p. 747; "Partnership After Death," p. 709; "Constitutionality of Civil Service Laws," p. 560. Published by the Bancroft-Whitney Company, San Francisco, Cal.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCOUNT STATED—Attorney and Client.—Where an attorney made out and delivered to his client a statement of his account for services rendered, showing an itemized schedule of debits and credits and the balance due, such account became an account stated, unless objected to within a reasonable time.—CRAWFORD V. HUTCHINSON, Oreg., 65 Pac. Rep. 84.

2. APPEAL—Findings of Court—Equity.—The findings of a court which tries a case without a jury, and without delegating its powers to a master or referee, is entitled to as much if not more consideration than the findings of a master or referee, and the judgment or decree will not be disturbed unless the evidence is manifestly insufficient to sustain it.—BADARACCO V. BADARACCO, N. Mex., 65 Pac. Rep. 153.

3. ATTORNEY AND CLIENT — Disbarment — Information.—The verification of an information in a proceeding to disbar an attorney may be made on information and belief, but the sources of affiant's information must be definitely stated.—IN RE VERDER, N. Mex., 65 Pac. Rep. 190.

4. BANKRUPTCY — Allowance of Attorney's Fees.—Bankr. Act 1898 presupposes that attorneys employed to file a voluntary petition in bankruptcy will arrange with their client for the prepayment of their fees for the services required in the ordinary course of the proceedings, and the provision of section 64b, cl. 3, contemplates the allowance from the estate by the court, in its discretion, of additional fees for extraordinary services which may have been required from such attorneys, which should be fixed at such sum as is equitable in view of the fees already received and the rights of creditors.—IN RE SMITH, U. S. D. C., E. D. (N. Car.), 108 Fed. Rep. 39.

5. BILLS—Notes — Execution Purchaser.—An execution purchaser of a note takes it subject to all equities existing against it in the hands of the original maker.—NEALE V. HEAD, Cal., 65 Pac. Rep. 132.

6. BUILDING AND LOAN ASSOCIATIONS—Sale—Shareholder's Contract—Rescission—Vendor's Lien.—Where plaintiff executed a deed of trust to a building and loan association to take up a note for the purchase price of the lot, and to pay for material which had been used in erecting a building on it, and the association, without the consent of its stockholders, assigned its assets to defendant, and ceased business, the defendant was entitled, on plaintiff's rescinding his contract, to be subrogated to the vendor's lien, and to a foreclosure of the lien.—NORTH TEXAS SAV. & BLDG. ASSN. V. JACKSON, Tex., 68 S. W. Rep. 344.

7. BURGLARY—Evidence.—Where one witness in a prosecution for burglary testifies to having seen a man running from the burglarized house, evidence of another witness that defendant's shoes corresponded with tracks found at the place of the burglary is admissible, though it is not shown that the tracks were made by the man running from the house.—PEOPLE V. ROWELL, Cal., 65 Pac. Rep. 127.

8. CARRIERS—Relation of Carrier and Passenger—How Created.—The relation of carrier and passenger, which will bring a carrier under the obligation to exercise the high decree of care and caution for the safety of a person imposed by such relation, can only be created by contract, express or implied.—FARLEY V. CINCINNATI, H. & D. R. Co., U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 18.

9. COMMISSIONER OF PUBLIC LANDS—Powers—Illegal Exercise—Injunction.—Plaintiff alleged that defendant, as commissioner of public lands, threatened to lease certain public land adjoining a city of which plaintiff was an inhabitant and taxpayer, and that the occupation of such lands by the lessees would contaminate the city water supply, and result in irreparable injury to the inhabitants of the city. Held, that the threatened injury was too remote to require a court of equity to inquire as to whether the threatened acts were within the exercise of the powers of the commissioner.—CITY OF TACOMA V. BRIDGES, Wash., 65 Pac. Rep. 186.

10. CONTRACT—Agreement to Support Another.—Where a conveyance was executed in consideration of the grantee's agreement to support an imbecile sister of the grantors, he cannot refuse to furnish that support because the imbecile refuses to remove with him to another state, as he is bound to furnish the support under such reasonable circumstances as may best conduce to her comfort and convenience.—LAIN V. MORTON, Ky., 68 S. W. Rep. 286.

11. CORPORATIONS — Collateral Security — Pledgee—Right of Action.—Certificates of stock, assigned as security for an indebtedness, give the holder, as pledgee of the stock, a right to maintain an action to compel defendant corporation to recognize it as a stockholder, after an illegal levy of assessments on the stock and sale thereof for delinquency.—HERBERT KRAFT CO. BANK V. BANK OF ORLAND, Cal., 65 Pac. Rep. 144.

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12. CRIMINAL EVIDENCE — Homicide—Self-Defense—Dying Declarations.—Where defendant shot deceased as the latter was crawling toward defendant's house, and defendant testified that he hailed deceased, and the latter made a move as if to draw a pistol, deceased's dying declaration that he had no weapon was admissible as a part of the *res gestæ*.—GRUBB V. STATE, Tex., 68 S. W. Rep. 314.

13. CRIMINAL LAW—Alibi — Instruction.—An instruction that the plea of alibi merely traverses the issue tendered in the indictment, and is not an independent fact, and therefore the burden of proof is not on the defendant to establish it, was properly refused.—SAENZ V. STATE, Tex., 68 S. W. Rep. 316.

14. CRIMINAL LAW - Court's Jurisdiction.—Under the general laws of Texas, the county court has concurrent jurisdiction with the justice courts over all misdemeanors that said courts have jurisdiction to finally try.—BRADY V. STATE, Tex., 68 S. W. Rep. 327.

15. CRIMINAL LAW — Larceny — Fraudulent Intent.—Where defendant sold a horse, which he did not own, to an innocent purchaser, who afterwards took possession of it in another county, the fact that the purchaser had no fraudulent intent, when taking the horse, is not a defense to defendant, when charged with larceny of the horse, since defendant had the fraudulent intent, and the purchaser was acting as defendant's agent.—WALLS V. STATE, Tex., 68 S. W. Rep. 336.

16. CRIMINAL LAW—Murder in First Degree—Alibi.—An instruction that the burden of showing an alibi is on the defendant, but, if the testimony in the whole case raises a reasonable doubt of defendant's presence when the crime was committed, he should be acquitted, is not erroneous as shifting the burden on defendant to show his innocence.—RAYBURN V. STATE, Ark., 63 Pac. Rep. 856.

17. CRIMINAL LAW—Theft—Sufficiency of Evidence.—Prosecutor engaged in a game of poker with five strangers, one of whom, the defendant, was dealing the cards. During the course of the play, defendant dealt prosecutor four aces and another four kings. Defendant then went out, and another took his place as dealer. When it came to a "showdown," prosecutor stated what he held, but declined to show his hand. One of the others then grabbed his cards, saying, "You have got a foul; you have six cards;" and on placing them on the table there were six cards. Thereupon the players grabbed for their money, prosecutor failing to get any. Prosecutor testified that he had five cards until the player grabbed his hand, and that he thought that defendant was present, and joined in the grabbing. All the other witnesses testified that they did not see defendant present or grab for money. Held, that the evidence was insufficient to sustain a conviction for theft.—HERNANDEZ V. STATE, Tex., 68 S. W. Rep. 320.

18. CRIMINAL TRIAL—Counsel — Sickness — Intoxication—Continuance.—Where the sickness of defendant's leading counsel was voluntarily produced by the use of intoxicating liquor, and defendant was represented at the trial by able counsel, it was not error to refuse a continuance.—COLEMAN V. STATE, Tex., 68 S. W. Rep. 322.

19. DIVORCE — Validity—Collateral Attack.—The objection that a decree of divorce is void, because the parties thereto were not residents of the state when the divorce was granted, cannot be raised to defeat the confirmation of the report of commissioners in a suit by the wife to partition community property, since such questions were passed on by the court granting the divorce.—MOOR V. MOOR, Tex., 68 S. W. Rep. 347.

20. EVIDENCE — Dying Declaration.—A statement that the accused and others were skinning or killing a beef when declarant found them, whereupon accused shot declarant, is admissible as part of a dying declaration as tending to show a motive for the shooting, where the beef had evidently been stolen.—MEDINA V. STATE, Tex., 68 S. W. Rep. 361.

21. EVIDENCE—Federal Census.—The federal census is competent evidence to prove the population of a county.—STATE V. NEAL, Wash., 65 Pac. Rep. 186.

22. FIRE INSURANCE — Policy — Dwelling House.—Where, in an action on a fire policy on a building "while occupied as a dwelling house," the complaint fails to allege that the building was so occupied at the time the fire occurred, the complaint does not state a cause of action, since there could be no recovery unless such fact was proved, and the facts necessary to be proved must be alleged.—ALLEN V. HOME INS. CO. OF NEW YORK, Cal., 65 Pac. Rep. 188.

23. FRAUD—Presumptions.—Where the facts upon which fraud is predicated consist as well with honesty as with dishonesty, the law presumes in favor of honesty.—FIRST NAT. BANK OF ALBUQUERQUE V. LESSER, N. Mex., 65 Pac. Rep. 179.

24. FRAUD—Special Deposit—Fraud of Depositor.—A complaint alleging that plaintiff made a special deposit with defendant bank, to be loaned on real estate, but that the bank loaned it to H without any security, and knowing that he was insolvent, is sufficient to support that a recovery for fraud on the part of the bank in procuring H, who was indebted to it, to execute a new note to plaintiff, and thereupon transferring the amount of the loan from the plaintiff's account to that of the bank.—LARSEN V. UTAH LOAN & TRUST CO., Utah, 65 Pac. Rep. 206.

25. FRAUDULENT CONVEYANCE — Debts of Husband—Liability.—Land levied on by plaintiff was conveyed to the wife by a third person. The execution creditor, though he could easily have obtained knowledge of the wife's title, made no attempt to gain possession until more than five years had expired after the conveyance. Held, that he was not then entitled to maintain a motion for possession on the ground that the property had been fraudulently conveyed to the wife to defraud her husband's creditors, since, if any fraud existed, the creditor did not use ordinary diligence to discover the same.—GREEN V. SALMON, Ky., 68 S. W. Rep. 270.

26. HABEAS CORPUS—Custody — Appeal.—Defendant sued out a writ of *habeas corpus*, and was remanded to custody, whereupon he appealed. Instead of being retained in custody, he was given his freedom on a recognizance. Held, that the appellate court had no jurisdiction of the defendant, and his appeal must be dismissed.—EX PARTE MCMINN, Tex., 68 S. W. Rep. 322.

27. HOMICIDE — Judgment — Sentence — Death Warrant.—Ballinger's Ann. Codes & St. §§ 6993, 6996, prescribe the proceedings to be taken when judgment of death is rendered, and include the provision that "the judge shall appoint a day for the execution which shall not be less than 30 nor more than 90 days from the time of judgment, and the sheriff or officer to whom a death warrant is delivered shall return the same within 20 days after the time fixed for execution." Act March 8, 1901, relating to the death warrant, the contents thereof, the return, and fixing the place of execution, amended sections 6993, 6995, *supra*. Held, that *mandamus* would lie to compel the judge of the superior court to issue a death warrant against a defendant convicted before the amendment, though the day fixed therein would necessarily be after the amendment took effect.—STATE V. SUPERIOR COURT OF PIERCE CO., Wash., 65 Pac. Rep. 188.

28. HOMICIDE —Murder—Acquittal—Manslaughter.—Where defendant was acquitted of murder, and convicted of manslaughter, and on appeal the judgment was reversed, he was not entitled in the succeeding trial to an instruction to acquit him of the charge of manslaughter, if the evidence showed him to be guilty of murder.—PICKETT V. STATE, Tex., 68 S. W. Rep. 325.

29. HOMICIDE — Self-Defense — Several Assailants.—

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Where the evidence shows that it may have appeared to defendant that he was in danger of his life or of serious bodily harm from more assailants than one, acting together, an instruction on self-defense, failing to charge that defendant had a right to defend against and to kill either assailant, is erroneous.—SEELEY v. STATE, Tex., 63 S. W. Rep. 309.

30. INDICTMENT—Conspiracy to Defraud the United States—Description of Offense.—An indictment under Rev. St. § 5440, charging a conspiracy to defraud the United States by depriving it of the title to certain lands by means of a fraudulent entry under the homestead laws, which avers that the entry was made, and that by means of it the accused obtained possession of the land, and cut the timber thereon, is sufficient, and need not allege that the land was subject to homestead entry. The conspiracy constitutes the offense, and it need not be shown how the overt act tended to effect its purpose, or that it was successful.—GANTT v. UNITED STATES, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 61.

31. INSURANCE—Premiums — Non- ayment—Forfeiture.—Where a life insurance policy called for an annual premium, non-payment of which forfeited the policy, but provided that the assured might, with the consent of the company, pay the premium in quarterly installments, the assured, having chosen the latter method, was bound thereby, and the policy was forfeited by his failure to pay the installments, though there was no provision in the policy regarding forfeiture for non-payment of installments.—NIXON v. TRAVELERS' INS. CO. OF HARTFORD, CONN., Wash., 65 Pac. Rep. 195.

32. JUDGMENT — Amount — Remittitur.—Where the judgment is in excess of plaintiff's demand as shown by his pleadings, it will be reversed, unless remitted to the amount claimed.—TEXAS & P. RY. CO. v. MITCHELL, Tex., 63 S. W. Rep. 886.

33. JURY—Discussion—Defendant's Failure to Testify.—Where jurors discussed the failure of defendant, charged with arson, to testify, and some of the jurors attempted to explain such failure, there was reversible error.—BUESSING v. STATE, Tex., 63 S. W. Rep. 318.

34. LANDLORD AND TENANT—Lien for Rent—Tenant's Goods Retained.—Where plaintiff claimed a landlord's lien on a safe left on his premises as against purchasers thereof from the tenant, the issue as to whether or not there was any rent due to plaintiff should have been submitted to the jury.—MYAR v. EL PASO GROCERY CO., Tex., 63 S. W. Rep. 337.

35. LANDLORD AND TENANT — Rent — Action—Judgment.—Where defendant leased plaintiff's premises for one year, paying one month's rent in advance, and at the expiration of the month offered to surrender the premises, which plaintiff refused, an action to recover the second month's rent in advance, decided against plaintiff, and in which the only material issue was the validity of the lease, was a bar to an action after the expiration of the year to recover rent, since, the defendant not having been in use and occupation, recovery would necessarily depend on the lease.—DOLAN v. SCOTT, Wash., 65 Pac. Rep. 190.

36. LIFE INSURANCE—Failure to Pay Premium Note at Maturity—Waiver of Forfeiture.—Neither the fact that the company retained the notes nor the fact that insured retained the policies amounted to a waiver of forfeiture, the insured having the right to a reinstatement of the insurance upon certain conditions, and the company therefore having no right to demand a return of the policies.—MANHATTAN LIFE INS. CO. v. SAVAGE'S ADMR., Ky., 63 S. W. Rep. 278.

37. LIS PENDENS—Sale Pendente Lite — Purchaser's Liability.—Where plaintiff seized property under a writ of sequestration, and it was replevined by defendants and sold to C *pendente lite*, and plaintiff obtained judgment in the replevin suit, the fact that C purchased for other parties did not prevent the judgment from being binding on him.—SOUTHERN ROCK ISLAND PLOW CO. v. PITLUK, Tex., 63 S. W. Rep. 354.

38. LOAN TO PAY INTEREST ON MORTGAGE COUPONS—Lender's Right to Preference over Mortgage.—That money was borrowed to pay interest on matured railroad mortgage coupons is no ground for giving the lender a preference over the mortgage; and this, though the loan was necessitated in part by the application of current income to the payment of the purchase money for locomotives which become subject to the mortgage under an after-acquired property clause.—CONTRACTING & BUILDING CO. OF KENTUCKY v. CONTINENTAL TRUST CO. OF NEW YORK, U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 1.

39. MASTER AND SERVANT.—Where laborers were furnished by an employment agency to a railroad promoter, and such laborers committed a trespass on plaintiff's land, and cut timber thereon without right, under the impression that the land was a part of the right of way, the employment agency could not be rendered liable for the trespass under the doctrine that a master who hired his servants to another is nevertheless liable for their negligence, he being responsible for employing unqualified and careless persons, since the injury did not result from any negligence in the selection of the laborers hired to the promoter.—SWACKHAMER v. JOHNSON, Oreg., 65 Pac. Rep. 91.

40. MASTER AND SERVANT—Injury to Employee—Negligence of Fellow-Servant.—Where a servant was not negligent, the master was liable if regligent, if such negligence was the cause of the injury to the servant, though the negligence of plaintiff's fellow-servant may have contributed to the injury.—TEXAS & P. RY. CO. v. MAUPIN, Tex., 63 S. W. Rep. 346.

41. MECHANICS' LIENS—Fees of Master—Sale under Decree.—A master who incurs expenses by having drawn up a notice of sale, etc., before the time limited for the redemption of property has expired, does so at his own risk, and cannot recover back such expenses, if the mechanics' liens for which the sale was to be made are paid before the expiration of the time limited for redemption.—NEHER v. CRAWFORD, N. Mex., 65 Pac. Rep. 156.

42. MECHANICS' LIENS—Foreclosure.—Where miners perform labor for the lessee of a mine under a contract with him alone, they are not entitled, under Rev. St. par. 2276, to a judgment against the owner of the fee, foreclosing mechanics' liens on the freehold.—GRIFFIN v. HURLEY, Ariz., 65 Pac. Rep 147,

43. MORTGAGES—Deficiency—Judgment—Transfer of Mortgage—Personal Liability.—Where the mortgagor conveyed the premises to one who assumed the mortgage, which fact was known to the mortgagee, who agreed in writing with such grantee that the time for payment should be extended, it was error to enter deficiency judgment against the mortgagor, since the mortgagor stood in the relation of surety, and was therefore discharged from personal liability.—HERD v. TUOHY, Cal., 65 Pac. Rep. 189.

44. MORTGAGE—Undertaking to Pay Mortgage.—A deed conveying about 100 acres of land, which recites that the grantees undertake to support the grantors for life, and that it is understood that the grantees are to pay off a certain mortgage "on 25 acres of land hereby conveyed, in addition to the foregoing," creates a lien on the entire tract conveyed to secure the payment of the mortgage debt.—FISHER v. HALL'S EXR., Ky., 63 S. W. Rep. 287.

49. PLEADING AND PRACTICE—Misjoinder of Defendants—Waiver by Failure to Object before Trial.—After a defendant files pleas to the merits, and goes to trial, and remains silent till evidence is offered which entitles plaintiff to judgment on the issues, it is too late to make an objection for misjoinder of parties defendant which he could have made before.—UNITED STATES v. AGEE, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 10.

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Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 27, 1901

The assassination of President McKinley has forced upon the consideration of the country questions of the most serious import—questions which have arisen heretofore, but have been permitted to smolder and to remain unanswered.

The act which resulted in the death of the President is, of course, murder and punishable by death, but the motives which prompted the assassin are important. It was a blow directed, not against Mr. McKinley, but against the President of the United States; it was prompted not by anger or spite against the man, but a deep seated prejudice against the office and the authority it represented. It was executed, not out of hope of any mere personal advantage, but under a settled conviction that the success of certain principles of government, called "anarchy," were necessary to release the world from an imagined tyranny, and that the death of those high in authority were the legitimate and nearest means of its attainment. The assassin, therefore, in this case, as in every such case, poses as a martyr to principle, and the death penalty does not call him to repentance. Herein lies the exceeding seriousness of this question. These principles have other votaries, and a propaganda which seeks to obtain the same awful and controlling influence over others. What is the remedy.

The criminal liability of those who directly incite others to deeds of violence or combine with them to overthrow the government is one of the first questions which suggest themselves, and was clearly decided in the cases which arose out of the anarchist uprising in Chicago in 1886, known as the Haymarket Cases. In one of these cases the editor of the *Arbeiter Zeitung*, who had incited the anarchists to violence together with a number of their leaders were convicted of murder and executed. Chief Justice Magruder, of the Supreme Court of Illinois, in passing upon the case, declared the law to be as follows: "If men combine together as conspirators to accomplish an unlawful purpose, as the overthrow of society and government and law, called by them a 'social revolution,' and seek, as a means to an end, to print and speak, in order to incite others to tumult and riot and murder, those who advise or instigate the others to violence will be held responsible for the murder that may result from their aid and encouragement." Spies v. People, 122 Ill. 1. Further on, in speaking of the liability of editors and orators who spread the pernicious doctrine of anarchy, the court advances this bold statement of the law so appropriate to the present crisis and its lessons: "He who inflames people's minds and induces them by violent means to accomplish an illegal object, is himself a rioter, though he takes no part in the riot. If he wakes into action an indiscriminate power, he is responsible. If he gives directions vaguely and incautiously, and the person receiving them acts according to what he might have foreseen would be the understanding, he is responsible. It can make no difference whether the mind is affected by inflammatory words addressed to the reader through the newspaper organ of a society to which he belongs, or to the hearer through the spoken words of an orator whom he looks up to as a representative of his own peculiar class." This rule does not deny the right of free speech or of the liberty of the press, but holds both the orator and the editor liable for the results which flow from the expression of his sentiments.

The proper limitations on the liberty of the press and their criminal responsibility for creating a feeling of discontent among the unthinking masses, and of disrespect for law and authority, or for instigating to crime and immorality, is a very difficult problem and one which has never been definitely or satisfactorily determined. The late case of *Re* Banks, 56 Kan. 242, goes very far in applying a remedy. In that case a statute of Kansas providing for punishment for publishing a newspaper devoted largely to the publication of scandals and accounts of lecherous and immoral conduct was held not in violation of the constitutional right of all persons freely to "speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right." The court said: "We entertain no doubt that the legislature has power to sup-

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press this class of publications without in any manner violating the constitutional liberties of the press." Most authorities, however, are not willing as yet to go to the extent of this case, and deny the right of the legislature to prohibit the publication of a newspaper for any reason, holding that the only proper remedy is against the newspaper and its publisher, either criminally or civilly, for any abuse of his privileges. *Ex-parte* Neill, 32 Tex Cr. Rep. 275.

Where a newspaper, however, attempts to ridicule and abuse the judiciary they are treading on very dangerous ground. A most commendable and wholesome tendency is to be observed of late years on the part of courts all over the country to hold newspapers to a strict accountability for all publications derogatory of the court or its decisions. The rule in this regard was well stated by the court in the case of State v. Morrill, 16 Ark. 388, as follows: "Any citizen has the right to publish the proceedings and decisions of a court, and if he deems it necessary for the public good, to comment upon them freely, and discuss the fitness or unfitness of the judges for their stations, but he has no right to attempt by defamatory publications to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments and decrees. Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well-being in society. The liberty of the press is one thing, and licentious scandal is another."

NOTES OF IMPORTANT DECISIONS.

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—RELIGIOUS INFLUENCE.—A case has recently risen in which the facts, while quite unique, are not unlikely to arise more often in the future. We refer to the recent case of Dowd v. Dowd (Mich.), 86 N. W. Rep. 86. The question of law was whether the honesty of their belief in certain religious teachings by which they obtained money had any effect on a charge against them for obtaining money under false pretenses. The defendants represented to a Mr. Curtis that they were the apostles of Christ; that said Curtis and they were to be the judges of the people in that part of the country; that the son of Curtis was to be Christ in his second coming; that they (respondents) were sent by the Lord to tell Curtis these things; and that the Lord required of him to pay to them $300, to make a home for them, which he did promptly. The respondents were convicted. The court charged the jury in very clear language, that if they believed defendants to be honest in their religious belief, no matter how misguided they might believe them to be, they could not be convicted. The supreme court, on appeal, held the charge to the jury to be a most correct one, and further that the jury are the sole judges of the sincerity of defendant's belief in such cases.

In view of the fact that certain leaders and promulgators of strange religious teachings have been alleged to have grown extremely wealthy under the successful growth of their new propaganda, it is very possible that cases of a similar nature will arise. The difficulty in handling such cases is to find the line between a proper regard for the freedom of conscience and religious belief on the one hand and the protection of the weak-minded and those easily influenced, from the schemes of religious tricksters. Even a jury of twelve sensible men will find it hard sometimes to carefully distinguish between religious trickery on the one hand and sincere belief on the other, but, undoubtedly, they are the most competent judges of that question.

MORTGAGES—RIGHT OF MORTGAGEE TO FORECLOSE AFTER DEATH OF MORTGAGOR.—What acts of the mortgagee will operate to release or discharge the lien of a mortgage has always been a litigated question of law. One phase of this question arose in the recent case of National Fire Insurance Co. v. Fitzgerald (Neb.), 85 N. W. Rep. 948, where it was held that a mortgagee may, after the death of the mortgagor, institute a suit to foreclose his mortgage, and the mere filing in the county court of the mortgage debt as a claim against the decedent's estate while the foreclosure suit is pending will not operate as a release or a discharge of the mortgage. Reviewing the authorities the court said in part: "Considering together the various provisions of chapter 23, *supra*, it is quite apparent that the right of a mortgagee to foreclose his mortgage is not affected in any way by the death of the mortgagor; and it is equally clear that the legislature did not intend that the filing in the county court of a claim secured by a mortgage or other lien on the debtor's property should work a forfeiture of the security. The following authorities bear upon the question, and tend directly or inferentially to sustain the conclusion we have reached: Meehan v. Bank, 44 Neb. 213, 62 N. W. Rep. 490; State v. Nebraska Sav. Bank, 40 Neb. 342, 58 N. W. Rep. 976; Andrews v. Morse, 51 Kan. 30; Kohl v. Hall, 141 Ind. 411, 40 N. E. Rep. 1060; Simms v. Richardson, 32 Ark. 297; Jones, Mortg. § 1218; 5 Am. & Eng. Enc. Law (1st Ed.), 213; 8 Am. & Eng. Enc. Law (2d Ed.), 1069. The authorities cited by counsel for appellants (Libby v. Cushman, 29 Me. 429; Whitney v. Farrar, 51 Me. 418; Evans v. Warren, 122 Mass. 303; Buck v. Ingersoll, 11 Metc. (Mass.) 226, to the effect

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that a mortgagee may waive his lien, and will, under some circumstances, be held to have waived it, by his conduct, are not, we think, applicable to the facts of this case. The plaintiff did not actually intend to abandon his lien, and he has done no act which is inconsistent with the existence of the right to enforce it. His position is as logical now as it would have been had he brought a foreclosure suit against Fitzgerald in his lifetime, and afterwards sued him to recover a personal judgment on the mortgaged debt."

RAILROADS—ACTION FOR KILLING DOG.—An interesting case was recently decided by the Supreme Court of Alabama, in the case of Louisville & Nashville Ry. Co. v. Fitzpatrick, 29 South. Rep. 859, where it was held that a dog is a species of property for the injury of which an action at law may be maintained; and that the owner of a dog can maintain an action against a railroad company to recover damages for the negligent killing of such dog. The court gives the following explanation of the position: "By the common law ownership of a dog carried with it property rights sufficient to afford the owner a civil remedy for injuries to the animal, but which was not a subject of larceny. 4 Bl. Comm. 235. This court has followed the common-law doctrine entire as to action for damages in Parker v. Mise, 27 Ala. 480, and White v. Brantley, 37 Ala. 430, and representing larceny in Ward v. State, 48 Ala. 163, and Johnson v. State, 100 Ala. 32, 14 South. Rep. 629. In other jurisdictions the civil remedy has been generally accorded, but to justify the proposition that a dog cannot be stolen has been difficult to an extent which has produced much conflict in decisions on that subject. See note to Hamby v. Samson (Iowa), 67 Am. St. Rep. 285, 74 N. W. Rep. 918, 40 L. R. A. 508, which collates and reviews authorities. Still more difficulty is invited by the theory of appellee's demurrer and argument going upon the assumption that a dog, though property, when willfully injured has no such attribute as will merit the exercise of care to avoid his injury. That theory seems to be favored by the opinion in Jamison v. Railroad Co., 75 Ga. 444, 58 Am. Rep. 476; but it was not necessary to the decision there made. In that opinion Wilson v. Railroad Co., 10 Rich. 52, is cited as authority, but the latter decision, as is shown in Salley v. Railroad Co., 54 S. Car. 481, 32 S. E. Rep. 526, 71 Am. St. Rep. 810, turned on the construction of a statute relating to the burden of proof on the question of negligence. In Salley's case, *supra*, the decision was on a demurrer to a complaint claiming damages for alleged negligence of a railroad company in running over and killing a dog, and is, therefore, directly in point here. It upheld the cause of action as a conclusion resulting from what had been held on kindred questions in many adjudications referred to in the opinion. To the same effect are Railway Co. v. Hanks, 78 Tex. 301, 14 S. W. Rep. 691; Transit Co. v. Dew, 100 Tenn. 317, 45 S. W. Rep. 790, 66 Am. St. Rep. 754; Jones v. Railroad Co., 7 Miss. 970, 23 South. Rep. 358."

RAILROADS—LIABILITY FOR NOT RINGING BELLS.—A question often arising and on which the courts are still in dispute is the liability of railroads for injuries at crossings where the statutory signals were not given. This question arose recently in the case of Mankey v. Railway Co. (South Dak.), 85 N. W. Rep. 1013. In that case a statute provided that whenever a railroad train approaches any crossing a bell shall be rung or a whistle blown, and that, in case of neglect, the railroad shall be liable for damages sustained by any person by reason of that neglect. Held, that where a horse was injured by being run into by a train between a whistling post and a crossing, and no statutory signals were given, there could be no recovery for the injury, in the absence of evidence that such failure was the cause of the injury. In construing the statute just referred to, the court said in part:

"The decisions of the courts under similar statutes are not in entire harmony, and no usefu purpose would be served by an attempt to review them; but the general rule laid down seems to be that unless the failure to comply with the statute in some manner contributes to the injury complained of, the company is not liable. In other words, there must be some connection between the failure to comply with the statute and the injury, and this, like any other fact in the case, must be proven by evidence, or, at least, there must be evidence from which the jury may reasonably draw the inference that the neglect of duty was the cause of the injury. Railway Co. v. Stebbing, 62 Md. 504; Hayes v. Railroad Co., 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28 L. Ed. 410; Railway Co. v. Blackman, 63 Ill. 117; Railway Co. v. McDaniels, 63 Ill. 122; Pike v. Railroad Co. (C. C.), 39 Fed. Rep. 754; Bell v. Railway Co. 72 Mo. 58; Evans v. Railroad Co., 62 Mo. 57; Railway Co. v. Taylor, 104 Pa. 306; Holman v. Railroad Co., 62 Mo. 562; Wallace v. Railway Co., 74 Mo. 594; Railway Co. v. Pierce, 33 Kan. 61, 5 Pac. Rep. 378; Reynolds v. Railway Co., 16 C. C. A. 435, 69 Fed. Rep. 808, 29 L. R. A. 695; Blankenship v. Railway Co., 15 Tex. Civ. App. 82, 38 S. W. Rep. 216; Railway Co. v. Parker (Tex. Civ. App.), 37 S. W. Rep. 973, 46 S. W. Rep. 289; Railroad Co. v. Burke, 93 Ga. 319, 20 S. E. Rep. 318. In Wallace v. Railway Co., *supra*, the Supreme Court of Missouri, speaking upon the subject, says: 'Neither does the failure to ring the bell or sound the whistle constitute negligence *per se;* there must appear to be some necessary connection betion between the failure and the injury.' In Holman v. Railroad Co., *supra*, it appears from the opinion that the plaintiff, to maintain the issues on his part, introduced evidence tending to show that the bell was not rung nor the whistle sounded, and the court says: 'The damage must

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be shown to be the result of the negligence; that is, the negligence must first be shown, and this fact must be supplemented by testimony tending to show that the negligence occasioned the damage.'"

CORPORATIONS — CANCELLATION OF STOCK SUBSCRIPTION—RIGHTS OF RECEIVER.—An interesting case of the right of a receiver of a corporation to bring suit on subscription for stock which had been cancelled by the corporation was that of Lellyett v. Brooks (Tenn.), 62 S. W. Rep. 596, where it was held that where a corporation permits the cancellation of a stock subscription, it and its assignee in insolvency are estopped to sue thereon; creditors existent at the time, and still unpaid, being the only ones who can sue on such subscriptions.

This decision is in line with the authorities. Thus, in the case of Glenn v. Hatchett, 91 Ala. 316, it was held that a resolution adopted by a corporation—that is, by the stockholders directly, or ratified by them after its adoption by the board of directors—authorizing the surrender and cancellation of one-half of the number of shares subscribed for, so that 5 per cent. paid on the whole number shall be considered as ten per cent. paid on the half retained, is valid and binding as between the corporation and the stockholders who avail themselves of it; and it is equally binding on a trustee appointed in a deed of assignment for the benefit of creditors, executed by the corporation on its subsequent insolvency, or a trustee appointed in his stead by a court of equity; but creditors may, it seems, set aside such surrender and cancellation as a fraud on their rights. The case of Insurance Co. v. Swigert, 135 Ill. 150, 25 N. E. Rep. 680, 12 L. R. A. 328, is equally in point. In that case it appeared that proceedings were instituted by a receiver whose powers were the same as those of an assignee under a voluntary assignment, and that the question was whether such receiver could sue and recover amounts on subscriptions to stock which had been previously cancelled by the company. Said the court: "A corporation may, if it acts in good faith, buy and sell shares of its own stock. Railroad Co. v. Town of Marseilles, 84 Ill. 145, 643; Chetlain v. Insurance Co., 86 Ill. 220; Clapp v. Peterson, 104 Ill. 26. The surrender by stockholders to the company of the certificates of stock upon which 20 per centum had been paid, and the issuance to such stockholders of certificates for paid-up stock, was, in substance and in legal effect, a purchase by the company of the unpaid stock at its par value. The transaction in question was lawful and valid, so far as the company itself was concerned, and was binding upon it, and it had no right to impeach it; only the creditors were entitled to that privilege. And the company had no authority to enforce or to 'control' the claims, and it could not pass by its deed of assignment to any one, either assignee or receiver, any right of control or enforcement that it did not itself have." See, also, Bouton v. Dement, 123 Ill. 142, 14 N. E. Rep. 62; Institution v. Adae (C. C.), 8 Fed. Rep. 106, 109; Clapp v. Nordmeyer (C. C.), 25 Fed. Rep. 71, 73; Manufacturing Co. v. Wright (C. C.), 22 Fed. Rep. 631. See, also, the case of Anderson v. Amonzett, 9 Lea, 1, 13, 14, where it is held that an assignee for creditors does not occupy the *status* of a creditor, but merely that of a volunteer. To the same effect see Trust Co. v. Bank, 91 Tenn. 336, 18 S. W. Rep. 822, 15 L. R. A. 710; Stainbank v. Manufacturing Co., 98 Tenn. 306, 319, 39 S. W. Rep. 530.

JUDGMENT—ASSIGNMENT OF PART OF JUDGMENT.—There has been some dispute whether the assignment of part of a judgment without the debtor's consent is valid against the latter's objection. This question arose in the recent case of Line v. McCall (Mich.), 85 N. W. Rep. 1089. In this case A and L were partners, and as such obtained a judgment against defendants for $6,000. On July 26, 1895, L assigned his interest in the judgment to plaintiff, and notice thereof was served on defendants' attorney. In August, 1895, A settled with defendants, through their attorney, for $1,100, and A executed a release of the judgment in the name of the firm. Held that, as the assignment of a part of the judgment was enforceable in equity, a decree dismissing plaintiff's bill to set aside the satisfaction of the judgment was erroneous. Montgomery, C. J., reviewed the authorities on this point as follows:

"There is no doubt of the fact of the assignment by Le Veque of his interest in the judgment to the complainant Line. It does not appear that any creditor is complaining, and it does appear that Le Veque's co-partner, Alway, assented to this assignment. In what manner, then, the assignment works any injury to the judgment debtor, I am unable to see, unless it be true, as contended, that an assignment of a portion of a judgment is of no effect, either in law or equity, as against the judgment debtor. I do not understand this to be the rule. It is true that it has been held in some jurisdictions that at law an assignment of a portion of a judg- is wholly ineffectual. In Missouri it seems to have been held that it is equally ineffectual in equity. See Love v. Fairfield, 13 Mo. 300, 53 Am. Dec. 148, and Burnett v. Crandall, 63 Mo. 410. But elsewhere the rule seems to be firmly established that an assignment of a portion of a claim is good in equity, and creates at least a trust in favor of the equitable assignee, or, as is said by the Supreme Court of Ohio, in Railway Co. v. Volkert, 58 Ohio St. 362, 50 N. E. Rep. 924: 'Whatever term is applied to it (the assignment) by way of description, the result reached is to give to the assignee a property right in the thing assigned—a right which is cognizable and enforceable in a court of equity.' In the case last cited it was distinctly held that, after an assignment of a portion of a demand or judgment, the

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debtor, having notice of the assignment, could not discharge the entire demand, so as to cut off the rights of the assignee. See, also, Railroad Co. v. Ackley, 58 Ill. App. 572; Moore v. Robinson, 35 Ark. 293; Beers v. Henderson, 45 N. Y. 665."

It might be well to call attention to some of the latest authorities on this question. In the case of McMurray v. Marsh, 54 Pac. Rep. 852, it was held that a partial assignment of a judgment is binding on the assignor, even when made without the judgment debtor's consent. In the case of Pittsburg, etc. R. R. v. Volkert, 58 Ohio St. 362, 50 N. E. Rep. 924, it was held that a judgment debtor, after knowledge of an equitable assignment of an interest in the judgment, has no power to compromise the debt with the assignor alone, and thus defeat the claim of the assignee. The assignment of an interest in a right of an action for a personal injury which is to be prosecuted in the name of the assignor, with an agreement to assign a corresponding interest in the judgment which might be recovered in the future, is equivalent to an equitable assignment of the specified interest in the judgment the moment it is perfected, and binds all parties having notice or knowledge of the same. North Chicago St. Ry. Co. v. Ackley, 58 Ill. App. 572. In Missouri, as stated by the court, the rule is diferent. The case of Loomis v. Robinson, 76 Mo. 488, lays down the rule emphatically that a part of a judgment cannot be assigned without the debtor's assent, and that such an assignment without consent of debtor is void, both at law and in eqnity.

ADULTERY—EVIDENCE OF INTIMACY PRIOR AND SUBSEQUENT TO THE OFFENSE CHARGED.—A local paper recently sent to us by a correspondent in Michigan contains a severe editorial arraignment of one of the latest decisions of the supreme court of that state in which, it is asserted, the court has directly contradicted itself on a question of law of more than usual importance. The editorial criticism referred to is as follows:

"Is it any wonder that a lawyer's hair grows prematurely gray practicing law in Michigan, while glaring inconsistencies are so common among the decisions rendered by the supreme court? To illustrate our point we will refer to two quite recent opinions filed in cases in which the subject-matter was the same, and the precise question in each was: What familiarity is admissible in evidence to corroborate a charge of adultery? The first case is that of The People v. Fowler, 104 Mich. 453, decided March 19, 1895. The defendant had been convicted of adultery, and in setting aside the conviction the court, in an opinion by Justice Long, said: 'Testimony was admitted to show a similar offense on May 6th, 1892. This was some three months after the offense charged in the information. The court was in error in admitting this testimony. Acts of intimacy in this class of cases prior to the offense charged may be shown but it is wholly incompetent to show subsequent acts for any purpose.' Citing People v. Clark, 83 Mich. 112; People v. Etter, 81 *Id.* 571; People v. Hubbard, 92 *Id.* 326. The other case is that of Mathews v. The Detroit Journal, 123 Mich. 609, decided April 3, 1900. The plaintiff, Mrs. Mathews, had obtained a heavy verdict against the defendant, in an action of libel for having published an article charging, that on a certain day at the village of Wayne, she had committed adultery with one Ainsworth. In an opinion written by Justice Montgomery the judgment of the lower court is reversed for the following reason: 'The defendant offered to show that about October 25th, plaintiff and one Ainsworth were seen on Fort Street Bridge, Detroit, embracing and kissing each other. This testimony was excluded, the court remarking, "Improper conduct in October don't prove improper relations in July." This offer presents the most important question in the case. The question of whether subsequent acts of familiarity and intimacy can be shown in corroboration of testimony tending to show adulterous intercourse, has never been distinctly decided in this court. But we find the courts of other states have frequently had occasion to consider this question and in numerous and well considered cases the admissibility of such testimony has been affirmed. * * * The testimony should have been received.' Justices Montgomery and Long, the authors, signed both of these opinions, although they decide exactly the same question in directly opposite ways. The latter opinion innocently asserts that this question has never before been passed on by the Supreme Court of this State, while the first opinion shows five distinct rulings on it. Not a word is said in the last opinion of the intention of the court to overrule the earlier decisions, so that we are left in profound ignorance of what he law really is."

While it is difficult to understand how a court of last resort can contradict itself on so important a rule of law in such a short interval or why the diligence of counsel should not have disclosed the contradiction, it is to be noted that the Supreme Court of Michigan is not alone in this failing. It is a fault more common with courts of appeal now than formerly, owing, no doubt, to the vast amount of business which overcrowds the courts of the present day and make anything like a carefully worded and considered opinion out of the question. Of the two opinions of the Michigan court alleged to be in contradiction, the latter is undoubtedly the correct one and in line with the great weight of authority. In all cases charging adulterous intercourse evidence of the particular acts alleged to constitute the unlawful intimacy must first be introduced before any other evidence whatever is admissible. What other acts of intimacy may be proven in corroboration has been a matter of some conflict of opinion. Very early, however, the rule became established that evidence having

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been introduced of adulterous intercourse during the period covered by the indictment, proof of similar acts or improper conduct prior to that time may be received in corroboration. State v. Pippin, 88 N. Car. 646; State v. Markins, 95 Ind. 464; Cross v. State, 78 Ala. 430; Brevaldo v. State, 21 Fla. 789; State v. Way, 5 Neb. 283; Commonwealth v. Durfee, 100 Mass. 146; State v. Marvin, 35 N. H. 22; State v. Henderson, 84 Iowa, 161; Commonwealth v. Bell, 166 Pa. St. 405. This rule constitutes an exception to the general rule of evidence in criminal proceedings, that the commission of other, though similar, offenses by the defendant cannot be proven to show the likelihood of his having committed the offense charged. But, as was said in a recent case, this rule has been, of necessity, specially relaxed in cases where the offense consists of illicit intercourse between the sexes. State v. Markins, 95 Ind. 464. Later the rule was again extended and has now been generally adopted that, on a charge involving illicit intercourse, during a particular period, evidence of acts subsequent to that time, which tend to illustrate or explain similar acts within the particular period, are admissible in connection with evidence of similar acts during the time laid, to prove illicit intercourse as charged. See Brooks v. State, 52 Ala. 24; State v. Bridgman, 49 Vt. 202; Cole v. State, 65 Tenn. 243; State v. Williams, 76 Me. 480; Commonwealth v. Nichols, 114 Mass. 285. This latter extension of the rule however, has not been universally accepted. For instance, some States, like Iowa, refuse to include subsequent acts within the exception to the general rule and hold that where the charge is of one act of adultery to which evidence has been given, the prosecution is not permitted afterwards to introduce evidence of other acts committed subsequently. State v. Donovan, 61 Iowa, 278, citing 2 Greenleaf on Evidence, sec. 47.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR DEFECTIVE PREMISES.—One of the most controverted questions of law to-day is the liability of a landlord for the defective condition of his premises. The common law practically excused the landlord from any liability whatever in such cases. But since the late case of Wilcox v. Hines, 100 Tenn. 538, so severely criticised by law journals and annotators, the tendency has been to relax the rule at common law in favor of the tenant and hold the landlord liable, not only for his positive torts, but also for his concealment of latent defects within his knowledge or which ought to be. This tendency is well illustrated by the recent case of Moore v. Parker, 64 Pac. Rep. 75, where the Supreme Court of Kansas held that a landlord is not an insurer or warrantor, nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are defective and in a dangerous condition, and especially if such dangerous or defective place is not obvious or is not discoverable to the tenant by the exercise of ordinary care, and he does not inform the tenant of such defective or dangerous place, and injury is occasioned thereby to the tenant or a member of his family who is not aware of such defective or dangerous place, while in the exercise of ordinary care, the landlord is liable to damages.

The facts in this case show that while the plaintiff in error was about her household duties upon said premises, drawing water from a well used for domestic purposes, and located at the residence, the platform around the well gave way, precipitating her into the well, from which she sustained personal injuries. The allegations in the petition, which was held good on general demurrer, were in substance as follows: First, the allegation of the lease between the parties and the occupation of plaintiff thereunder; that the well that was intended for use for domestic purposes, and situated at the porch of the residence, was covered with a wooden platform or planks; that the defendants in error had built the platform over this well, and had constructed it of inferior and unsuitable material, selected by them for that purpose, and used in its construction by their direction; that the sleepers or stringers under this platform were in a defective and unsafe condition at the time of the leasing and taking possession by plaintiff in error; that the defendants in error knew this, and, notwithstanding their knowledge, they negligently, fraudulently and carelessly concealed it from the plaintiff, as well as from her husband, the lessee, and failed to disclose said knowledge to the plaintiff or her husband; that the defects in the sleepers or stringers were not obvious, and could not be discovered by the exercise of ordinary care; that the plaintiff in error did not know of such defective material or the dangerous condition of the platform; that in the performance of her household duties she was required to, and frequently did, draw water from this well; and that upon this occasion, about two months after they had gone into possession, she was in the exercise of ordinary care, and while performing her household duties, and in attempting to draw water from this well, the sleepers or stringers under the platform around the well gave way, and she was precipitated into the well, whereby she sustained personal injuries.

The court makes this excellent statement of the rule of law to be applied to such a statement of facts:

"In deciding this question, we are not called upon to determine the liability of the landlord, where he did not have actual knowledge of the defective condition of the premises. A landlord is not an insurer or warrantor, nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are in a dangerous condition, and especially if such danger or defect is not obvious, or is not discoverable by the means of the tenant by the exercise of ordinary care, and does not in-

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form him of such danger and injury is occasioned thereby to the tenant or a member of his family, the landlord is liable in damages. The law requires good faith on the part of the landlord towards his tenant. The defect existed when the premises were leased, and the defendants in error knew this, and intentionally concealed it from their lessee; and, it being a defect not discoverable by the lessee or his family in the exercise of ordinary care and reasonable diligence, we have been unable to find any principle upon which the demurrer should have been sustained. The rule seems to be that in the absence of a contract to repair, or warranty of condition, both landlord and tenant must use reasonable care and diligence. If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or, knowing their condition, assumes the risk, then he cannot recover against the landlord. On the other hand, if the landlord actually knows they are unsafe, and conceals or misrepresents their condition, then he is liable; the tenant being in no fault."

The court bases this statement of the law on the following authority: Wilcox v. Hines, 100 Tenn. 538; Edwards v. Railroad Co., 99 N. Y. 249; Coke v. Gutkese, 80 Ky. 598. The case of Wilcox v. Hines, however, goes further than the statement of the court in this case and holds the landlord liable for what he ought to know as well as for what he actually knows. For full discussion of this important question see 52 Cent. L. J. 388.

THE POWER OF ONE PARTY TO AN EXECUTORY CONTRACT TO STOP ITS PERFORMANCE WITHOUT THE CONSENT OF THE OTHER.

It has often been ruled by the courts that one party to an executory contract may rightfully stop performance under it at any stage before full completion, but subject to the liability of responding in damages to the party able and willing to continue its execution. Indeed, it is believed, that in all cases except where equity will enforce specific performance—such instances as a class forming an exception to the general rule—one who is willing to subject himself to the liability for such damages as are recoverable at law for the breach of his contract, has the legal right to stop performance at any point before its full accomplishment. The right is usually denominated the power to stop performance, and notwithstanding its exercise is deemed to constitute a breach of the contract, it nevertheless, to such an extent changes in law the relations of the parties interested, that it places the one willing to continue under an entire new obligation, and one not specified in the contract. Such obligation is never stated at less than to refrain from further performance, and often there is superadded the duty of using all ordinary care and making all reasonable exertion to render the injury as light as possible.[1] By the exercise of the power mentioned the contract is not put an end to as upon a rightful rescission, but survives in force as a basis of the right to recover damages by the party not in fault. The liability to respond in damages on the part of the party stopping performance, and the right of the party willing to perform to recover damages, constitute the foundation of the power to stop performance accorded by the law to the one party and the obligation thereby imposed upon the other to refrain from performance. The damages awarded by the law to the party not in default for a breach of the contract—and the exercise of the power under consideration is nothing other than a breach—are deemed to be the equivalent, measured in money, of the advantages to be derived from complete performance, or as often expressed, full compensation for the injury inflicted. In awarding damages the law aims fully to compensate the party not in fault for the injury suffered.[2] Indeed, from the presumed inadequacy in some instances of the damages recoverable at law to compensate for the injury arises the jurisdiction in equity to decree specific performance.[3] And therefrom also doubtless may be discovered one of the reasons for excepting contracts of which equity will decree a specific performance from the general rule under consideration.[4] However, in all cases where the damages recoverable at law for the breach of a contract are judicially deemed a just equivalent for the injury there seems to exist in favor of the party willing to subject himself to a liability for such damages, the right of stopping performance by the other party to

[1] 1 Suth. Dam. 88, and cases cited; Dillon v. Anderson, 43 N. Y. 231.

[2] Moline Scale Co. v. Beed, 52 Iowa, 307, 3 N. W. Rep. 96; Griffin v. Colver, 16 N. Y. 489; Allison v. Chandler, 11 Mich. 542.

[3] Morgan v. Bell, 3 Wash. 554, 28 Pac. Rep. 925, 16 L. R. A. 614; 3 Par. Cont. 350, ch. 11.

[4] Marsh v. Blackman, 50 Barb. 333.

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the contract at any period.[5] In the nature of things the power exists in respect of executory contracts only, and though as before intimated its exercise is deemed a breach of the contract, it seems nevertheless to adhere in and constitute an implied provision or incident of the contract itself,[6] and in point of time to continue until the full execution of the contract is accomplished by the party willing to perform. An early case in New York with great force and clearness states the rule and the reason upon which it rests.[7] Of this decision Mr. Bishop, in his work on Contracts,[8] says: "The opinion in this case is brief; it cites no authorities, but in legal argument it is conclusive," and it might be added that no subsequent decision seems to have discovered or suggested any additional reason for the rule. The case was: The defendant delivered a number of paintings to the plaintiff to be cleaned and repaired at certain prices stipulated for each. After the plaintiff had commenced work upon them, the defendant directed him not to go on as he had concluded not to have the work done. The plaintiff, however, finished the work and claimed to recover for the whole, insisting that the defendant had no right to countermand the order. At the trial requests for instructions by each party according to his contention were asked, but the court instructed the jury that inasmuch as the plaintiff had commenced the work before the order was revoked, he had a right to finish it, and to recover the whole value of his labor and for his materials furnished. The verdict and judgment were for the plaintiff. In considering the defendant's exceptions to the charge upon errors assigned, the court says: " * * * The defendant by requiring the plaintiff to stop work upon the paintings violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain, * * * but the plaintiff had no right by obstinately persisting in the work, to make the penalty upon the defendant greater than it otherwise would have been. To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work and pay for what has been done, and the damages sustained by the contractor. He may be under a necessity of changing his residence, but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith toward the employer." The judgment was reversed.

It is noticeable that in the suppositious cases mentioned the court finds reasons excusing the discharge of the laborer and the discontinuance of work upon the house, but in the statement of facts in respect to which the decision was made, no excuse is discovered or referred to. It is, therefore, clearly inferable that the event by which a party is induced to break his contract is not a material subject of inquiry in an action to recover damages for such breach. And to such effect doubtless is the law as disclosed by the tenor of the decisions upon the questions, though the language of some of the common-law prececents would seem to indicate that the rule is otherwise.

Upon the authority of this decision the Supreme Court of Vermont,[9] held where a

[5] The right is most frequently declared [illegible]

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further execution of the contract, and they so did, that it was not an abandonment but a breach of the contract. Hall, J., says: "The direction of the defendants to the plaintiffs to quit the work was positive and unequivocal, and we do not think the plaintiffs were at liberty to disregard it. In Clark v. Marsiglia, 1 Denio, 317, it was held, that the employer in a contract for labor had the power to stop the completion of it, if he chose—subjecting himself thereby to the consequences of a violation of his contract; and that the workman, after notice to quit work, had not the right to continue his labor and claim pay for it, and this seems to be reasonable." The court further expounds the reason for the rule as applied to the case before it, and says: "Rather than an injury so greatly disproportioned to that which could possibly befall the workman should be inflicted on the employers, it seems better to allow them to stop work, taking upon themselves, of course, all the consequences of such a breach of their contract. Such we think is and ought to be the law." The decision also holds that it was optional with the plaintiffs to treat the contract as rescinded from the beginning, and, though the defendants urged that the rate of compensation specified in the contract should be the only rule of recovery, it was held that the plaintiffs might recover as upon a *quantum meruit* for the work done.[10] The court reasons that to hold to the rule contended for by the defendants "would impose upon the plaintiffs a contract they have never made." The location of the railroad had been changed from the place where the work was contracted to be done. So there was ample excuse for the direction given not to continue the work. And the same court in a later case,[11] speaking by Peck, J., says: "While a contract is executory, a party has the power to stop performance on the other side, by an express direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the progress in the execution of the contract."[12] The contract in this case was for the purchase and delivery of a quantity of potatoes, and a fall in the market price was the reason by which the defendant was induced to direct the plaintiff not to make further purchases. The same principle was applied to a contract between a city and a lighting company,[13] wherein it appeared that the city by a resolution of its common council approved by the mayor, declared such contract at an end and wholly rescinded and so notified the company. The court say:[14] "As we understand the law applicable in such cases, it gives to the city, notwithstanding the contract, the absolute right, at its own election, to decline to receive any more gas under it, thereby refusing performance on its part.[15] And the doctrine has been applied to a contract for future employment and service where the employer at the time the service was to commence absolutely repudiated the contract.[16] The case holds that the remedy of the employee is not in action for wages, but to recover damages for the breach of the contract. So when the state had entered into a contract with an individual for the erection of a public building and afterward the legislature passed an act suspending and discontinuing the work or providing for its performance by other agencies, it was held that the state stands, in this respect, in the same position as an individual, and may at any time abandon an enterprise and refuse to allow the contractor to proceed. Such refusal would be only a violation of its contract.[17] The rule that the remedy is limited to the recovery of damages is applicable to contracts only while they are executory and the consideration for which is entire and not divisible.[18] In Butler v. Butler[19] the case was:

[12] See also Freidlander v. Pugh, 43 Miss. 117, 5 Am. Rep. 781, citing with approval Clark v. Marsiglia, 1 Denio, 317.

[13] City, etc. v. The Nebraska, etc. Co., Neb. 339, N. W. Rep. 870.

[14] Lake, J., writing the opinion.

[15] Citing Clark v. Marsiglia, 1 Denio, 317.

[16] Howard v. Daly, 61 N. Y. 362.

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The plaintiff contracted to erect on the defendant's premises a complete machine all ready to make gas. The defendant agreed to pay freight on the machine and to furnish tank and house and pay $1,500 "when the works are on the ground." The plaintiff shipped the materials and parts of the machine which the defendant received and paid the freight thereon, but did not permit the plaintiff to put up the machine. The court held that an action to recover the contract price was not maintainable; that as the contract was entire and had not peen performed, and as the contract price was not divisible no recovery could be had for any portion of it. The delivery of the parts only did not constitute the delivery of a complete article; the property of such parts did not vest in the defendant and the consideration or contract price not being divisible the plaintiff's only remedy was to recover damages for a breach of the contract.[20] To the same effect is Hosmer v. Wilson,[21] wherein Christiancy, J., after stating the reason assigned for the holding in Clark v. Marsiglia, says: "This doctrine is fully approved in Derby v. Johnson above cited.[22] This would seem to be good sense and, therefore, sound law. And it would seem that any other rule must tend to the injury and, in many cases, to the ruin of all parties." The rule has been approved in Massachusetts.[23] The court says: "A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits." And the explicit order or notice would be sufficient if given to such agent or employee as was authorized to stand in the place of and represent his principal in the particular branch of his business connected with the subject of the contract, though such notice should never come to his personal knowledge.[24]

And again the question was directly presented to the Supreme Court of North Dakota in 1892.[25] Corliss, C. J., writing for the court, says: "The utmost that can be urged is that he (the defendant) arbitrarily refused to perform his part of the contract. This would subject him to an action for damages for breach of the contract. But the plaintiffs could not, in the face of this refusal, undertake to carry to completion the work * * * and insist that they were entitled to recover from the appellant his share of the contract price. The authorities are very clear on this point."[26] The defendants were two of a large number of subscribers agreeing to contribute specified sums towards the contract price of a creamery to be built by the plaintiffs. No reason is assigned for the defendant's countermand of his subscription. He acted arbitrarily.

And, the same year the question came before the Supreme Court of Minnesota.[27] The general principle is fully affirmed upon the authority of the case of Davis v. Bronson, just cited and of some of the decisions in note 25, *supra*. Collins, J., continuing says: "The legal right, on general principles, of either party, to violate abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows—subject to the jurisdiction of equity to decree specific performance in proper cases—is universally recognized and acted upon."[28] It should be noted also that in this instance no reason, other than the arbitrary will of defendant, is found or required justifying the exercise of the right. In each of these actions the contract price was sought to be recovered.[29]

[20] Citing Ichbald v. The Western, etc., 17 C. B. (N. S.) 733; Blanch v. Cocheran, 8 Bing. 14.

[21] 7 Mich. 204.

[22] 21 Vt. 17.

[23] Collins v. Delaporte, 115 Mass. 159.

[24] Dillon v. Anderson, 43 N. Y. 231.

[25] Davis v. Bronson, 2 N. Dak. 300, 50 N. D. Rep. 6.

[26] Citing Bishop. Cont., secs. 837 841; Danforth v. Walker, 37 Vt. 239, 40 Vt. 257; Moline Co. v. Beed, 52 Iowa, 307, 3 N. W. Rep. 96; City of Nebraska v. Coke Co., 9 Neb. 339, 2 N. W. Rep. 870; Clarke v. Marsiglia, 1 Denio, 317; Butler v. Butler, 77 N. Y. 473.

[27] Gibbons v. Bente, 51 Minn. 499, 53 N. W. Rep. 756.

[28] Citing Bishop, Cont. par. 837; Leake, Cont. 868, 1044; 1 Suth. Dam. 113; 2 Suth. Dam. 193, 526; Hickley v. Steele Co., 121 U. S. 264, 7 Sup. Ct. Rep. 875; Ins. Co. v. McAden, 109 Pa. St. 399, 1 Atl. Rep. 256; Frost v. Knight, L. R. 7 Exch. 112; Roper v. Johnson, L. R. 8 C. P. 167; Laird v. Rim, 7 Mees. & W. 474; Hochster v. Dela Tour, 2 El. & Bl. 678.

[29] The cases cited from North Dakota and Minnesota were upon the same general form of contract, only differing in names and location. A motion for a rehearing was made in each court. In the former case the court adhered to its decision holding the contract to be entire. In the latter case the court granted a rehearing, and thereupon receded from its former decision, holding that the contract created a

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The exercise of the power by an explicit direction, or other sufficient act constituting a breach of the contract, or, if performance has been entered upon, not to continue in the carrying out of the contract, or any act preventing such continuance, does not in any exact sense, of itself, effect a rescission of it. By rescission a contract is put an end to and no longer exists as the basis of any right, but by a breach it continues effective for the recovery of damages by the party injured —in some cases as his only basis of recovery—in others, as such basis at his option. The distinction is found in the fact that the rights of the party not in fault, as he may elect, are not the same if the breach is effected after, as when it occurs before performance is entered upon. In the latter case there is no recovery of damages *eo nomine*, upon and for a breach of the contract, but in the former instance it has been often, but not always held—the decisions are not harmonious—that the party willing to perform may treat the contract as rescinded from the beginning and recover upon the *quantum meruit* for the work done.[30] But the rule seems to have its limitations and "the right to sue * * * on a *quantum meruit* is frequently and emphatically stated to depend on the fact that the contract has been discharged."[31] The principle has been stated thus: "If he has done all or a portion of that which he promised, so as to have a claim to a money payment for such performance, he may deal with such a claim as due upon a different contract arising upon a promise which is understood from the acceptance of an executed consideration."[32] Thus it appears that the party not in default, upon a breach occurring after he has entered upon performance may, in some instances, treat the contract as rescinded from the beginning, and have a recovery of the value of his part performance without regard to the contract. But the general rule of law formulated so as to embrace all cases under all circumstances clearly is to the effect that where the breach occurs before performance, or after part performance, where damages for the breach of the contract are claimed and not the mere value of part performance, or where consideration for full performance is in something other than money, the action must be predicated upon the contract alone, and a recovery had for damages in the strict sense only. The manner of breach, limited to the narrow question under consideration, must be such that the other party is not at liberty to disregard it, and is usually effected by an explict direction not to commence, or not to continue performance, or notice that the party giving it will not be bound by the contract or that he renounces its obligation. But the renunciation must go to the whole contract.[33]

At what period with reference to the time when performance is due, the power to stop performance may be exercised, has been much discussed in the courts. The question does not arise except in case of an anticipatory breach. That a contract may be broken by renunciation by a party to it before the time for performance has come seems to be well settled.[34] However, instances are found where it seems to be held that if the renunciation or other step constituting a breach is made or taken before performance is due, it is yet incumbent upon the other party to treat the contract as in force up to the time to begin its performance, as before then the party who has signified his renunciation may change his purpose and abide by the contract.[35] The point, doubtless, is to some extent dependent upon the acts to be done to effect performance, as whether the mere delivery of something already in existence is required, or whether previous preparation to perform is necessary, as when the party is required to prepare or construct the thing to be delivered before the day of tender. In the latter instance clearly any direction given or other act done by one party at whatever

several liability on the part of each subscriber to the amount of his subscription only, and that in other respects the interests of the subscribers were joint, and that all must unite in order to repudiate and renounce the contract.

[30] Derby v. Johnson, 21 Vt. 17; Hulle v. Hightman, 2 East, 145; Weeks v. Burt, 78 N. Y. 191; Mitchell v. Scott, 41 Mich. 108. See also cases cited in previous notes.

[31] Anson, Cont. p. 366 (2d Am. Ed.), and cases cited.

[32] Anson, Cont. p. 367 (2d Am. Ed.), and cases cited.

[33] See cases cited in previous notes.

[34] Hochster v. Dela Tour, 2 El. & Bl. 678; Bungee v. Koop, 48 N. Y. 225; Howard v. Daly, 61 N. Y. 362; Ferris v. Spooner, 102 N. Y. 10; Platt v. Brand, 26 Mich. 173 (2d Series), and cases cited in note.

[35] Daniels v. Newton, 114 Mass. 533; Kadish v. Young, 108 Ill. 170, 48 Am. Rep. 548, and cases cited; Clark v. N. B. & Q. Co. Co., 67 Fed. Rep. 222.

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time whereby the other party is placed under obligation to refrain from increasing the damages must constitute a breach of the contract. The general rule as already shown seems to be that any explicit order, or positive assertion of a wish that performance be abandoned, or of a present intended repudiation of the contract, even before performance is due or any preparation to that end begun, or placing "himself in an attitude of impossibility of performance" is sufficient, and that decisions holding such instances not to be within the rule thus stated are exceptional.[36] A perusal of the decisions cited in the several notes hereto will fully disclose the contention for and against the rule. In Marks v. Van Eeghen,[37] Wallace, C. J., writing for the court (Circuit Court of Appeals, Second Circuit), and citing a great number of decisions both English and American, says: "In veiw of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause, before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages; and, if the latter elects to treat the contract as terminated, his right of action accrues at once." But it must appear that the intention to repudiate the contract was distinctly signified. It is not enough to prove an equivocal or indeterminate renunciation.

There is another point of much interest to the effect that if the party not violating the contract keeps it, as he may, in force for his own benefit, up to the time performance is due—it is his right to have his damages ascertained at that date—he also keeps the contract alive for the benefit of the other party. Therefore, if the notice of intention not to perform is withdrawn before it is acceded to or acted upon as a breach, the right to treat the contract as broken is lost, and the rights of the several parties are the same as they were before the notice was given. And further, such failure or refusal to accede to the anticipatory breach enables the party committing it to take advantage of any intervening circumstances justifying non-performance—as where performance becomes illegal or is excused by matter subsequent, or affording him the means of mitigating his loss, as a change in the market.[38]

It has been already noticed that cases where a court of equity will decree specific performance of a contract form an exception to the general rule under consideration. That fact alone seems to invest such contracts with other privileges at law. Thus it is said: "If it be a case for specific performance, the plaintiff having the power to perform is at liberty to do so and recover a t law under the contract."[39] It was so ruled in an action to recover an installment due on a contract made by the defendants for the support of their father during his life, though they had given notice that they would pay nothing further under said contract. The circumstances suggest that the recovery at law according to the provisions of the contract was nothing other or different than the specific performance which equity would have decreed. However, though the result is the same it is reached by proceeding upon other and distinct lines.

The construction of the subject expressed in the title of this article with its immediate incidents is easily susceptible of expansion into a treatise. So it has not been attempted to review in detail all the arguments advanced in support or challenge of the questions presented. However, it is contended that the conclusions reached are shown to be maintainable upon principle and reason, and that they are in harmony with the great weight of authority both in England and in this country.

GEO. W. NEWTON.

[36] Roebling & Sons Co. v. Lock S. F. Co., 130 Ill. 660; Kadish v. Young, 108 Ill. 170, 48 Am. Rep. 548, and cases cited; Roehm v. Horst, 91 Fed. Rep. 845, 33 C.

[38] Avery v. Bronson, 5 E. & B. 714; Frost v. Knight L. R. 7 Exch. 111, 1 Eng. Rep. 218; Brown v. Muller, L. R. 7 Exch. 319, 3 Eng. Rep. 429; Roper v. Johnson, L. R. 8 C. P. 167, 4 Eng. Rep. 397.

[39] Marsh v. Blackman, 50 Barb. 333.

CARRIERS—PERSONAL INJURIES—FREE PASS —RELEASE—EFFECT—NEGLIGENCE.

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employees, an answer in a suit for such injuries that, by an express stipulation indorsed on the pass, the acceptance and use thereof, was a release of any injuries which might be sustained by the person to whom it was issued, will not bar an action brought by such passenger against the company for negligence

WILEY, J. The only question involved in this appeal is the sufficiency of the second paragraph of answer, a demurrer to which was overruled. The complaint is in three paragraphs, and charges that appellant was a passenger upon one of appellee's trains, and while so riding as a passenger he was injured by the carelessness and negligence of appellee's servants in charge of the train. In the second paragraph of answer it is charged that, at the time appellant was injured in the manner stated in the complaint, he was riding upon the car and train of the appellee, and was entitled to be there solely by virtue of a pass theretofore issued to and accepted by him and used as a pure gratuity, and that by an express stipulation indorsed on the back of said pass, it was provided that by its acceptance and use any and all claims for injuries that might accrue to the person named on the face of the pass should be released. The answer further avers that the appellant was the only person named on the face of said pass, and that he was riding upon said pass at the time he was injured, and had paid no fare, nor was any expected of him. A copy of said release was indorsed upon the pass, as set out in full in the answer, and is as follows: "By its acceptance and use any and all claims for injuries to person or for loss or damage to baggage that might accrue to the person or persons named on the face thereof are released." It is then averred that the appellant accepted said pass as a pure gratuity, that he paid nothing therefor, and that he had full knowledge of the express release above set out and indorsed thereon. After the court had overruled a demurrer to this paragraph of answer, the appellant refused to plead further, and suffered judgment to be entered against him for costs. It is obvious, therefore, that the question for determination is simply this: Can a railroad company exempt itself from liability to a passenger on one of its trains who is injured by the negligence of its employees while he is being carried as such passengers upon a gratuitous pass? This question must be answered in view of the fact that the passenger accepts such pass with a full knowledge of the limiting clause indorsed upon its back; for the answer avers that discussion of the proposition would be useless. We are bound by the law as declared by the supreme court. In Railway Co. v. Faylor, 126 Ind. 126, 25 N. E. Rep. 869, it was held that an answer pleading a contract of release indorsed on a free pass upon which appellee was riding at the time he was injured would not bar an action for damages based upon the negligence of the company. The answer in that case was in principle the same as the second paragraph of answer here. To the same effect are the following cases: Railway Co. v. Nickless, 71 Ind. 271; Railway Co. v. Selby, 47 Ind. 471. Upon the authority of these cases the answer was fatally defective. In our judgment, the ruling in the cases cited is not in conflict with the more recent case of Railway Co. v. Keefer, 146 Ind. 21, 44 N. E. Rep. 796, 38 L. R. A. 93, as urged by appellant; nor is a different rule there declared. Judgment reversed, and the court below is directed to sustain appellant's demurrer to the second paragraph of answer.

NOTE.—*Limitation of Carriers' Liability for Injuries to Passengers.*—No more difficult or controverted question of law arises more often to perplex the courts of the present day than the one covered by the subject of this annotation. The authorities cannot be reconciled.

The old rule at the common law prohibited any attempt whatever on the part of a common carrier, either by notice or contract, to limit the liabilities imposed by the common law. Cole v. Goodwin, 19 Wend. (N. Y.) 257, 32 Am. Dec. 470; Fish v. Clapman, 2 Ga. 349, 46 Am. Dec. 393. One modification of this rule has been made and universally recognized and conceded,—that a common carrier may limit its liability, by special contract, for injuries not arising from its own negligence or that of its servants. Merrill v. Express Co., 62 N. H. 514; New York Central R. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Louisville, etc. R. R. v. Gilbert, 88 Tenn. 430; Christenson v. Express Co., 15 Minn. 270; Rosenfeld v. Railroad, 103 Ind. 121, 53 Am. Rep. 500. This limitation of liability by the carrier, however, cannot be affected by notice or otherwise that by special agreement, oral or written. Baltimore, etc. R. R. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Smith v. Railroad, 64 N. Car. 235; Kansas City, etc. R. R. v. Rodebaugh, 38 Kan. 45, 5 Am. St. Rep. 715; Solon v. Railroad (Iowa, 1895), 63 N. W. Rep. 692; St. Louis, etc. R. R. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104. *Contra* in Pennsylvania: Lake Shore, etc. R. R. v. Rosengweig, 113 Pa. St. 519; Camden, etc. R. R. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481. The rule is well stated in New Jersey Navigation Co. v. Bank. 6 How. (U. S.) 344, where the court said: "The common carrier is in the exercise of a sort of public

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mon carrier, by special contract supported by a valuable consideration, as for instance, a reduction of fare, limit its liability for its own negligence or that of its servants? The leading case of this subject, and undoubtedly still sustained by the weight of authority, is that of New York Central R. R. v. Lockwood, 17 Wall. (U. S.) 317, where the United States Supreme Court clearly and definitely decided the question propounded in the negative, holding, first, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; secondly, that it is not just nor reasonable for a common carrier to stipulate for exemption from responsibility for the negligence of himself or servants; thirdly, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. This decision is undoubtedly supported by the great weight of authority. Louisville, etc. R. R. v. Taylor, 126 Ind. 126; Missouri Pacific R. R. v. Ivy, 71 Tex. 409, 10 Am. St. Rep. 758; Jones v. Railroad, 125 Mo. 666, 28 S. W. Rep. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718; B. & O. R. R. v. McLaughlin, 73 Fed. Rep. 519; Doyle v. Railroad, 162 Mass. 66, 44 Am. St. Rep. 335; Rose v. Railroad, 39 Iowa, 246; Davis v. Railroad, 93 Wis. 470, 67 N. W. Rep. 16; Cleveland, etc. R. R. v. Curran, 19 Ohio St. 1; Louisville, etc. R. R. v. Oden, 80 Ala. 38; Southern Express Co. v. Moon, 39 Miss. 822; Moulton v. Railroad, 31 Minn. 85. The reason of the rule thus announced is well stated in Louisville, etc. R. R. v. Taylor, *supra*, where the court said: "A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment. · · · The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void."

Another line of authorities hold to a contrary doctrine. This has been called the "New York rule," although it is difficult to see why it should be called the rule of one state over another as each state reached its conclusion without relying particularly on the authority of any state. In fact an examination of the cases will show that these authorities rely more on the English construction of a railroad's right to limit its liability under the Railway and Canal Act than upon any other outside authority. The rule adopted by these authorities is to the effect that a common carrier may make a valid contract with the passenger exonerating itself from all liability not caused by the fraud or willful wrong of the company. Meuer v. Railroad, 5 S. Dak. 568, 59 N. W. Rep. 945, 25 L. R. A. 81; Arnold v. Railroad, 83 Ill. 273, 25 Am. Rep. 386; Higgins v. Railroad, 28 La. Ann. 133; Smith v. Railroad, 29 Barb. (N. Y.) 132; Wilson v. Railroad, 97 N. Y. 87; Bissell v. Railroad, 25 N. Y. 602; Kinney v. Railroad, 32 N. J. L. 407, 90 Am. Dec. 671; Baltimore, etc. R. R. v. Brady, 32 Md. 333. The reason of this rule is well stated in the case of Bissell v. Railroad, *supra*, where the court said: "The principles being established that parties may lawfully enter into contracts of this nature, there is no limit to the extent and variety of modification which may be given to such contracts. The passenger may assume all risks arising from the condition of the track, or of the cars, or from the negligence of the agents, of all of them or of any class of them. There is no danger which the party may encounter, resulting from the journey, which he may not assume the responsibility of, and he may assume all or any portion of it." A distinction sought to be made in the case of Perkins v. Railroad, 24 N. Y. 196, holding a railroad liable for its own negligence, but not that of its servants, has been generally repudiated. See Gulf, etc. R. R. v. McGowan, 65 Tex. 645. It might also be mentioned that there is a line of cases holding that a common carrier may limit its liability for ordinary negligence but not for gross negligence. Chicago, etc. R. R. v. Chapman, 133 Ill. 96, 23 Am. St. Rep. 587; Bosiowitz v. Express Co., 93 Ill. 239, 523, 34 Am. Rep. 191; Black v. Transportation Co., 55 Wis. 322; Amas v. Railroad, 67 Wis. 46, 58 Am. Rep. 848; Meuer v. Railroad, 5 S. Dak. 568; Smith v. Railroad, 29 Barb. 132; Baltimore, etc. R. R. v. Brady, 32 Md. 333. This distinction has also been repudiated as too artificial and vague. See Griswold v. Railroad, 53 Conn. 371, 55 Am. Rep. 115; Philadelphia, etc. R. R. v. Derby, 14 How. (U. S.) 468.

Thus far the authorities while not in harmony are by an overwhelming preponderance in favor of the rule that in case of passengers for hire, a common carrier will not be permitted to limit its liability for its own negligence or that of its servants. But now the further question arises, is a common carries liable to a person carried gratuitously or at reduced rates, and, even if so, will that fact furnish such a consideration as will validate a contract with the passenger exonerating the carrier from responsibility for its own negligence or that of its servants. The great confusion of authority and argument that exists on this subject is due no doubt in large measures to a failure to distinguish between the carrier's liability on contract and tort. The undertaking of a common carrier to transport a passenger from one point to another is more than a contractual relation between individuals,—it is a public relation as well, to which duties and liabilities are attached entirely separate and distinct from any arising under the contract. These duties to the public the carrier and, indeed, the passenger himself, cannot in principle be permitted to abrogate or modify. The government as *parens patriæ*, is interested in the life of the citizen and even the latter himself is not justified in making an attempt to take his life by his own hand; much less should a railroad corporation be permitted to exonerate itself from any responsibility to protect the life of the passenger under its care and, by special contract, to place itself in a position where it is free to maim, injure and kill without fear of liability. Such a contract is absolutely against public policy and should be sternly discountenanced. It is evident therefore that persons riding gratuitously by express or implied invitation of the carrier are as much passengers in every sense of that term as passengers for hire. The consideration for such a contract is in the rule that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. This rule was laid down in the leading case of Coggs v. Bernard, 1 Smith's Leading Cases, 199, and is universally sustained by authority. See Waterbury v. Railroad, 17 Fed. Rep. 671; Annas v. Railroad, 67 Wis. 46, 58 Am. Rep. 848; New World v. King, 16 How. (U. S.) 469. Thus, persons riding free by consent of the company, or with consent of the conductor, or where no demand is made for his fare, or on a free pass, have the same rights as other passengers, and the carrier assumes towards them the same responsibility and is liable for the same lack of care and to the same degree. Benner Undertaking Co. v. Bus

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son, 58 Ill. App. 17; Jacobus v. Railroad, 20 Minn. 125, 18 Am. Rep. 360; Pittsburg, etc. R. R. v. Caldwell, 74 Pa. St. 421; Sherman v. Railroad, 72 Mo. 62, 37 Am. Rep. 423; State v. Railroad, 63 Md. 433; Rose v. Railroad, 39 Iowa, 246; Buck v. Power Co., 46 Mo. App. 555; Louisville, etc. R. R. v. Taylor, 126 Ind. 126. This rule and the reason for it is well stated in Waterbury v. Railroad, 17 Fed. Rep. 671, where the court held that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him.

The last question to be considered is whether the fact that a carrier agrees to carry a passenger gratuitously or at reduced rates furnishes such a consideration as will validate an agreement on the part of the latter exonerating the carrier from liability. The rule supported by the weight of authority and based, as we believe, on the true principles which distinguish between the contractual and public relations arising upon the agreement to carry, is to this effect,—that any indorsement or agreement on the back of any part of the contract of carriage which, on consideration of gratuitous or reduced rate of passage, exempts the carrier from liability for negligence is against the policy of the law and void. Grand Trunk R. R. v. Stevens, 95 U. S. 655; Cleveland, etc. R. R. v. Curran, 19 Ohio St. Rep. 1; Rose v. Railroad, 39 Iowa, 246; Brush v. Railroad, 43 Iowa, 554; Jacobus v. Railroad, 26 Minn. 125, 18 Am. Rep. 360; Illinois Central R. R. v. Crudup, 63 Miss. 291; Bryan v. R. R., 32 Mo. App. 228; Camden v. Railroad, 7 Atl. Rep. (Pa. 1887) 731; Mobile, etc. R. R. v. Hopkins, 41 Ala. 486, 2 Am. St. Rep. 369. On the other hand, it was held in New York that public policy was satisfied by holding a railroad company bound to take the risk when the passenger chooses to pay the regular fare. If he voluntarily and for any valuable consideration waives the right to indemnity, the contract is binding. Bissell v. Railroad, 25 N. Y. 442, 8 Am. Dec. 369. This rule applies particularly to persons traveling on passes, and is upheld by the following authorities: Quimby v. Railroad, 150 Mass. 365, 23 N. E. Rep. 205, 5 L. R. A. 846; Griswold v. Railroad, 53 Conn. 371, 55 Am. Rep. 115; Chicago, etc. R. R. v. Hawk, 36 Ill. App. 321; Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. Rep. 1069, 25 L. R. A. 491; Muldoon v. Railroad, 10 Wash. 311, 45 Am. St. Rep. 787; Annas v. Railroad, 67 Wis. 46, 30 N. W. Rep. 282. Thus, in the case of Rose v. Railroad, 39 Iowa, 246, a railroad was held liable for causing the death of a passenger by the negligence of its employees, although he was riding on a pass releasing the company from all liability for injury to his person and property. In the case of Bissell v. Railroad, 25 N. Y. 442, it was held that a common carrier, in consideration of an abatement in whole or in part of his legal fare, may lawfully contract with a passenger that the latter will take upon himself the risk of damage from the negligence of agents and Central R. R. v. Crudup, 63 Miss. 291, it was held that a railroad company was not relieved from liability for the negligence of its servants by the fact that the injured person, a mail agent running on its road, had accepted a free ticket, by which he assumed the risk of injury.

In conclusion, it may be stated that the weight of authority, sound principle and a safe public policy sustain the following propositions,—that a common carrier may limit its liability by special contract for injuries not arising from its own negligence or that of its servants, but that in regard to the latter a contract exempting itself from liability is void as against public policy; that in the case of gratuitous passage the liability of the carrier for its own negligence or that of its servants is not modified or limited to any extent whatever, the liability of the carrier in this regard not arising out of the contract of passage, but out of the relation created by accepting the person as a passenger; and for the same reason any limitation of its liability in cases of gratuitous passage is no more warranted than in cases of passengers for hire, and is as much opposed to a safe public policy in the one case as the other; that any distinction between ordinary and gross negligence in permitting a carrier to limit its liability as to one and not the other is vague and artificial, as all negligence which injures the person and endangers human life may be said to be gross. The fraud and willful misconduct of the carrier or its agents are by all authorities held to subject the carrier to a liability from which it can by no contract claim exemption or exoneration.

A. H. ROBBINS.

JETSAM AND FLOTSAM.

SPECIALISM IN THE LAW.

James B. Dill, the corporation lawyer, writes interestingly in *Success* on the question, "Are the Three Great Professions Declining?" taking the law as his subject. He says: "The great bulk of the work of the profession has been turned into industrial creation and adjustment, and very often the counsel is as good a business man as his clients. A knowledge of law has, therefore, within the last thirty years, become the side arms of certain classes of the captains of industry. Every good business man knows a good deal of law. Specialism has split it up into a half dozen or more divisions, and a lawyer who is now able to master more than one sort of practice is a genius. The profession has lost nearly all of its old, æsthetic, ostentatious attractions. The civil law pays a practitioner so much more than the criminal law does, that it attracts the ablest men. Juries and courts no longer care for eloquence. Yes, law is business, and if the young man wants to practice it, the sooner he makes up his mind to do so with an eye single to some particular branch of it, the better lawyer will he become."

BOOKS RECEIVED.

Tabular Analysis of the Law of Real Property. Arranged by L. W. McCandless. (Following Blackstone Book II.) Ann Arbor, Mich. Published

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WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. AGENCY—Authority—Estoppel.—Defendant is not estopped to deny that its solicitor, who had an office with it, where he also, to plaintiff's knowledge, attended to law business other than defendant's had authority to make contracts, or receive money for it, though in communicating with her he used its letter heads, and sent his receipts and forged instruments, drawn on forms in use by it, and in one case sent her a mortgage, money for the purchase of which from defendant she had sent him.—HARVEY v. SCHUYLKILL TRUST CO., Pa., 49 Atl. Rep. 277.

2. AGENCY — Authority — Payment of Mortgage.—Where a mortgagee permits his agent, who has invested his money for him, to retain the bond and mortgage in his possession, and collect interest thereon, he gives such agent apparent authority to receive payment of the mortgage after maturity, and is estopped from denying that he possessed such authority.—CENTRAL TRUST CO. OF NEW YORK v. FOLSOM, N. Y., 60 N. E. Rep. 599.

3. ASSIGNMENT FOR CREDITORS—Rights of Mortgagee—Rents of Realty.—Rents of land, accruing after an assignee for the benefit of creditors has taken possession of the assigned property, belong, as between general creditors and a mortgagee claiming under a mortgage which pledges the rents, issues, and profits the judgment rendered therein can have no effect beyond the appropriation of the attached property to the satisfaction of the debt and costs.—OIL WELL SUPPLY CO. v. KOHN, Ohio, 69 N. E. Rep. 608.

5. ATTORNEY AND CLIENT — Summary Proceedings—Payment of Money—Stipulation.—Where, in a summary proceeding to compel payment of money alleged to have been collected by an attorney, a stipulation is entered into for the amendment of the order of reference, so that differences between the parties as to moneys in the attorney's hands as business agent might be included, the stipulation authorizing the court to enter a decree on confirmation of the report of the referee, ordering the attorney to pay over any amount found due, binds such attorney in his character as business agent only to the extent of the determination of the amount due, the court having no power, even by consent, to compel by order, instead of judgment and execution, the payment of money in his hands as agent.—IN RE LANGSLOW, N. Y., 60 N. E. Rep. 590.

6. BENEFICIAL ASSOCIATION—Insolvency—Receivers.—The beneficiary of a beneficial association is, on the death of a member, a creditor of the association, so as to have the right to attachment.—FROWERT v. BLASE, Pa., 49 Atl. Rep. 802.

7. BILL OF LADING — Ownership of Goods — Hypothecation of Bill.—Evidence in this case considered, and held, that where a bill of lading was issued, but retained by the shipper, who hypothecated the same to a third party, after the shipment had been made, the evidence reasonably tends to support the finding of the trial court that it was the intention of the shipper to vest the title of the property in the consignee at the time the same was delivered to the carrier.—BANK OF LITCHFIELD v. ELLIOTT, Minn., 86 N. W. Rep. 433.

8. BONDS—Official Actions for the Use and Benefit of Third Persons.—Where the bond of a city marshal runs to the city, and not to the people, an action cannot be maintained for the use and benefit of a third person unless it is expressly authorized by statute.—CITY OF EATON RAPIDS v. STUMP, Mich., 86 N. W. Rep. 438.

9. CARRIERS — Duty to Drunken Trespasser on Freight Train.—Where the servants in charge of a freight train ejected a trespasser in a drunken and helpless condition in a deep cut on a dark night, and he was run over and killed by a train which followed, as the servants ejecting him had reason to believe that he would be, the railroad company was liable for his death, though the place at which he was ejected was the place at which he entered the train.—FAGG'S ADMR. v. LOUISVILLE & N. R. CO., Ky., 63 S. W. Rep. 580.

10. CARRIERS—Stop-Over Privilege.—Where plaintiff sued for an illegal arrest for the alleged non-payment of railroad fare, and there was evidence that plaintiff stopped over without securing a stop-over check, the rules of the company requiring conductors to issue stop-over checks was admissible.—DIXON v. NEW ENGLAND R. R., Mass., 60 N. E. Rep. 581.

11. CONSTITUTIONAL LAW—Validity of Act Establishing City Court.—Since Code, tit. 8, ch. 6, authorizing the establishment of city courts, and conferring on them concurrent jurisdiction with the district and circuit courts, operates uniformly on all persons within the relations and circumstances provided for, it does not violate Const. art. 1, § 6, requiring all laws of a general nature to be of uniform operation.—PAGE v. MILLERTON, Iowa, 86 N. W. Rep. 441.

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made by the president, whether it was originally authorized or not.—HERRING v. DIX RIVER & L. TURNPIKE ROAD CO., Ky., 63 S. W. Rep. 576.

18. CRIMINAL LAW—Adultery — Information.—An information for adultery, which charged that a man and woman unlawfully cohabited, said woman "being lawfully married to another person," sufficiently alleged that the woman was married to some one other than her co-defendant.—LENERT v. STATE, Tex., 63 S. W. Rep. 563.

14. CRIMINAL LAW — Perjury — Testimony — Materiality.—Where the issue in a prosecution for gaming was whether the house had a roof, without which it would not be an outhouse, as alleged in the indictment, and defendant testified that its roof was about two-thirds gone, for which testimony he was prosecuted for perjury, there was no error in charging that the fact as to which he testified was material.—JERNIGAN v. STATE, Tex., 63 S. W. Rep. 560.

15. CRIMINAL LAW—Violation of Ordinance—Punishment.—The punishment prescribed by the ordinance in question was that, upon conviction of the offense therein provided for, the accused "be punished by a fine not exceeding $100, nor less than $10, or by imprisonment in the workhouse of the city of Minneapolis for a term not exceeding ninety days, not less than ten days." Held, that the municipal court was authorized to fine or imprison, in its discretion, under and within the limits of this provision.—STATE v. GRIMES, Minn., 86 N. W. Rep. 449.

16. CRIMINAL LAW — White-Capping — Threatening Letter.—Where an indictment for white-capping charged that defendant, on April 9, 1900, sent to complainant a letter containing a drawing of a coffin, a body suspended by the neck, and the words, "Jim Owens went to Hell June 20th, 1900," the intention to convey the idea that complainant would be hung June 20th was sufficiently plain so that it was not necessary for the indictment to contain an *innuendo* averment.—DUNN v. STATE, Tex., 63 S. W. Rep. 571.

17. DEATH BY WRONGFUL ACT — Damages—Negligence.—The damages recoverable for death by a wrongful act are limited by statute to the amount of "pecuniary injuries" sustained by the persons for whose benefit the action is brought. They must be estimated according to reasonable probabilities,—as well those which tend to make the pecuniary injury less as those which tend to increase it.—CONLEY v. MAINE CENT. R. CO., Me., 49 Atl. Rep. 668.

18. DEEDS — Defeasible Fee—"Dying Without Children."—Where a father conveyed land to his daughter, providing in the deed that, in case of her death "without children" before he should die, the land should revert to him, and that if she died after his death "without issue" the title should vest in his grandson, the fee did not become absolute upon the birth of a child to the daughter, but was still subject to be defeated by her death at any time without leaving children.—CALMES v. JONES, Ky., 63 S. W. Rep. 583.

19. DEED—Unopened Street as Boundary — Adverse Possession.—The grantee in a deed describing the property as bounded by the line of a street, which at the time is platted, but unopened, takes an easement only over the bed of the unopened street, and enters into possession by privity with the original owner, and in subservience to his title, so that adverse possession cannot commence till the privity is broken by some unequivocal act.—COLE v. CITY OF PHILADELPHIA, Pa., 49 Atl. Rep. 808.

petitioners.—IN RE MINNETONKA DAM, Minn., 86 N. W. Rep. 455.

21. EVIDENCE—Boundaries—Parol — Declarations of Grantor.—Where a deed to real estate is delivered elsewhere than on the land, evidence of the grantee that he was taken on the land by the grantor a few days later, and the boundaries pointed out by the latter, is incompetent to prove a disputed boundary, in a suit between the grantee and a third person, unless the grantor is dead.—O'CONNELL v. COX, Mass., 60 N. E. Rep. 580.

22. EXECUTION—Sale—Notice of Secret Trust.—One purchasing at execution sale against B under judgment which was a lien on the land prior to B.'s deed to K takes the land discharged of any secret trust, K having given notice at the sale merely that he was the absolute owner of the land, and that B. had no interest therein.—DEWATERS v. KUHNLE, Pa., 49 Atl. Rep. 264.

23. EXECUTORS AND ADMINISTRATORS—Claim Against Estate—Contract for Board.—Where a father agrees to pay his son so much a week for board, the fact that the father afterwards changed his mind, and decided to leave certain property to the son, does not authorize the latter to recover from the father's estate the reasonable value of the board, but the recovery is limited to the agreed price.—LAIRD v. LAIRD, Mich., 86 N. W. Rep. 486.

24. EXECUTORS AND ADMINISTRATORS—Right of Administrator to Sell Real Estate.—Upon appeal from a judgment for the sale of land to pay the debts of a deceased person, it will be presumed, in the absence of the evidence, that it showed the want of personal property, and that it was necessary to sell the real estate.—SEIBERT v. BLOOMFIELD, Ky., 63 S. W. Rep. 584.

25. FORBEARANCE—Consideration.—Where plaintiffs were about to institute suit to subject the property of M their co-obligor in a note, who had removed from the state, to the payment of his one-sixth part of the debt, and defendant induced them to forego that purpose by executing a bond binding himself "as surety" for M "for one-sixth of said note, and no more," there was a sufficient consideration for the bond, as forbearance to enforce legal rights is a good and valuable consideration.—HOWARD v. LAWRENCE, Ky., 63 S. W. Rep. 589.

26. FOREIGN CORPORATIONS—Internal Management—Jurisdiction.—The court will not take jurisdiction of matters relating to the internal management of a foreign corporation on a dispute between it and one or more of its stockholders.—MADDEN v. PENN ELECTRIC LIGHT CO., Pa., 49 Atl. Rep. 296.

27. FRAUDULENT CONVEYANCES — Sale of Stock—Statute—Fraud.—A failure to comply with Acts 1900, ch. 579, providing that the sale of all or any portion of a stock of merchandise in other than the regular course of business will be presumed to be fraudulent unless the seller and purchaser makes an inventory of the goods before the sale, and unless the purchaser makes inquiry as to creditors of the seller, and gives them notice of the contemplated sale, is not conclusive evidence of fraud, but only creates a presumption thereof, which the purchaser must rebut.—HART v. DEAN, Md., 49 Atl. Rep. 661.

28. GARNISHMENT—Written Disclosures—Oral Examination.—Where the written disclosures of a garnished insurance company denied liability on a policy held by the principal defendant, but on these being stricken from the files, and garnishee's agent subjected to oral

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ceived from defects in a temporary way opened by commissioners around a bridge which they are rebuilding.—BREWER v. SULLIVAN CO., Pa., 49 Atl. Rep. 259.

30. HUSBAND AND WIFE — Abandonment—Duty of Wife to Accept—Husband's Residence.—If the husband procures a residence suitable to his situation in life, and in good faith will take the wife there and treat her as a husband ought to, the allowance of alimony for maintenance made should cease, as it is the duty of the wife to accept such residence as the husband may, without unwarranted parsimony select.—CLUBB v. CLUBB, Ky., 63 S. W. Rep. 587.

31. INSURANCE — Reformation of Policy—Election of Remedy.—The reversal of a judgment in favor of plaintiff upon a policy of fire insurance on the ground that the policy as written did not embrace the property destroyed, leaves the case as if there had been no judgment, and plaintiff may then amend his petition, and seek a reformation of the policy on the ground of mistake, so as to make it include the destroyed property, as the mere assertion of a claim on the policy as written on the ground that it already embraced the property was not a conclusive election of remedy so as to preclude plaintiff from seeking relief on the ground of mistake.—HILLERICH v. FRANKLIN INS. CO. OF PENNSYLVANIA, Ky., 63 S. W. Rep. 592.

32. INSURANCE COMPANIES—Deposits with Insurance Superintendent — Insolvency.—Where securities have been deposited with the superintendent of insurance by an insurance company, to be held by such superintendent in trust for the benefit and protection of, and as security for, the policy holders of such company, the assignee of such company, under our insolvent laws, cannot recover such securities from such superintendent without first showing that such company is no longer liable to any of its policy holders.—STATE v. MATTHEWS, Ohio, 60 N. E. Rep. 605.

33. JUDGMENT—Res Judicata.—A judgment enforcing a mortgage lien is a bar to an action by the mortgagor against attorneys who procured the execution of the mortgage on the ground of misrepresentations made by them whereby she was induced to execute the mortgage, as the fact that such misrepresentations were made would have been a complete defense to the action to enforce the mortgage.—SHAW v. MILBY'S EXR., Ky., 63 S. W. Rep. 576.

34. LIBEL AND SLANDER — Information — Evidence.—Where defendant was charged with having published a libelous pamphlet, evidence that certain witnesses had seen the pamphlet was not inadmissible because the pamphlet they had seen was not the identical copy the publication of which was charged in the information.—LOCKARD v. STATE, Tex., 63 S. W. Rep. 566.

35. LIFE INSURANCE — Beneficiary.—Where application for life insurance names a beneficiary, the insurer has no power to pay the insurance to another, under its agreement in the policy to pay to the person or persons designated in a condition thereof, providing, "The production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative, or connection by marriage, of the assured, shall be conclusive evidence that such sum has been paid to, and received by, the person or persons lawfully entitled to the same."—MCNALLY v. METROPOLITAN LIFE INS. CO., Pa., 49 Atl. Rep. 299.

36. MASTER AND SERVANT — Assault by Employee—Employer's Liability.—Testimony that, as an intending passenger was in the act of entering a car, the conductor caught hold of him, saying, "Stay off till the people get out," is evidence that what the conductor did was not only in the course of his employment, but in the supposed performance of his duty in the orderly management of the passengers leaving and entering the train, so as to make his employer liable for any unnecessary violence used by him in so doing.—MCFARLAN v. PENNSYLVANIA R. CO., Pa., 49 Atl. Rep. 270.

37. MECHANICS' LIENS—Written Contract—Specifying Time.—Under Mechanics' Lien Law 1895, § 6, providing that no lien shall be had for work done or materials furnished where the time stipulated for the completion of the work or furnishing the materials is beyond three years from the date of the contract, where a written contract for furnishing materials fixes no time for their delivery or for payment the party furnishing them can have no lien therefor, though they are furnished within a year from the date of the contract.—KELLEY v. NORTHERN TRUST CO., Ill., 60 N. E. Rep. 585.

38. MUNICIPAL CORPORATIONS — Annexed Territory—Taxation—Liability.—Acts Assem. 1888, ch. 98, § 19 (Annexation Act), provided that until the year 1900 the rate of taxation on all landed property or certain territory annexed to Baltimore should not exceed the rate for Baltimore county; that from and after 1900 the property, real and personal, in said territory, should be liable to taxation as similar property within the other wards of the city; provided, that after the year 1900 the Baltimore county rate of taxation for the year 1887 should not be increased, for city purposes, "on any landed property within the said territory until avenues, streets or alleys shall have been opened and constructed through the same." Held, that property fronting on a turnpike road within said annexed territory, and between two streets, and on which stood some 24 houses, was no longer rural "landed" property, within the proviso, but city property, and taxable as such.—GOEBEL v. MAYOR, ETC. OF BALTIMORE, Md., 49 Atl. Rep. 649.

39. MUNICIPAL CORPORATIONS—Defective Sidewalk—Notice.—A city is not liable for injury from a defective sidewalk, it not having had actual notice of the defect, and there being no evidence from which constructive notice could be inferred, the sidewalk having been repaired 18 days before the accident, and there being no evidence as to when it again got out of repair.—ROGERS v. CITY OF WILLIAMSPORT, Pa., 49 Atl. Rep. 298.

40. NEGLIGENCE — Accidental Occurrence.—Actionable negligence may spring from the careless performance of a legal duty, or from a total neglect and disregard of such duty, but it can never be consistently predicated of a purely accidental occurrence.—FIDELITY & CASUALTY CO. v. CUTTS, Me., 49 Atl. Rep. 678.

41. NEW TRIAL—Excessive Damages—Defamation of Character.—Held, in the case at bar, which was an action for defamation of character, that there is nothing in the evidence which shows, upon comparison of the same with the verdict, that the amount thereof ($50) was at all excessive, or that it was arrived at through passion or prejudice on the part of the jury; and held, further, for this reason, that the court below was not justified in reducing the verdict to the sum of $100.—BLUME v. SCHEER, Minn., 86 N. W. Rep. 446.

42. NUISANCE — Powder Magazine.—A powder magazine located near the shaft of a colliery, and originally not in a residence locality, but around which the population had settled, and of which complaint had not been made during its 30 years of existence, and in which explosives were kept only for use in the mine, and in small quantities, is not a nuisance, so as to render its owners liable for an injury to one living near by explosion caused by lightning.—TUCKASHINSKY v. LEHIGH & W. COAL CO., Pa., 49 Atl. Rep. 308.

43. OFFICERS — Sergeant of Police — Salary.—The salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise, nor to the usurpation or colorable possession of it. On the conditions shown here, there is no merit in the claim that the plaintiff cannot recover because there was a *de facto* officer to whom the salary was paid during the period of time—about three months—between

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the day of his attempted dismissal and the day of his reinstatement.—LARSON v. CITY OF ST. PAUL, Minn., 86 N. W. Rep. 459.

44. ORDINANCE—Violation—Complaint—Open Drunkenness.—By Gen. St. 1894, § 1224, village councils are authorized "to order and establish all such ordinances and by-laws for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of trade and commerce and the promotion of health, not inconsistent with the constitution and laws of the United States or of this state, as they shall deem expedient." Held that, under this general welcome clause, councils are authorized and empowered to enact ordinances to punish open and notorious drunkenness.—VILLAGE OF FAIRMONT v. MEYER, Minn., 86 N. W. Rep. 457.

45. PARTNERSHIP — Action of Settlement.—Though the pleadings in an action for a settlement of several different partnerships were defective, yet, as the parties united in praying a reference to the commissioner to settle the accounts of the partnerships, the court will disregard the defects in the pleadings on both sides, and treat the case as an agreed case for a settlement.—MCCOMBS v. MATNEY, Ky., 63 S. W. Rep. 578.

46. PLEADING AND PRACTICE—Mortgage—Foreclosure—Validity.—Where the answer of one defendant in a mortgage foreclosure suit, alleging ownership of the mortgage, and asking its foreclosure, is defective, in failing to allege the execution of the mortgage, such defect is cured by allegations of its execution in the complaint.—HANSEN v. WAGNER, Cal., 65 Pac. Rep. 142.

47. RAILROADS—Engineer—Death—Contributory Negligence.—An engineer and conductor both received orders to take a side track, where there was no telegraph station, and wait until three sections of a train had passed. The conductor and brakeman went to sleep, and in about an hour and a half the conductor, on awakening, saw the second section pass, which he mistook for the third, and sent the brakeman forward with orders to the engineer to pull out. The brakeman found the fireman asleep, and the engineer looked as if he had just awakened. The train was pulled onto the main track and collided with section 3, resulting in the engineer's death. Held, that the engineer was guilty of contributory negligence as a matter of law.—GALVESTON, H. & S. A. RY. CO. v. BROWN, Tex., 65 Pac. Rep. 805.

48. RAILROADS—Fire Set by Locomotive.—In an action against a railroad company for negligently scattering fire by which property adjoining its tracks was destroyed, it is necessary to go further than to show a mere possibility or conjecture that such fire was scattered by one of its engines, to require the submission of that issue to a jury under section 2700, Gen. St. 1894.—MINNEAPOLIS SASH & DOOR CO. v. GREAT NORTHERN RY. CO., Minn., 86 N.W. Rep. 451.

49. RAILROADS—Foreclosure Proceedings—Preferential Debts.—To entitle a general unsecured creditor of an insolvent railroad company, whose property has been placed in the hands of a receiver in foreclosure proceedings, to preferential payment over the mortgage creditors, it must be shown: First, that the demand is not a debt created upon the personal credit of the company, but a current operating expense incurred to maintain its property as a going concern and its railroad in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company; and, second, that there are net or current earnings in the hands of the receiver applicable to the pay-

50. RAILROADS—Negligence — Evidence—Admissibility.—Where the receiver of a street railroad defends an action for the negligent killing of an alleged passenger on the ground that she was not a passenger on the car, and did not receive any injuries through defendant's negligence, the clothing worn by deceased at the time of the accident is admissible for the purpose of her identification, and as tending to show the nature and extent of her injuries.—BAGGS v. MARTIN, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 33.

51. RAILROADS—Negligence—Speed. — Where, in an action for an accident at a public crossing, negligence of defendant is charged in operating its train at a great and unlawful rate of speed, the court, if requested, should charge that, in the absence of a statute or ordinance prescribing the rate of speed at which the train may run, it is a question of fact for the jury to determine whether or not, under any circumstances, the speed of the train was negligence.—MISSOURI, K. & T. RY. CO. v. MELUGIN, Tex., 63 S. W. Rep. 333.

52. RES ADJUDICATA—Record—Former Action—Pleading.—Where plaintiff sued defendant for the loss of a horse, and alleged that its death was occasioned by the defective condition of defendant's fence, and judgment was rendered in favor of defendant at the close of plaintiff's testimony on the ground that plaintiff had knowledge of the condition of the fence, the judgment was on the merits, and constituted a bar to a subsequent action.—BARTELDT v. SEEHORN, Wash., 65 Pac. Rep. 185.

53. RIGHT OF WAY—Prescription—Statute of Limitations—Computation—Civil War.—Const. 1870, providing that the time elapsing between May 6, 1861, and January 1, 1867, shall not be computed in any case affected by the statute of limitations, has no application to a claim of a right of way by 20 years' user under claim of right, as the reason of such provision was that the courts were closed during such period so that a right could not have been asserted therein, and the right to stop the running of the prescription on the right of way might have been asserted independently of any action in the courts, by merely objecting to, or obstructing the way.—JACKSON v. CODY, Tenn. 63 S. W. Rep. 302.

54. PAYMENT NOT IN MONEY—Sales.—Where the payment for goods sold under a special contract is in something other than money, the seller, who has performed his contract, cannot sue on the common counts, but must declare on the contract.—PUSEY & JONES CO. v. DODGE, Del., 49 Atl. Rep. 248.

55. SCHOOL BOARD—Contract—School Building—Authority.—An action could not be maintained against a school board for failure to permit plaintiff to fulfill a contract to furnish materials for a school house without showing that the board was authorized by the city to construct the building, or to use any of the funds received or receivable from the city for that purpose, or to appropriate any state funds to that end.—PECK SMEAD CO. v. CITY OF SHERMAN, Tex., 63 S. W. Rep. 340.

56. SHERIFFS—Agreement with Deputy.—Under an agreement between a sheriff and deputy for certain years, by which the territory of the country was divided between them, each party to account for the taxes in his part and to be entitled to the fees earned in that part, the deputy is chargeable with uncollected taxes in his territory, as he should, if they were not collectible, have presented them to the county court for exoneration or as delinquent, and received credit therefor.—BALE v. MUDD, Ky., 63 S. W. Rep. 451.

57. SHIPPING—Cargo Damage—Seaworthiness.—The chain locker of a steamship, which extended from the

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been stopped or covered at the beginning of the voyage, but not sufficiently to withstand the action of the seas which broke over such deck, although the weather was no worse than should reasonably have been anticipated at that season of the year. Held, that the ship was liable for the injury to the cargo.—THE PALMAS, U. S. C. C of App., First Circuit, 108 Fed. Rep. 87.

58. TAXATION—Assessments — Board of Equalization —Limited Jurisdiction.—The board of equalization acting on assessments is a tribunal of limited and inferior powers, and hence its jurisdiction must affirmatively appear on the record of its proceedings.—COPPER QUEEN CONSOL. MIN. CO. v. BOARD OF EQUALIZATION OF COCHISE CO., Ariz., 65 Pac. Rep. 149.

59. TAXATION—Assessment to Decedent—Tax Sale.—Harriet J. Morrill, of Boston, the owner in her lifetime of the real estate in question, died in 1899. The real estate had been assessed to her up to the time of her death. Afterwards, in 1890 and 1891, the assessors continued to assese taxes on this real estate to Harriett J. Morrill as a non-resident owner. For non-payment of these taxes the property was sold at tax sale. The defendant is the grantee of the purchaser at the tax sale. The complainant is the devisee of Harriett J. Morrill.—MORRILL v. LOVETT, Me., 49 Atl. Rep. 666.

60. TAXATION—Mortgage.—When a mortgage was assigned by the owner thereof to another, who held certain notes of the assignor, as collateral security for the payment of the notes, the mortgage was taxable as the personal property of the assignor, so long as the note remains unpaid, and the mortgage continued to be held as security for their payment.—STATE v. HOWELL TP., N. J., 49 Atl. Rep. 675.

61. TAXATION—Validity of Levy — Irregular Meeting of Board of Trustees.—A levy made by the board of trustees of a town of the sixth class, at a special session called by the clerk of the board at the place of business of one its members, which was not the usual meeting place, was void.—TOWN OF SPRINGFIELD v. PEOPLE'S DEPOSIT BANK, Ky., 68 S. W. Rep. 271.

62. TELEPHONE COMPANIES— Construction of Line Along Turnpike.— A telephone company incorporated under the general corporation act of April 29, 1874, and its supplements, is a telegraph company and a turnpike is a highway, within section 33 thereof, providing that a telegraph company incorporated thereunder may construct its line along any highway. — PEOPLE'S TELEPHONE & TELEGRAPH CO. v. PRESIDENT, ETC. OF BERKS & D. TURNPIKE ROAD, Pa., 49 Atl. Rep. 284.

63. TENANTS IN COMMON—Severence of Mineral and Surface Rights.—The owner of mineral rights, under a reservation in a deed of the surface of the lands, is not a tenant in common or joint owner with the owner of the surface, so that either can buy the estate of the other at tax sale.—HUTCHISON v. KLINE, Pa., 49 Atl. Rep. 312.

64. TRESPASS — Inclosure of Another — Possession—Title.—Where defendant purchased land while he knew it was in the actual possession of another, who had purchased and inclosed it, defendant's claim of title did not justify him in turning his cattle into such inclosure without the consent of the one so in possession; and a fine for violating the provision of Pen. Code, art. 794, prohibiting any person from knowingly causing any cattle to go within the inclosure of another without the consent of the owner, should be sustained.—BARBER v. STATE, Tex., 68 S. W. Rep. 328.

65. VENDOR and PURCHASER—Contract by Correspondence.—A sufficient contract for sale and purchase of land may be deduced from correspondence, though it does not contain an express acceptance of terms by the purchaser, and agreement to pay; the seller several times averring a contract, and the purchaser never denying it, but many times tacitly and several times admitting it, and merely asserting as cause of postponement of perfomance the lack of ready funds. —HAINES v. DEARBORN, Pa., 49 Atl. Rep. 319.

66. VENDOR AND PURCHASER — Contract of Sale—Implied Warranty.—Where a vendee, on entering into a written contract for the sale of real estate, knows that there is a squatter in possession of a portion of the property, and the written contract does not refer thereto, or to the character of the vendor's title, there is no implied contract to furnish a good and marketable title as against such squatter.—LEONARD v. WOODRUFF, Utah, 65 Pac. Rep. 199.

67. WATERS AND WATER COURSES—Navigable Waters —Negligent Operation of Drawbridge.—The owner of a drawbridge across a navigable channel in the Duluth-Superior harbor held liable in damages for injury to a barge in tow, on the ground that the bridge tender negligently failed to give the signal to warn the approaching tug and tow of an obstruction which prevented the opening of the draw until it was too late for the barge to stop, in consequence of which she came in collision with the draw.—HARTLEY v. AMERICAN STEEL-BARGE CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 97.

68. WATERS AND WATER COURSES—Navigable Waters —Obstruction of Channel by Fallen Drawbridge.—Where the owner of a bridge over a navigable channel negligently permitted the draw of the bridge to improperly obstruct the channel, the owner of sea-going vessels which, before the creation of the obstruction, had sailed with cargoes for points of discharge in the channel above the bridge, and of vessels which were above the bridge when the obstruction was created, may, if the vessels were prevented by the obstruction from passing up and down the channel when necessary to do so, maintain suits in admiralty to recover damages in the way of demurrage, regardless of the local law.—NEW YORK, ETC. R. CO. v. PISCATAQUA NAV. CO., U. S. C. C. of App , First Circuit, 108 Fed. Rep. 92.

69. WILLS—Beneficiaries—Adopted Child.—Under a will giving a fund in trust to pay the income to testator's son for life, and on his death the principal to such persons as would be entitled thereto if he survived his wife and died inestate seised and possessed thereof, and in such shares as such persons would in such case be entitled to by law, the rights of a child adopted by the son long after testator's death are to be determined according to the law at the time of the son's death.—IN RE KOHLER'S ESTATE, Pa., 49 Atl. Rep. 286.

70. WILLS—Devisee Dying Before Testator.—Where testator devised land to his son A subject to his payment of legacies, with a provision that, if A did not desire to take the land and pay the legacies, then C should take it, and pay the legacies, and a certain amount to A, and A died before testator, but leaving issue surviving him, and indicated no desire to have the devise transferred to C, and testator intimated no purpose to change the will, the issue of A takes the land subject to the payment of the bequests.—BLACKWELL v. SCOUTEN, Pa., 49 Atl. Rep. 261.

71. WILLS—Devise to Testatrix's Children—Vested Interest.—Where a fund was devised to a trustee, the income to be paid testatrix's children, they took a vested interest as tenants in common, and not as a class with right of survivorship, and hence the estate of a deceased child was entitled to share in the income accruing after such child's death.—STANWOOD v. STANWOOD, Mass., 60 N. E. Rep. 584.

72. WILLS—Undue Influence.—Undue influence, inducing a woman enthusiastic in church work, and who had no relations nearer than nephews, with whom she had little acquaintance, to leave the bulk of her property to the missionary and educational societies of her church, cannot be inferred from the fact that the ministers of the church had influence with her, and knew in advance of her purpose, no suggestion or encouragement by them being shown.—APPEAL OF COLNELIUS, Pa., 49 Atl. Rep. 281.

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Central Law Journal.

ST. LOUIS, MO., OCTOBER 4, 1901.

The late catastrophe that befell our country in the violent death of our beloved President at the hands of an assassin has awakened into controversy important questions relating to the treatment and suppression of crime, which have never been satisfactorily answered. Prof. Arthur McDonald, specialist in the United States Bureau of Education, who has made a most extensive study of criminals and criminalogy and who is now engaged in promoting the establishment by the United States government of a Psycho-Physical Laboratory for the study of criminal, pauper and defective classes, recently stated several conclusions as to the origin and proper treatment of the criminal man based upon the experience of those who have studied criminals directly or who have had practical control of large numbers in prisons or reformatories. These suggestions are very pertinent at this crisis and are earnestly commended to lawyers and law-makers as a basis for a sound, practical advance in the treatment of criminals and the suppression of crime. These conclusions are as follows: 1. The prison should be a reformatory and the reformatory a school. The principal object of both should be to teach good, mental, moral, and physical habits. Both should be distinctly *educational.* 2. It is detrimental financially, as well as socially and morally, to release prisoners when there is probability of their returning to crime; for in this case the convict is much less expensive than the ex-convict. 3. The determinate sentence permits many prisoners to be released who are morally certain to return to crime. The indeterminate sentence is the best method of affording the prisoner an opportunity to reform without exposing society to unnecessary dangers. 4. The ground for the imprisonment of the criminal is, first of all, *because he is dangerous to society.* This principle avoids the uncertainty that may rest upon the decision as to the degree of freedom of will; for upon this last principle some of the most brutal crimes would receive a light punishment. If a tiger is in the street, the main question is not the degree of his freedom of will or guilt. Every man who is dangerous to property or life, whether insane, criminal, or feeble-minded, should be confined, but not necessarily punished. 5. The publication in the newspapers of criminal details and photographs is a positive evil to society, on account of the law of *imitation;* and, in addition, it makes the criminal proud of his record, and develops the morbid curiosity of the people; and it is especially the mentally and morally weak who are affected. 6. It is admitted by some of the most intelligent criminals, and by prison officers in general, that the criminal is a fool; for he is opposing himself to the best, the largest, and the strongest portion of society, and is almost sure to fail.

One of the most unfortunate aspects of the work of the Supreme Court of the United States during the last few years has been the more than ordinary lack of harmony and concurrence between the different members of the court on many very important questions of law. In addition to the Income Tax and Insular Tariff decisions, which were attended with so many embarrassing circumstances and which cannot be said to evidence that clear grasp of the law which is to be expected from members of the highest court in the land, we are compelled to add to this list the decisions of the court on the constitutionality of the "front-foot" rule of assessment in apportioning the cost of street improvements. This decision was handed down April 29, 1901, in the now celebrated case of French v. Barber Asphalt Paving Co.,—celebrated, however, more because of the importance of the subject under consideration than for the brilliancy or correctness of the argument extended in support of the decision. In a very unsatisfactory opinion, in that it leaves the important question it attempts to discuss still undecided, Justice Shiras, representing a majority of the court, practically overrules the case of Norwood v. Baker, although expressly denying any such intention, and holding that the apportionment of the entire cost of a street improvement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the

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legislature, and this will not constitute a taking of property without due process of law. Aside from the unbecoming attitude of the court in overruling itself in so short a time on such an important rule of property, the decision offers further evidence of the dangerous tendency toward the subversion of private and property rights of the individual in the large cities of the country. Quite often of late has attention been called to the fact that our large cities were becoming hot-beds of anarchy and socialism, due to the fact that the freedom of the individual was being sacrificed in favor of what are known as "municipal conveniences." Indeed, one of the arguments used so often in the persistent attempts to overrule the case of Norwood v. Baker, was that street improvements must stop unless the expense of their construction could be taxed upon the abutting property owner. The sufficient answer to such an argument is that all such enterprises ought to stop and the people compelled to use God's green earth in the condition in which he left it without any of man's "improvements" rather than sacrifice one *iota* of individual right. The words of Church, C. J., as expressed in Guest v. Brooklyn, 69 N. Y. 506, are very pertinent in this connection: "The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty."

NOTES OF IMPORTANT DECISIONS.

TRUSTS—MERGER OF LEGAL AND EQUITABLE ESTATE.—With all the favor which courts of equity show to trust estates, it seems impossible to keep such an estate alive when the person in whom the absolute equitable interest is vested is also entitled to exactly the same interest at law. In other words, a man who is absolute owner is not allowed to be a trustee for himself, and accordingly "by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either come together or are afterwards united in him, the legal will prevail, the equitable is totally gone for the purpose of being acted on by any person in this court." Selby v. Alston, 3 Ves., p. 342. The principle has recently been applied by Farwell, J., in *Re* Selous, 49 W. R. 440 under somewhat curious circumstances to the case of two owners. A testator who died in 1890 bequeathed leasehold property to a trustee, in trust for his two daughters in equal shares as tenants in common. By a deed made in 1895 between the trustee and the daughters, the trustee, at the request and by the direction of the daughters, assigned the property to the daughters as joint tenants, the daughters giving him a joint covenant of indemnity against liability under the lease. The death of one of the daughters in 1900 raised the question whether this conveyance had put an end to the equitable tenancy in common and had substituted a joint tenancy at law free from any equitable interest, so that the surviving daughter was entitled to the whole. This was the view taken by the learned judge. The rule that one person cannot be trustee for himself applies, he held, equally to the case of two absolute owners, and the daughters, by taking the conveyance, had lost their previous interests. The difference between a tenancy in common and a joint tenancy was not sufficient to avoid this result. It would seem to be clear also, on the form of the conveyance, that the daughters had no idea of keeping alive their former estates.

MASTER AND SERVANT—LIABILITY OF MASTER FOR ACTS OF ILL-TEMPERED OVERSEER.—Man's inhumanity to man has recently been the subject of many sad and theoretical observations and discourses as well as the outlet of much useless sentiment, useless in this, that a man very often consents in theory to that which he indifferently disregards in practice. The law, however, is always practical and regards with more favor the actual illustration of the principle than the principle itself. In the relation of master and servant the temptation is very strong for the one in authority to gratify his sense of power by ill-treating and insulting those who have submitted themselves to his control. But this practice of maltreatment and insolence is not so often found in the master himself as in some narrow gauged hireling whom he has raised to a position of authority over his other servants. The principle which the law announces in such cases is that a master owes an obligation to his servants not to place incompetent, ill-tempered or unskilled overseers or foreman over them. The practical application of this principle was well illustrated by the recent case of Lamb v. Littmann, 38 S. E. Rep. 911, when the Supreme Court of North Carolina held that where a mill owner places a man generally reputed to be ill-tempered and mean to children and other help over a 10 year old boy, he will be liable for his violent handling

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of the boy in urging him to the proper performance of his work. The court said:

"Had the master committed the assault his liability would not be questioned. Then why not be responsible for his representative, whom he knew, or ought to have known, to have been of such nature and character that the like result would follow? Under the contractual relations existing between plaintiff and defendant, it was the duty of plaintiff to render proper service and obey the commands and directions of his superiors in the service. It was likewise the duty of defendant, under those relations, to appoint as his representative a fit and competent person, not one of a cruel and mean nature, who would use violent means in urging the performance of duty. We do not wish to be understood as holding that the master is generally an insurer of the good conduct of his representative, or an insurer against his violence resulting from his own malice or ill will or sudden outbursts of temper, although in charge of the master's business but only when he puts in such representative as is by him known, or ought to have been known, to be violent and mean, and the injury is the natural result of such character."

CORPORATIONS — IMPROVIDENT ACTIONS AGAINST DIRECTORS.—"No wrong without a remedy" is one of those flattering illusions with which law—or equity—beguiles the unwary into litigation. The fallacy lies in the ambiguity of the word "wrong." In the maxim sense it is *injuria*—a legal wrong—and so read, the proposition becomes little more than a truism; but to the plain man a wrong means a grievance, and a grievance may or may not be cognizable by the law. The plain man cannot, therefore, be too careful in ascertaining, or having it ascertained for him, whether his particular grievance falls within the category of legal grievances—is, in other words, an actionable wrong. Shareholders are peculiarly prone to neglect this. They have been led to invest their money in an enterprise which has turned out disastrously; they have lost it, and a retaliatory instinct urges them to seek redress from the directors, the supposed authors of the wrong. Now, in this matter of redress against directors the law is highly technical, not to be invoked, as a recent case in the court of appeals shows, without great care and circumspection. To begin with, a personal action by a shareholder against directors is quite another thing from an action by a shareholder against the company to obtain rescission of his contract to take shares; so in an action by the company against directors as its managing agents to account or answer for misfeasance. The gist of the personal action against directors by a shareholder is a tort, not a trust; it is that they have by fraudulent or reckless misstatements in the prospectus induced the plaintiff to join in a commercial venture, whereby he has sustained loss. For this purpose the principles of an action of deceit still hold good. The common law of England, though it exhorts *honeste vivere*, does not visit civility as a tortious act, or criminally, except in the witness-box, the mere telling of lies. In the case of contracts, of course, it is different; but to constitute a tort, to found an action of deceit, there must be something more. The plaintiff must prove (i.) actual fraud; (ii.) that the fraud was *dans locum contractui*; (iii.) that he was, in fact, misled by it; (iv.) that he suffered loss as a natural consequence of his doing so. All that the Directors' Liability Act, 1900, has done is to qualify the second of these conditions (ii.)—the necessity for the plaintiff proving actual fraud by making it enough that the directors have made a misstatement without reasonable ground for believing it true. It was thought politic by the legislature thus to stretch the law of deceit for the protection of the public against a particular class of persons who enjoy special facilities for committing frauds, and are under a peculiar obligation to deal honestly and candidly with the public. But the relaxtion of the law of deceit goes no further. It would add a new terror to life if for every idle word or careless opinion a man had to give an account in this world as well as in the next.—*Solicitors' Journal.*

BANKRUPTCY—LIMITATION OF TIME PRIOR TO BANKRUPTCY IN WHICH A PAYMENT MAY BE CONSIDERED A PREFERENCE.—One of the few remaining controversies of any importance over the new bankruptcy act is that over the question whether the time limit of four months, specified in subdivision "b" of section 60, apply to preferences referred to in subdivision "g" of section 57, so as to limit the return of preferential payments to those received during four months prior to bankruptcy proceedings. District and circuit courts of appeals have answered the question differently, and are awaiting patiently the decision of the supreme court to set the matter at rest. We called attention to this question and its serious character in our editorial comment on the recent case of Carson, Pirie, Scott & Co. v. Trust Co., 53 Cent. L. J. 1, where we said:

"One question is yet undecided. Is the time limit of four months provided for in section 60b, in regard to preferences which may be recovered by the trustee, applicable also to sections 60a and 57g in regard to preferences which must be surrendered to entitle the creditor to participate in the estate of the bankrupt? In section 60a no limit is set to when a payment may be a preference, except the insolvency of the debtor. It would, therefore, seem that the decision in the case of *In re* Jones, reported in 4 Am. B. R. 563, and holding that section 57g compels a surrender of a preferential payment of money, even though received more than four months prior to bankruptcy, as a condition precedent to sharing in the assets, is the only logical deduction to be drawn from the plain wording of these sections and the construction put upon them by the su-

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preme court. The question of expediency under such construction becomes even more vital than before, but it is one for congress and not the judiciary to determine."

This question has just recently come up for decision in the case of *In re* Steers Lumber Co., 6 Am. B. R. 315, where the court follows the case of *In re* Jones, *supra*, and holds that there is no time limit to the operation of section 60a or to the preferences mentioned in section 57g, and a payment received from a bankrupt while insolvent, though more than four months prior to the commencement of bankruptcy proceedings, creates a preference under both of said sections. The court in rendering the opinion said:

"The court is constrained to the conclusion that there is no time limit to the operation of section 60a. The suggestion of the supreme court in Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co., 5 Am. B. R. 814, tends in such direction, and the discussion of Judge Lowell (*In re* Jones, 4 Am. B. R. 563) states the view that may be adopted most reasonably. Some limitation of time upon the operation of 60a may be advisable, but an examination of the act and of the different parts thereof fails to disclose that it exists."

The question at bar did not arise in the Carson case, but counsel in that case referred to the four month' limit for the purpose of showing that if that was allowed the court "could travel outside" for the purpose of taking in the connecting element of intent also. This argument was met by the court as follows:

"The argument is strong which is urged to support a four months' limitation; but it can be argued in opposition that subdivision 'a' needs no explanation from other parts of the statute in order to obtain a time limit on the question of preference. It can be argued that subdivision 'a' gives such limit in the existence of insolvency. But we are not required to decide either way on this record. If the 'element' of intent is not to be interpolated into subdivision 'a' of section 60, it must seem that the element of time is not to be so interpolated."

DUTY OF WIFE TO FOLLOW DOMICILE OF HUSBAND.

It is a generally accepted rule of law that the domicile of the wife follows that of her husband.[1]

This doctrine rests, not merely on the legal identity of husband and wife, but more particularly on her duty to dwell with the husband wherever he dwells. If he commits an offense which entitles the wife to seek a dissolution of the marriage, she must abandon him or future cohabitation will generally amount to condonation and bar her claim to remedy.[2]

So long as the unity of the marriage relation remains undisturbed the wife cannot acquire a domicile other than that of her husband,[3] nor can she acquire a separate domicile if separated from him,[4] unless such separation is justified,[5] or she is abandoned.[6] His domicile will be her domicile and will change with his thoroughout their married life.[7] Only for the purpose of bringing a suit for divorce may the wife acquire a domicile or residence distinct from that of her husband.[8]

The fact that husband and wife have separated by agreement will not enable the wife to acquire a separate domicile.[9] This seems to be the rule in England and

[1] Greene v. Greene, 28 Mass. (11 Pick.) 410; Hairston v. Hairston, 27 Miss. 704; Burnham v. Rangeley, 1 Woodb. & M. 7, Fed. Case No. 2176; Johnson v. Turner, 29 Ark. 280; Jeness v. Jeness, 24 Ind. 355; McAfee v. Kentucky University, 70 Ky. (7 Bush) 135; Hick v. Hick, 68 Ky. (5 Bush) 670; Baldwin v. Flagg, 43 N. J. Law (14 Vroom.), 495; Henderson v. Ford, 46 Tex. 627; Yule v. Yule, 10 N. J. Eq. (2 Stockt.) 138; Ditson v. Ditson, 4 R. I. 87; Williams v. Saunders, 45 Tenn. (5 Cold.) 60.

[2] Twyman v. Twyman, 27 Mo. 383; Quincy v. Quincy, 10 N. H. 272; Delliber v. Delliber, 9 Conn. 235; Bishop, Mar. & Div. vol. 2, §§ 38, 40, 125; Phelan v. Phelan, 135 Ill. 447; Weigand v. Weigand, 42 N. J. Eq. (15 Stew.) 699, 11 Atl. Rep. 113; Harper v. Harper, 29 Mo. 301; Dutcher v. Dutcher, 39 Wis. 659; Smith v. Smith, 19 Neb. 706, 28 N. W. Rep. 296.

[3] Howland v. Granger, 45 Atl. Rep. 740, citing *In re* Florance, 54 Hun. 328, 7 N. Y. S. 578; Shute v. Sargent, 67 N. H. 305, 36 Atl. Rep. 282; Ditson v. Ditson, 4 R. I. 87; Harrison v. Harrison, 20 Ala. 629; Hardin v. Allen, 9 Greenlf. 140.

[4] Maguire v. Maguire, 7 Dana, 181; Colburn v. Holland, 14 Rich. Eq. 176; Johnson v. Johnson, 12 Bush, 485; Greene v. Greene, 28 Mass. (11 Pick.) 410; McGown v. McGown, 18 Misc. Rep. 708, 43 N. Y. S. 745; Johnson v. Johnson, 75 Ky. 485. *Contra:* Chapman v. Chapman, 129 Ill. 386; Rundle v. Van Inwegan, 9 Civ. Proc. Rep. 328; Arrington v. Arrington, 102 N. Car. 491, 9 S. E. Rep. 200.

[5] Cheever v. Wilson, 9 Wall. 108, L. Ed. 604; Lyon v. Lyon, 30 Hun, 455; Derby v. Derby, 14 Ill. 645; Hill v. Hill, 166 Ill. 54.

[6] Shute v. Sargent, 67 N. H. 305, 36 Atl. Rep. 282.

[7] Cooper v. Biers, 143 Ill. 25; Mason v. Homer, 105 Mass. 116; Barber v. Barber, 21 How. (U. S.) 103; Bank v. Balcom, 35 Conn. 351; 5 Am. & Eng. Ency. 868.

[8] Jeness v. Jeness, 24 Ind. 355, 87 Am. Dec. 335; Craven v. Craven, 27 Wis. 418; Derby v. Derby, 14 Ill. App. 645; Lazovert v. Lazovert, *Id.* 653; White v. White, 18 R. I. 292, 27 Atl. Rep. 506; Mellen v. Mellen, 10 Abb. N. C. 329; Turner v. Turner, 44 Ala. 437; Hewes v. Hewes, 61 Hun, 625, 16 N. Y. Supp. 119; Hopkins v. Hopkins, 35 N. H. 474.

[9] Dolphin v. Robbins, 7 H. L. C. 390; Warrender v. Warrender, 3 Cl. & F. 488.

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in many of our states,[10] but in New York the rule is now well established that a wife may acquire a domicile separate from that of her husband whenever it is necessary for her to do so, and when husband and wife have separated and agreed to live apart the wife's domicile cannot be drawn to that of her husband without her consent or without her actual presence at his place of residence.[11] The husband has the right to decide where the matrimonial residence shall be,[12] and may without the consent of the wife, change it as often as his health, pleasure or buisness dictates,[13] and when in good faith he thus changes his residence and his wife refuses to go with him such refusal amounts to desertion.[14]

It is the husband's right to fix the domicile of the family, and the refusal of the wife to accompany him and live with him on a change of residence, is desertion on her part.[15] She cannot control his right to fix his residence where he will.[16]

In Cutler v. Cutler, the court said: "The husband has the undoubted right to change his home as often as his business, his comfort or his health may require; and so long as his conduct in this particular is free from taint or cruelty we have no authority to criticise it."[17]

In Illinois, where the husband moved from his old homestead to a new one about a mile distant, and his wife refused to join him, and insisted on remaining in the old home with her brother to whom it had been conveyed by herself and husband, the court granted the husband a decree of divorce on the ground of desertion.[18]

On application of the wife for separate maintenance under the Illinois statute, where it was shown that the husband had removed to Michigan for good reasons, and the wife refused to follow, the court denied the application, saying: "It is her duty as a faithful and obedient wife to accompany him there."[19]

In the Kennedy case, *supra*, the court said: "In the case of Davis v. Davis, 30 Ill. 180, the general and well-recognized rule of law was announced that the domicile of the husband is that of the wife, and the rule was recognized in the case of Ashbaugh v. Ashbaugh, 17 Ill. 476, where it was said the residence of the wife follows that of the husband."[20] Where the husband's income became reduced, and in order to curtail expenses he removed to another home in the same city, which was in every way suitable, and his wife refused to accompany him, the court granted a divorce.[21] In the case of Hunt v. Hunt the parties were married in Wisconsin, and later the husband established himself in the legal profession in New York, supporting his wife who remained in Wisconsin. He requested her to live with him in New York but she refused his requests saying "she could not think of it; she could not think of giving up her arrangements in Wisconsin; that she could not break up all her arrangements and plans in compliance with that letter." The court granted a divorce.[22] Willful refusal of the wife to live with her husband in South Carolina where he had moved after their marriage in Alabama constituted desertion on her part.[23]

Desertion to constitute a ground for divorce under the statutes of most of the states is generally, if not always qualified and "willful," "willful and malicious" or "willful, continued and obstinate" desertion must be proven.[24] And there are, however, limitations and exceptions to the general rule that it is the wife's duty to follow her husband to a new residence. The husband cannot arbitrarily and without reason compel the wife to conform

[10] See *ante* note 4.

[11] Rundle v. Van Inwegan, 9 Civ. Proc. Rep. 328.

[12] Kennedy v. Kennedy, 87 Ill. 250; Hanberry v. Hanberry, 29 Ala. 719; Cutler v. Cutler, 2 Brewst. (Pa.) 511; Stewart, Mar. & Div. §§ 221-253; Firebrace v. Firebrace, Law Rep. 4 Pro. & D. (Eng.) 63.

[13] Cutler v. Cutler, 2 Brewst. (Pa.) 511.

[14] Gahn v. Darby, 36 La. Ann. 70; Hunt v. Hunt, 29 N. J. Eq. (2 Stew.) 96; Thompson v. State, 28 Ala. 12; Ralston v. Ralston, 13 Phila. 30.

[15] Angier v. Angier, 7 Phila. 305.

[16] *In re* Bye, 2 Daly, 525.

[17] 2 Brewst. (Pa.) 511.

[18] Kennedy v. Kennedy, 87 Ill. 250.

[19] Babbitt v. Babbitt, 69 Ill. 277.

[20] Kennedy v. Kennedy, 87 Ill. 252.

[21] Beck v. Beck, 163 Pa. St. 649.

[22] 29 N. J. Eq. 96.

[23] Hanberry v. Hanberry, 29 Ala. 719.

[24] Broughton v. Broughton, 1 Del. Co. Rep. 273; Bean v. Bean, 11 Lanc. Bar, 138; Appeal of Clark, 2 Chest. Co. Rep. 38; Rose v. Rose, 50 Mich. 92, 14 N. W. Rep. 711; Davis v. Davis, 60 Mo. App. 545; Sergent v. Sergent, 33 N. J. Eq. (6 Stew.) 204; Orr v. Orr, 71 Ky. (8 Bush) 156; Jennings v. Jennings, 13 N. J. Eq. (2 Beasl.) 38; Rutledge v. Rutledge, 37 Tenn. (5 Sneed) 554; Cornish v. Cornish, 23 N. J. Eq. 208.

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to his wishes and change her residence from whim or caprice on his part or where such change would injure or endanger her health.[25] In the Cutler case, the court said, "A husband cannot from mere whim or caprice remove his wife from the comforts of home, friends and refinement, to take her beyond the jurisdiction of their domicile."[26] And a wife may be justified in refusing to live with her husband's relations against her inclinations. In the case of Albee v. Albee the parties were married in Bellows Falls, Vermont, and at the time of the marriage the wife was running a small millinery store at that place, and her husband, the only child of his parents, was working on their farm and living with his father and mother a few miles from Bellows Falls. After the marriage the young couple went to live on the farm with the husband's parents, though the wife continued her business at Bellows Falls. As is frequently the case the daughter-in-law and the mother-in-law did not get along pleasantly, and the wife sought to induce the husband to take rooms in the village, and offered to pay for them herself. This he would not do and she suggested that his father build them a home which the father was willing to do but his mother said no, there should be no other house built—that if the house was not large enough for her daughter-in-law she could get out and leave it. The husband finally took his wife to her father's at Rutland and lived with her there for a while, and later they again lived with his parents. The mother-in-law continued to make it unpleasant, often refusing to speak to the wife, and if she came on the porch or into a room where her husband's mother was the latter would leave.

When the wife left to go to Rutland her husband drove her to the depot. The husband asked her if she noticed when leaving that his mother did not invite her to return. He said, "I'll give mother hell for that." She said, "Don't for my sake." The husband refused to provide a home for her other than that of his parents, and refused to live with her at her father's home. He finally went to Chicago where suit for divorce was instituted on the ground of desertion. A decree was granted which the appellate court reversed. In an able opinion (by Moran, J.) the court said: "It is not laid down as a settled law that a wife must live in the house of her mother-in-law or be divorced from her husband for desertion. Much stress is laid on the fact that before the marriage she agreed to live at his mother's house. Such an antenuptial contract is of no force. All such promises are merged and obliterated by the marriage contract which bound the husband to 'leave father and mother and cleave to his wife.' It is proved that the house was large and comfortable, but his wife wanted more than mere space and convenience—she wanted peace of mind and happiness, and was willing to live with him in his father's sheep house in order to be happy."[27] In a similar case in Vermont the court said: "While we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardized, or even where she seriously believes such results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere willfulness. Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind was thereby seriously disturbed. This would be very far from compliance with the Scriptural exposition of the duty of husbands: 'For this cause shall a man leave father and mother and cleave to his wife, and they twain shall be one flesh.' And in the present case, as the wife alleges the vicinity of the husband's relatives as a reason why she cannot consent to come to Milton to live with him, and as every one at all experienced in such matters knows that it is not uncommon for the female

[25] Powell v. Powell, 29 Vt. 148; Gleason v. Gleason, 4 Wis. 64; Stewart, Mar. & Div. §§ 261, 273.

[26] Cutler v. Cutler, 2 Brewst. (Pa.) 513.

[27] 43 Ill. App. 370; affirmed, 141 Ill. 550, 31 N. E. Rep. 153. See also Hair v. Hair, 10 Rich. (S. Car.) Eq. 163.

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relatives of the husband to create, either intentionally or accidentally, disquietude in the mind of the wife, and thereby to destroy her comfort and health often, and there is no attempt here to show that this is a simulated excuse, we must treat it as made in good faith, and if so, we are not prepared to say that she is liable to be divorced for acting upon it."[28] If the husband intends to visit upon the wife the penalty of disobedionce he must present to her in unequivocal terms the alternative of a compliance with his wishes that she reside with him or surrender all claims to his support and protection. A proposition for the wife's removal addressed merely to her discretion she may reject without the penalty of desertion.[29] In a suit for a divorce by a husband on the ground of abandonment it appeared that the abandonment from the common home was the act of the husband, and that, though the conduct of the wife may have tended to alienate him from his home, she never deliberately designed by her conduct to effect a final separation, it was held that he was not entitled to a divorce as abandonment to constitute ground for a divorce, *a vinculo* must be the deliberate act of the party complained against done with the intent that the marriage relation should no longer exist.[30] The refusal of the wife to accompany her husband to a foreign country is not in itself a willful and malicious desertion within the meaning of the statute.[31]

In the case last cited the wife refused to accompany the husband to America from England. The husband came to Philadelphia to reside, and subsequently returned and renewed his request, but his wife persisted in her refusal, although she allowed him to take some of their children with him. The court held that the proof was insufficient to show willful and malicious desertion, and said: "Is willful and malicious desertion a natural and necessary inference from such a state of facts? The terms imply free election to live with or not to live with the party deserted, and determined upon against the marital obligation, and impelled thereto by willfulness and malice. The choice must be free, excepting so far as it may be controlled by these evil impulses. Can this be inferred, by any fair process of reasoning, from the facts sworn to here? The woman had for years followed the fortunes of her husband—faithful in everything, as the testimony shows, as well as his anxiety to have her accompany him to this country evinces, if he were sincere in it. At this point, however, and in the face of this great trial, she fails. The leaving home and country, the dangers of a long ocean voyage, the privations of a stranger in a strange land, may have overmastered her strongest desire to follow his footsteps further, and determined her to cling to her native country. This is the evidence; and the fair inference from it, extending to her the legal presumption of innocence and honesty until the contrary be made to appear, does not necessarily, and in opposition to all other inferences, establish willful and malicious desertion."

Where it is doubtful whether the husband is able to provide food and shelter for the wife, she is not obliged to follow him. In the case of Phelan v. Phelan, Gary P., J., in a characteristic opinion, says: "The defendant at the time of the marriage was and had been for eight or nine years and still is in business in La Salle in this state. There the parties were married in 1877 and lived together as husband and wife until 1884, when the plaintiff in error came to Chicago and remained here. It is probably true that he has several times requested her to come and live with him in Chicago, and that she has refused. He claims that he is entitled to a divorce, and cites Kennedy v. Kennedy, 87 Ill. 250. But in this case the record does not show that the plaintiff is engaged in any business, and it does show that he has no home to which she can come in Chicago. She is under no obligation to abandon a home and means of support and children by a former marriage in La Salle and follow his uncertain fortunes here, under such circumstances. The decree is affirmed."[32]

In a suit for divorce by the husband who had left his wife in New York, he cannot sustain a charge of desertion by merely showing a request to her to come and reside with

[28] Powell v. Powell, 29 Vt. 148. See also Wright v. Wright, 43 Atl. Rep. 447; Law Notes, vol. 5, No. 3.
[29] Hardenburgh v. Hardenburgh, 14 Cal. 654.
[30] Lynch v. Lynch, 33 Md. 328.
[31] Bishop v. Bishop, 30 Pa. St. 412.
[32] 35 Ill. App. 511; affirmed 135 Ill. 447.

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him, but must show that he in good faith offered her a home.[33]

A wife need not follow her husband to a place where her health would be affected, or where the condition of civilization would render it an inappropriate place for her residence.[34]

The poverty of the husband will not excuse the wife for refusing to live with him; and even his inability to provide for her support will not constitute desertion on his part.[35]

Through financial reverses a husband was compelled to change residence, and was unable to afford the comforts his wife was used to. The court said: "The wife is bound to follow the fortunes of her husband, and to live where he chooses to live and in the style and manner which he may adopt."[36]

Where the husband's request that his wife join him in a new domicile is accompanied by threatening language, she will be justified in refusing to join him; and she may decline to accept an invitation palpably insincere.[37]

And where a husband abandons his wife because she will not sell her city property and purchase in a distant county and remove with him, the wife is entitled to a divorce for abandonment.[38]

Though the wife repeatedly declares she will not go with her husband to a new home selected by him, her failure to go with him does not place her in the attitude of deserting him if he leaves her at home declaring that his absence will be temporary.[39] As stated heretofore the husband must request in unequivocal terms his wife's compliance with his wishes. And even where the wife refuses to accompany her husband to his new home, if, in good faith, she subsequently offers to return to him, it is his duty to receive her at any time before her desertion has reached the period prescribed by statute as a cause for divorce. And if the husband refuses, the refusal amounts to desertion.[40] Notwithstanding the fact that the wife's refusal to accompany or follow her husband may amount to willful desertion on her part, subsequent cohabitation will be construed as condonation, and bar a divorce on the ground of desertion.[41] But occasional visits or sexual intercourse with the offending party without renewal of cohabitation will not amount to condonation.[42]

As may be seen, the weight of authority is in favor of the general rule that the domicile of the wife follows that of the husband; that the husband may change his residence as often as his health, pleasure or business dictates, provided that he act in good faith, and when he thus removes his domicile it becomes the duty of the wife to follow. But, on the other hand, it is the husband's duty to provide a home as comfortable as his means will warrant for the wife to go to; a home separate from his relatives, should she desire it; a home in a healthy and civilized country. If he does this and the wife refuses to accompany or follow him, such refusal amounts to desertion.

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[33] Paul v. Paul, 75 Ill. App. 388.

[34] Haymond v. Haymond, 74 Tex. 414; Hardenburgh v. Hardenburgh, 14 Cal. 654.

[35] Bennett v. Bennett, 43 Conn. 313; Palmer v. Palmer, 22 N. J. Eq. (7 C. E. Green) 88.

[36] Messenger v. Messenger, 56 Mo. 329.

[37] Walker v. Leighton, 31 N. H. 111.

[38] Hughart v. Hughart, 5 Ky. Law Rep. 931.

[39] Barbour v. Barbour, 7 Ky. Law. Rep. 827.

[40] Hanberry v. Hanberry, 29 Ala. 719; Fellows v. Fellows, 31 Me. 342.

[41] Phelan v. Phelan, 186 Ill. 447; Reed v. Reed, 62 Ark. 611, 37 S. W. Rep. 230; Todd v. Todd, 87 Atl. Rep. 766.

[42] Kennedy v. Kennedy, 87 Ill. 250; Bohnert v. Bohnert, 95 Cal. 444; Danforth v. Danforth, 88 Me. 120, 33 Atl. Rep. 781.

STREET RAILROADS—DEFINITION—CONSTITUTIONAL INTERPRETATION.

BOARD OF RAILROAD COM'RS OF STATE OF CALIFORNIA v. MARKET ST. RY. CO.

Supreme Court of California, May 15, 1901.

1. Const. art. 12, § 22, defining the judgment and jurisdiction of the railroad commission, and authorizing it to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies, does not give the commission jurisdiction and control over street railroad companies, since such companies are not railroad or transportation companies, within the meaning of the act.

2. A legislative interpretation of a constitutional provision contemporaneous with its adoption may be considered by the courts in an interpretation of a doubtful provision thereof.

COOPER C.: This is an application by the board of railroad commissioners of the state of California for a writ of mandate to compel the defendant corporation to produce to the plaintiffs, and to permit plaintiffs to examine, the books, records and papers of said corporation. The court below refused the writ, and ordered the action dismissed, and judgment was accordingly entered.

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This appeal is from the judgment. The question to be here determined is as to whether or not the defendant corporation is subject to the supervision of plaintiffs, under the provisions of an act of the legislature entitled "An act to organize and define the powers of the board of railroad commissioners," approved April 15, 1880. St. 1880, p. 45. The constitution provides for and defines the duties and jurisdiction of the railroad commissioners. Article 12, § 22. The language is: "The state shall be divided into three districts as nearly equal in population as practicable, in each of which one railroad commissioner shall be elected. * * * Said commissioners shall have the power and it shall be their duty to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies." Do the words, "railroad and other transportation companies," include a street railway company in a municipality engaged in the business of carrying passengers on street railroad cars? In order to correctly determine this question, we must look to the words used, the context, the object in view, and the evils that were intended to be remedied. In this manner we should, if possible, arrive at the intention of the convention in using the words, and give to them the same meaning and effect as was intended by the people through their representatives in framing the constitution.

It is a matter of common knowledge that among the evils, or supposed evils, under which the people of the state were suffering, and for which they demanded redress, was that of exorbitant and discriminating charges by railroad corporations engaged in transportation of freight and passengers. The political agitation of the times resulted in calling a constitutional convention, and the people, through their representatives, framing the present constitution, in 1879, which was afterwards, in the same year, adopted by the people by the expression of their will at the ballot box. The constitution in no place mentions street railroad corporations, although there were many such corporations in existence at the time it was framed. The Civil Code of the state, at the time, in title 3, §§ 454–491, contained many provisions in regard to "railroad corporations," and in title 4, §§ 497–511, treated of and provided for "street railroad corporations." Those sections of the Code so treating railroad corporations and street railroad corporations, under separate and distinct titles, had long been a part of the law of the state. Therefore we must presume that the convention, in which there were many lawyers of ability, knew that the two classes of corporations had long been known by the legal profession, and treated by the people through their legislatures from the state, the other, from the municipal authorities of the town or city in which it was carrying on its business. It is therefore a significant fact that no mention is made in the constitution of "street railway corporations," and we cannot resist the conclusion that such omission was not unintentional. There was no public demand for the regulation of fares of street railways in municipalities. The convention consisted of delegates chosen from all parts of the state. In the section of the constitution quoted the power is given to establish rates for passengers and freight. And it is further provided that "the rates of fares and freights" established by the said commission shall be conclusively deemed just and reasonable. It is further provided, in section 23 of the same article, that the state shall be divided into three "railroad districts," naming the counties in each district. This is consistent with the idea that the entire people of the state were interested in the great corporations engaged in the carrying of freight and passengers from one portion of the state to another, or from sister states into or through the state.

It is inconsistent with the idea that the entire people of the state were interested in the rates for carrying passengers within the corporate limits of a town or municipality. It was the policy of the constitution that such matters as concerned the inhabitants of a particular subdivision of the state or county should be governed as far as practicable by local laws. That the people of the state, through their representatives, understood the said sections of the constitution not to apply to street railroad corporations, is apparent from the contemporaneous construction given to them by the legislature in the act providing for the organization and defining the powers of the railroad commission, approved April 15, 1880, before cited. This act was passed for the purpose of providing machinery to carry into effect the constitutional provision creating the railroad commission. It was passed at the first meeting of the legislature after the constitution was adopted, and by the representatives of the people who had been elected for the purpose of providing for carrying it into effect. In this act it is provided in section 14: "The term 'transportation companies' shall be deemed to mean and include—First. All companies owning and operating railroads (other than street railroads) within this state. Second. All companies owning and operating steamships engaged in the transportation of freight or passengers from and to ports within this state. Third. All companies owning and operating steamboats used in transporting freight or passengers upon the rivers or inland waters of this state."

It will thus be seen that street railroads are

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such provision, either by the legislature or the courts. Particularly is this the case where that interpretation has been upon the statute books unchallenged for twenty years. The interpretation placed upon the constitution by the legislature of 1880 has ever since been acquiesced in, and legislation has been in accord with such interpretation. Thus, the legislature by an act approved March 23, 1893 (St. 1893, p. 288), made provision, among other things, for granting of franchises to operate railroads along public streets and highways by the board of supervisors or common council, only after public notice by advertising in one or more daily newspapers and then to the highest bidder. Again, on March 13, 1897 (St. 1897, p. 135), it was enacted that a franchise to construct or operate street railroads, except steam railroads, upon any public street or highway, shall be granted by the governing or legislative body of the city or town, only after public notice by advertising, as provided in said act, to the highest bidder, for a stated per cent. of the gross anual receipts, which shall in no case be less than three per cent. of such receipts. Thus, under the interpretation given to the act, and as it always appears to have been interpreted by the legislature, franchises for street railroads have been granted and rights have accrued. In the case of Stuart v. Laird, 1 Cranch, 299, 2 L. Ed. 115, the constitutional objection was made that the judges of the supreme court had no right to sit as circuit judges, not being appointed as such, nor having commissions for that purpose. In passing upon the question the Supreme Court of the United States said: "To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not now to be disturbed." In End. Interp. St. § 527, it is said: "The greatest deference is shown by the courts to the interpretation put upon the constitution by the legislature, in the enactment of laws and other practical application of constitutional provisions to the legislative business, when that interpretation has had the silent acquiescence of the people, including the legal profession and the judiciary, and especially when [illegible] poraneous interpretation of statutes, under which interpretation rights of property have for many years been acquired." In the case of Manufacturing Co. v. Ferguson, 113 U. S. 733, 5 Sup. Ct. Rep. 741, 28 L. Ed. 1138, in speaking of an act of the legislature as interpreting a provision of the constitution of Colorado, the court said: "The act was passed by the first legislature that assembled after the adoption of the constitution, and has been allowed to remain upon the statute book until the present time. It must, therefore, be considered as a contemporary interpretation entitled to much weight."

But, independent of the contemporaneous interpretation so given to the constitution by the legislature, we think the interpretation correct, and that the words "railroad company" were not intended to mean street railway. In the ordinary acceptation of the term "railroad company" or "railroad," it is not understood to mean a street railway engaged in the business of carrying passengers the entire distance, or any part of the distance, over which the road runs, for one and the same fare. In the late case of Ferguson v. Sherman, 116 Cal. 169, 47 Pac. Rep. 1023, this court had under consideration a provision of the constitution of Kansas exempting from statutory liability the stockholders of railroad corporations, and it was held that the provision did not extend to stockholders of the Electric Rapid-Transit Company, which was a street railway corporation. In the opinion it is said: "It is not so easy to believe that the purpose of that constitution was to exempt from liability the stockholders of street railways, which are designed merely to facilitate travel and communication upon the public highways of a municipality. * * * In this state the difficulty is much relieved by the distinction which our Codes make between railroad corporations proper and street railroad corporations. This consideration, however, is entitled to weight, * * * and we therefore conclude that the provision of the constitution of Kansas was not designed to apply to stockholders of street railroad corporations." In Gyger v. Railway Co., 136 Pa. 96, 20 Atl. Rep. 399, it was held by the Supreme Court of Pennsylvania that section 4, art. 17, of the constitution of the state, providing that "no railroad, canal or other corporation * * * shall consolidate * * * with or lease or purchase the works or franchises of, or in any way control, any other railroad or [illegible]

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construction of street railways. In the opinion the court said: "A railroad is for the use of the universal public, in the transportation of all persons, baggage and other freight; a street railway is dedicated to the more limited use of the local public, for the more transient transportation of persons only and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad." In Bloxham v. Railroad Co., 36 Fla. 539, 18 South. Rep. 446, 29 L. R. A. 509, it is said: "The word 'railroad,' as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term 'street railroad' applies only to such roads the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed compared with commercial railroads, which carries no freight, but only passengers from one part of a thickly-populated district to another in a town or city and its suburbs." In Trust Co. v. Douglas, 104 Iowa, 536, 73 N. W. Rep. 1040, in a very late case it is said: "The words 'railroad' and 'railway' may undoubtedly be so used as to mean a street railway, but by popular usage, when used without qualifying words, they are understood to refer to commercial railways; the word 'street' being almost invariably used in connection with 'railway' to designate a street railway." The same has been substantially held in other states in the discussion of the various uses of the words "railroad" and "street railway." Funk v. Railway Co., 61 Minn. 435, 63 N. W. Rep. 1099, 29 L. R. A. 208; Sears v. Railway Co. (Iowa), 23 N. W. Rep. 150; Railway Co. v. Johnson (Wash.), 25 Pac. Rep. 1084, 11 L. R. A. 693. And the same rule has been laid down in the federal courts. Manhattan Trust Co. v. Sioux City Cable R. Co. (C. C.), 68 Fed. Rep. 82; Trust Co. v. Hamilton, 32 C. C. A. 46, 88 Fed. Rep. 588; 1 Foote & E. Incorp. Co., p. 668, note 5,

It is claimed that the words, "other transportation companies," include street railway companies. We think, by reference to the context and other sections of the same article, it clearly appears that the words refer to transportation companies engaged in the business of common carriers of freight and passengers. The section refers to and speaks of "the rates of fares and freight" established by the commission. And in section 21 of the same article it is provided: "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons or in the facilities for the transportation of the same classes of freight or passengers within this state or coming from or going to any other state." In section 20 reference is made to the consequences of lowering rates "for transportation of passengers or freight from one point to another." Companies engaged in draying, running freight wagons, delivery wagons, delivering parcels, teaming, or running elevators, are engaged in the business of "transportation," but it surely could not be contended that they are subject to the jurisdiction of the "railroad commission." The people of the state would not have agreed to pay the salaries and expenses of the railroad commissioners selected from different geographical sections of the state for the purpose of regulating the charges of the "United Carriage Company" of San Francisco. Yet it is a transportation company. It clearly is not a transportation company whose "fares and freights" are subject to regulation by the railroad commissioners of the state. It follows that the judgment should be affirmed.

TEMPLE, J. (dissenting): The question here is whether the jurisdiction of the railroad commissioners extends to street railroads. That the phrase "railroad and other transportation companies," does include street railroads in its natural and most obvious sense, and also by common usage of the words, is not and cannot be denied. The phrase is repeated five times in this section, and nowhere is there a suggestion that anything comprehended in the phrase is to be excluded, and the constant repetition of the more extensive accompanying term, as though fearing and desiring to forestall an adverse construction which might limit the usefulness of the commission, is significant of a determination that there shall be no doubt as to the extent of the power of the board.

It is said that to give the words, "and other transportation companies" any meaning whatever will lead to absurd consequences, and one must limit the term, so far as railroads are concerned, to a particular species of them, to-wit, what counsel call commercial railroads, and it is said if these words mean anything there was no occasion to mention railroads at all, as they are all transportation companies. By what rule of construction are these words repeated in section 22 five times, and in article 12 many times more, to have no effect whatever? If the words serve no other purpose, they demonstrate that the jurisdiction of the commission was not to be confined to commercial railroads, although they were thought to be the principal offenders. Their use should conclude this question.

And it is said section 22, art. 12, has received a practical and contemporaneous construction by the act to organize and define the powers of the board of railroad commissioners, passed April 15, 1880. The act provides for the organization of the board, and that its members and employees, when in performance of their official duties, shall be carried free over all railroads, steamboats, etc., and in all vehicles employed in or by any railroad or other transportation company, etc.; and in section 14 that the term "transportation companies" shall be deemed to mean and include,

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"first, all other companies owning and operating railroads (other than street railroads) within this state." Contemporaneous construction can have no weight whatever where there is no doubt or ambiguity in the terms used, and none arises by implication from the context. This is clearly laid down by Cooley, Const. Lim. p. 80 *et seq.* The authorities are carefully collected and elaborately discussed in Morris v. Wrightson, 56 N. J. Law, 126, 28 Atl. Rep. 56, 22 L. R. A. 548. It would serve no useful purpose to go over that subject, especially as I think there has been no need for a contemporaneous or practical construction of this constitutional provision.

NOTE.—*Contemporaneous Construction of Constitutions.*—One difference must be noted at the outset between the construction of constitutions and statutes, in this, that the former are to be strictly while the latter are to be liberally construed. The reason for the rule is well stated by Stuart, J., in Greencastle v. Black, 5 Ind. 570: "The discretion of courts is more restricted in applying the rules of construction to a plan of government contained in a written constitution than in the construction of statutes, and the reason is conclusive. Statutes often are hastily and unskillfully drawn, and thus need construction to make them sensible. But constitutions import the utmost discrimination in the use of language." So also it must be borne in mind that a constitutional provision should not be so construed as to defeat its evident purpose and intent, but rather so as to give it effective operation and suppress the mischief it was aimed at. Jarrolt v. Moberly, 103 U. S. 921. In the construction of constitutional provisions, however, the question is, not what was the intention of the framers, but what is the meaning of the words they have used. A constitution does not derive its force from the convention which framed it, but from the people who ratified it, and the intent to be arrived at is that of the people, and this is found only in the words of the text. Beardstown v. Virginia, 76 Ill. 34. Upon this last rule stated is founded the most important rule of construction in all constitutional law and one which, in the principal case, the court or counsel, or both, obviously overlooked. When and how far can extrinsic circumstances be consulted in construing the meaning of a constitutional provision where there is no inconsistency of expression or meaning in the words themselves when taken in their natural meaning? In denying any such right whatever under ordinary circumstances, Chief Justice Marshall, in the leading case of Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, formulates the rule in the following words: "When the words conflict with each other, where the different clauses of the instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

In view of the rules just stated, and of the fact that the words of a constitutional instrument are presumed to be chosen with the utmost discrimination, it is surprising that the court in the principal case should have resorted to extrinsic circumstances and especially to the rule of contemporaneous construction, in order to show that the framers of the constitutional provision under discussion meant absolutely nothing by the words, "and other transportation companies." The words are certainly unambiguous, they are certainly full of meaning, and giving to the words their natural meaning their application is not so monstrous as to cause all mankind to unite in rejecting it, as whatever else may be included under the term "transportation companies," street railroads obviously and naturally come within the designation, and in such case it matters not what the people or the framers meant by the use of such words,—they are presumed to know the natural meaning of the words they use and to intend them to be taken in that sense. We therefore agree with Temple, J., in his dissenting opinion, that there was no authority to resort to extrinsic aid in the construction of the constitutional provision referred to in the principal case.

We have already found that in the construction of constitutions extrinsic circumstances can be consulted only in case of unsolvable doubts, ambiguities or inconsistencies after applying the natural meaning of the words to the provisions in question. This is the general rule, although the authorities are not uniform. Thus some courts seem to have held that contemporaneous history and convention debates and the circumstances and conditions under which they were passed may be consulted even where there are no doubts or ambiguities. Bay City v. State Treasurer, 23 Mich. 499; Daily v. Swope, 47 Miss. 1880; People v. Harding, 53 Mich. 485, 51 Am. Rep. 95. But it conceded by the great weight of authority that contemporaneous construction of constitutional provisions either by the people or the legislature can never be resorted to when the plain and natural meaning of the words themselves are entirely free from doubt. Hovey v. State, 119 Ind. 386; Jarrot v. Jarrot, 7 Ill. 1; Story on Const. § 407; Biggs v. McBride, 17 Oreg. 640; Enckling v. Simmons, 28 Wis. 272; Brown v. State, 5 Colo. 496; Union Pac. R. Case, 91 U. S. 72. But in case of doubt or ambiguity the contemporaneous or practical construction is not only permissible but is the safest and most reliable of all extrinsic aids to construction. Its influence is often controlling. Cohens v. Virginia, 6 Wheat. 418; Harrison v. State, 22 Md. 468; Howell v. State, 71 Ga. 224, 51 Am. Rep. 259; Allen v. Clayton, 63 Iowa, 11, 18 N. W. Rep. 663; Chesapeake, etc. R. R. v. Miller, 19 W. Va. 408; Collins v. Henderson, 74 Ky. 74; Linesay v. Wright, 6 Colo. 92; Cordova v. State, 6 Tex. App. 207; Jackson v. Board of Supervisors, 34 Neb. 680, 52 N. W. Rep. 169; Hedgcock v. Davis, 64 N. Car. 650. Thus where the provisions of the constitution relating to the appointment of officers of benevolent institutions of the state, not being entirely free from doubt, the fact that the legislature has colorable authority to make appointments, and that this authority was exercised by the legislature both before and since the adoption of the constitution, must be taken into consideration in construing such provisions since the practical exposition in such case is of controlling force. Hovey v. State, 119 Ind. 386. It must be borne in mind, however, that the contemporaneous construction just referred to is not that evidenced by the popular understanding of its meaning at the time,—that is of little force. What is meant is that practical applications of its provisions by other departments of the government at the time of their adoption,—these

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furnish strong presumption that such construction rightly interprets the intention. McPherson v. Secretary of State, 92 Mich. 377, 31 Am. St. Rep. 587, 52 N. W. Rep. 469; *Ex parte* McNiel, 13 Wall. (U. S.) 236; People v. LaSalle County, 100 Ill. 495. Thus, the legislature having the same right to construe the constitution of the state that the courts have, where the question is a doubtful one or one in which a liberal construction may be made, the legislative construction will not be condemned unless it very clearly appears that it is wrong. *Ex parte* Selma & G. R. Co. 45 Ala. 696. In Harrison v. State, 22 Md. 468, it was held that a contemporaneous construction of the constitution, of long duration, continually practiced under, and through which many rights have been acquired, ought not to be shaken but upon grounds of manifest error and cogent necessity. And also in United States v. Moore, 95 U. S. 760, it was held that the construction given to a provision by those charged with the duty of executing it is always entitled to the most respectful consideration and should not be overruled without cogent reasons. But a construction of the constitution by the legislature where it is restrictive of legislative authority or where such legislative construction is not continuous and concurring, it is not entitled to much weight. Maige v. State, 4 Ind. 342. And in Portland Bank v. Apthorp, 12 Mass. 252, a similar limitation is noted where it is held that although the practice and usages of successive legislatures will be considered in construing constitutional provisions, still no continued usurpation under color of legislative construction will work a forfeiture of any constitutional rights and liabilities.

JETSAM AND FLOTSAM.

TRIED TO BEAT THE BAND.

A complaint which a correspondent says was filed in an Idaho court, runs as follows:

"I. That at all times hereinafter mentioned plaintiffs .... were associated together as a musical organization under the name and style of the Granville Brass Band.

"II. That the defendants ... are, and at the times hereinafter mentioned were, associated together and doing business at the county and state of Idaho under the name and style of the Democratic Executive Committee of Idaho county, Idaho, and that the said defendants constituted the head push of what is commonly known and styled as the Unterrified or Great Unwashed, and are and were organized and existing for the purpose of knocking the stuffing out of the G. O. P., and then and thereby drawing public pap and growing fat and sleek therefrom.

"III. That during the months of September, October, and November, 1900, at the county and state of Idaho, the defendants then and there being desirous of rallying the Unterrified to listen to the shooting of anvil, cannon, and other big guns, and forcing and compelling the G. O. P. to dance to the music of plaintiffs, employed plaintiffs to furnish music for the entertainment and inspiration of the Great Unwashed and for the terror and intimidation of the G. O. P. for three meetings; all of which was of the reasonable value and agreed price of $60 in free and unlimited coin of the United States without the consent of the G. O. P.

"IV. That defendants have failed and refused to pay the said sum or any part thereof, although they are now enjoying the fat and lucrative offices much coveted by the G. O. P. and the Pops, commonly called 'Hayseeds.'

"V. That plaintiffs have demanded in writing payment thereof, and there is now due and owing from defendants to plaintiffs the said sum of $60 together with $5 attorney's fees as provided by law.

"Wherefore, plaintiffs demand judgment against defendants for the sum of $60 together with $5 attorney's fees, and costs of this action."—*Case & Comment.*

SENATOR VEST'S FAMOUS DOG SPEECH.

Many years ago, in a country town in Missouri, Senator Vest was retained for the plaintiff in a dog case. It was charged that the defendant had shot the dog in malice. Senator Vest said:—

"Gentlemen of the Jury: The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to their faith. The money that a man has, he may lose. It flies away from him, perhaps when he needs it most. A man's reputation may be sacrificed in a moment of ill considered action. The people who are prone to fall on their knees to do us honor when success is with us may be the first to throw the stone of malice when failure settles its cloud upon our heads.

"The only absolutely unselfish friend that man can have in this selfish world, the one that never proves ungrateful or treacherous, is his dog. A man's dog stands by him in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry winds blow and the snow drives fiercely, if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert, he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens. If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying him, to guard against danger, to fight against his enemies. And when the last scene of all comes, and death takes the master in its embrace, and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by the graveside will the noble dog be found, his head between his paws, his eyes sad, but open and alert in watchfulness, faithful and true even in death."

Then Vest sat down. He had spoken in a low voice, without a gesture. He made no reference to the evidence or the merits of the case. When he finished, judge and jury were wiping their eyes. The jury filed out, but soon entered with a verdict for the plaintiff for $500. He had sued for $200. It is even said that some of the jurors wanted to hang the defendant.—*Nashville American.*

WOMEN LAWYERS.

Among the graduates of the Baltimore Law School, who received their diplomas last night, was one who cannot practice in this state, although standing high in the class for intelligence, industry and mastery of the theory and the spirit of the law. It is not any physical infirmity or unfitness, or any lack of personal qualification that prevents this graduate from becom-

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ing a practicing attorney and counselor at law in Maryland. There are no defects of hearing, speech or sight to handicap this aspirant; no bodily weakness to prohibit active attention to business in or out of court. But while this unfortunate individual possesses a bright brain, stood among the highest in the class, and could probably do as well at the bar as any of the young men who are turned out by our colleges and universities, there is one grave indictment against this graduate which, in the eye of the laws of Maryland, more than counterbalances all the good qualities mentioned, and that is that nature made this young person a member of the female sex.

The only crime of Miss Etta H. Maddox is that she is a woman, and in Maryland the doors of the courts have not yet been opened to women as practitioners of law. They can practice medicine in this state, and kill or cure according to the most approved methods of regular male practitioners, and they can enter almost every other field of endeavor; but when they ask to assist justice they are sternly pointed to the code and told that ladies are not admitted.

The provisions of the Maryland Code on the subject are survivals of a period when woman, though a lawgiver, as now, in her own house, did not aspire to legal fame and profit. The old regulations have lingered on till the beginning of this century, probably rather because there has been no special demand for their repeal than because of any determined opposition. If a proposition for their repeal should come before the next legislature, as we trust it may, it does not seem likely that it would be opposed by any considerable portion of the bar or by any members of the judiciary. Opposition could be based only on fear of competition, and there are few men who would be willing to confess themselves afraid to meet feminine competition in the courts.

It is true we have a great many attorneys at law already, but that is not equivalent to saying that we would have too many lawyers, the terms not being by any means equivalent. The general moral tendency of admitting women to the bar would probably be wholesome. There would be fewer "shysters" among the women practitioners, and they would be likely to exercise a good influence both in the actual trial of cases and in upholding the dignity and fair name of the profession. If the lawyer is regarded by many thoughtless and prejudiced persons as tricky and untrustworthy, a licensed soldier of fortune, ready for a consideration to make the worse appear the better cause, prepared without regard to principle or precedent to defend to day what he denounced yesterday, it is the male sex which is responsible for these misapprehensions, as well as for cases of actual offense. Nowadays women, whether because men have become more worthless than formerly, or more selfish and less matrimonial, are compelled in increasing numbers to make their own livings. In the vast majority of cases it is not a question of choice, but of necessity. If they could do as they pleased they

WHAT'S IN A NAME?

Job Trotter Brown, the tipstaff, was a student of the laws,
And all his time was occupied in learning legal saws.
He scorned to live a fameless life—mere lackey of the court—
And nightly did he lucubrate on Contract, Crime and Tort.
For Job had sworn quite solemnly, forensical renown
Should trumpet to the universe the worthy name of Brown;
And, though his own accomplishments ne'er reached the outer throne,
His genius hatched a brilliant scheme to help his oath along.
So all his little children, as they numerously came,
He christened after jurists in the Pantheon of Fame.
Hence Mansfield and then Webtster Brown and Salmon Chase Brown appeared,
And Brewster Brown and Blackstone Brown and Story Brown were reared.
P. Henry Brown and E. Coke Brown arrived at man's estate,
And Bacon Brown and James Kent Brown filled up the family slate.
Old Job believed his great named boys predestined to renown
And that, in time, they'd lift the sod from the buried name of Brown.
But still that great day has not come, and still that worthy name
Is missing from the pedestal within the Hall of Fame;
For Mansfield Brown, the farmer, is the man behind the hoe;
And Webster Brown's a tailor, content to sit and sew;
Salmon Chase Brown's a monger, of fish, both shell and scale;
And Brewster Brown's a maker of choicest brands of ale;
Young Blackstone Brown delivers coal—good anthracite's his line—
And Story Brown is pitching for the Tallahassee nine;
Pat Henry Brown, the lightweight, is a pugilist of note;
And E. Coke Brown's a stoker on a Jersey ferry-boat;
The butcher shop is Bacon Brown's and there he toils each day;
While James Kent Brown makes cock-tails in a Cripple Creek cafe.—*Green Bag.*

CORRESPONDENCE.

TAXATION OF PERSONAL PROPERTY.

To the Editor of the Central Law Journal:

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and that is to require every bond, debenture, note, mortgage or other evidence of debt to be stamped by the assessor of taxes showing its rendition for taxes, and unless so stamped the same should be non collectible by any process of law. The state and county, and all municipal bodies should be inhibited from paying any bond issued by them unless so stamped. This would unearth untold millions of secreted personal property, force the tax-dodgers to assess their estates, and relieve farmers and other holders of realty from the unequal and excessive burdens now imposed upon them. JAMES B. SIMPSON.

[We desire to thank our correspondent for his suggestions on this important matter of personal property taxation, and consider them quite valuable. An objection, however, often made to the taxation of evidences of debt, is that the borrower is generally forced to pay the tax or submit to a higher rate of interest, while the lender and the one most able to pay the tax escapes its burden. This objection may be met by the suggestion of Mr. Simpson that all evidences of debt be "stamped by the assessor showing their rendition for taxes" before recovery can be had thereon. We shall be glad to hear from Mr. Simpson more at length on this subject, and from any others who may have pertinent suggestions to offer on this vexed and troublesome question.—ED. CENT. L. J.]

BOOK REVIEWS.

OUTLINE OF THE LAW OF REAL PROPERTY.

A most interesting and unique arrangement of the law of real property appears in a tabular analysis or skeleton of that part of the second book of Blackstone's Commentaries which relates to real property, prepared under the above title by L. W. McCandless of Ann Arbor, Mich. This book is one of especial advantage to the student of Blackstone, aiding him in a clearer comprehension of the important subject-matter of Blackstone's treatment of the subject of Real Property by having constantly before him the entire framework of his subject, showing its divisions and the inter-relations of its parts. Published by George Wahr, Ann Arbor, Michigan.

HIRSH'S TABULATED DIGEST OF THE DIVORCE LAWS OF THE UNITED STATES.

Codification of the laws of the several states and tabulation of the laws of all the states are among the latest fads of American jurisprudence. They are, however, more than fads; they stand with the new method of index-digesting, as evidences of the advance reforms of twentieth century jurisprudence—reforms brought about, not by caprice, but of inevitable necessity. With the wide difference and increasing changes, together with the delicate modifications and constructions by judicial opinion, of the laws of the several states, the average lawyer is buried and bewildered under the very mass of it. To put into his hands an index or tabulation of all the law of his own state or of all the law of all the states, is like throwing a rope to a drowning man. He clutches at it with a sense of infinite relief and sees the expected labor of weeks melt away into the delightful labor of a few hours, and he plunges into his adversary with the feeling of confidence of a general who knows the strength of the enemy's position as well as he does his own. Hirsh's Tabulated Digest of the Divorce Laws of the United States contains a complete digest of the divorce laws of every state and territory, placed in tabulated form, so that by a mere glance the particular information sought for may be obtained. The tabulation is printed on one large sheet of paper. At the head of it is an introduction with an explanation of the arbitrary signs and abbreviations used. Then follows an alphabetical list of states and territories in columns, and on each side is an index of causes for divorce. At the end of each column there is a concise synopsis of the practice in such case, showing the jurisdiction of courts, the methods of service of process, trials, and grounds for separation. To the student of this subject and to any person who may be interested in it—and who is not?—this table presents an easy method of comparing the laws of the various states; and to those who are urging uniformity of divorce laws, this method of compilation will be a saving of months of labor. Published by Funk & Wagnalls Company, New York and London.

BOOKS RECEIVED.

The Law of Sales of Personal Property. By Francis M. Burdick, Dwight Professor of Law in Columbia University School of Law. Second Edition. Revised and Enlarged. Boston: Little, Brown and Company, 1901. pp. 299. Buckram. Price, $3.00.

The Liability of Municipal Corporations for Tort Treating fully Municipal Liability for Negligence. By Waterman L. Williams, A. B., LL. B. Author of "Statutory Torts in Massachusetts. Boston: Little, Brown and Company, 1901. pp. 345. Sheep. Price $3.50. Review will follow.

HUMORS OF THE LAW.

A wise old man once said that the three degrees of comparison in a lawyer's progress were: "getting on; getting on er (honor); and getting on est (honest)."

The will of a jilted bachelor left a handsome legacy to a lady who had, twenty years before, refused to marry him, in order to express his gratitude to her for her forbearance, and his admiration for her sagacity in leaving him to a happy bachelor life of independence and freedom.

Mr. W, a prominent Hebrew, who saw an accident, and afterwards took much interest in a suit for damages by the injured person, was approached by Mr. H, the defendant's lawyer, who was also a Hebrew and a friend of his, and asked why he took such an interest against him in that case. He answered that the claim was just and ought to be paid. The next day on the trial of the case, having testified for the plaintiff, he was cross-questioned by his friend, the attorney, as follows: Question: "Mr. W, Haven't you taken a good deal of interest in this case?" Answer: "Yes, sir." Question: "Haven't you been telling around, that you knew this plaintiff would get a verdict?" Answer: "I have made that statement to but one person—that was to you, Mr. H." Question: "Well, sir, haven't you even offered to bet a suit of clothes that the plaintiff would win this case?" Answer: "Well, I did make that offer to you, Mr. H, and the offer is still open." The judge quickly turned his face to the wall, but seemed taken with a sudden convulsion. The verdict was for the plaintiff.

An embarrassing experience once happened, it is said, to Lord Cairns. As lord chancellor he was *ex officio* visitor of a certain insane asylum, and as

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such was entitled to be admitted at any time. One day he went to perform the duties of his office, but when he knocked at the gate he was met by a gate-keeper who didn't know him and who told him he could not be admitted until the appointed day for the public. His lordship straightened himself up and with dignity said, "Do you know who I am? I am the lord chancellor of England." The gate-keeper, nothing abashed, replied, "Oh, that's all right, my man; we've got three of them in here already."

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCORD AND SATISFACTION—Acceptance of Part of Debt in Satisfaction of Whole.—The acceptance by a creditor of a part of his debt in satisfaction of the whole was without consideration, and therefore does not preclude him from recovering the residue, though he accepted as part payment of the amount agreed to be paid by the settlement the note of a third person.—MANNAKEE v. MCCLOSKEY, Ky., 63 S. W. Rep. 482.

2. APPEAL—Bill of Exceptions—Signature.—Where a bill of exceptions was not signed, a signing of the findings of fact under the hand and seal of the judge, three months before the bill of exceptions was ready to file, cannot be considered as a signing of the bill, and hence did not cure the defect.—COOPER v. MALONEY, Mo., 63 S. W. Rep. 372.

3. ASSIGNMENT—Liability of Assignor—Failure of Assignee to Sue on Assigned Bond.—The assignee of a county bond, who has not sought by an action to enforce the collection of the bond, cannot recover of the assignor on the ground that the bond was issued by the county without authority of law, and that the county refuses, for that reason, to pay.—MAZE v. OWINGSVILLE BANKING CO., Ky., 63 S. W. Rep. 428.

4. ASSIGNMENT—Assignment for Benefit of Creditors—Preferences.—Where a debtor, in making an assignment for the benefit of creditors, directs the assignee to pay a debt due from him to a third person, the assignment is void, as the assignee is not authorized to make preferences, and the assignment is not saved by the fact that the assignee is also directed to pay the debts of the assignor in accordance with the assignment laws of the state will not lie.—H. B. CLAFLIN CO. v. LUBKE, Mo., 63 S. W. Rep. 407.

5. BANKRUPTCY — Partnership.—Where one member of a firm furnished money, which was deposited with a third party as a payment on a firm contract, and afterwards became bankrupt, his trustee had no claim to such money under Bankr. Law, § 5h, providing that, in the event of one or more, but not all, the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, since the money, when so furnished, became the property of the firm.—BURKE v. ROLLINSON, R. I., 49 Atl. Rep. 694.

6. BANKS AND BANKING—National Banks—Stockholders Subject to Assessment — Pledgee.—A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intention, by causing the stock to be transferred into the name of an employee, who holds it for the benefit of all parties interested, nor by any other action which is required or is proper for the protection of both his own interests and those of the pledgor, and not inconsistent with his retention of the stock merely as pledgee, such as paying an assessment required by the comptroller to make good the impaired capital of the bank, and charging the amount to the pledgor.—HIGGINS v. FIDELITY INS., TRUST & SAFE DEPOSIT CO., U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 475.

7. BILLS AND NOTES — Admissibility of Evidence under Plea of Non est Factum.—Under a simple plea of *non est factum* in an action against executors on a promissory note, the body of which was written by testator, it was error to permit defendants to prove that the note sued on had been altered so as to make it appear to be the note of testator, when in fact he had signed it only as a witness, and also that the amount of the note had been changed, as these facts should have been specially pleaded.—WALL v. MUSTER'S EXRS., Ky., 63 S. W. Rep. 432.

8. BONDS—Contract of Sale—Measure of Damages.—The measure of damages for breach of a contract for the sale of corporate bonds is the highest value of the bonds, within the time after the breach of the contract in which the purchaser may reasonably indemnify himself by the purchase of similar bonds.—TURNER v. JACKSON, Tenn., 63 S. W. Rep. 511.

9. BOUNDARIES — Determination by Owners — Disregard of Determination.—Where the true dividing line between adjacent landowners is unknown, and they agree on a fixed line as the true line, and thereafter the parties ignore it, in an action between them to determine the line the true line according to the survey will be enforced.—BRUMMELL v. HARRIS, Mo., 63 S. W. Rep. 495.

10. BUILDING AND LOAN ASSOCIATIONS—Shareholder's Deed of Trust—Assignment.—Where a sale and assignment by a building association of the bond and deed of trust of a shareholder was void as *ultra vires*, a sale of the property under the deed of trust at the instance of the assignee passed no title.—LOVELACE v. PRATT, Mo., 63 S. W. Rep. 83.

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STATE NAT. LOAN & TRUST CO. v. FULLER, Tex., 63 S. W. Rep. 552.

12. CARRIERS—Action for Loss of Goods—Presumption from Failure to Produce Evidence.—Where plaintiff, in an action against a railroad company to recover for a loss of goods in shipment, introduces evidence which tends strongly to show inferentially that defendant managed and controlled the line of road upon which the loss occurred, although it was owned by a separate corporation, such as that the managing officers of the two companies were the same, that defendant held itself out to the public as operating the line by advertising it as a part of its system, etc., and defendant, although having it within its power, fails to produce evidence to show the actual relation between the two companies, it is a reasonable presumption that such evidence would support plaintiff's contention, and the jury is justified in determining the issue in favor of the plaintiff.—PENNSYLVANIA R. CO. v. ANOKA NAT. BANK, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 482.

13. CARRIERS—Long and Short Haul—Indictment.—A railroad company may be indicted for charging more for a short haul than for a long haul, in violation of Const. § 218, and Ky. St. § 820, without recommendation by the railroad commission.—ILLINOIS CENT. R. CO. v. COMMONWEALTH, Ky., 63 S. W. Rep. 448.

14. CONSPIRACY—Agreement with Manufacturer Not to Resell Goods Below a Certain Price.—An agreement by one who buys goods from a manufacturer, not to resell them for less than a certain price, does not violate Ky. St. § 3915, known as the conspiracy or trust statute.—COMMONWEALTH v. GRINSTEAD, Ky., 63 S. W. Rep. 427.

15. CONSTITUTIONAL LAW — Christian Scientist—Violation of Ordinance.—A conviction of a Christian Scientist, who performs alleged services for the sick, and receives compensation therefor, for a violation of a city ordinance requiring physicians to report all cases of diphtheria to the board of health, is not a violation of Const. art. 2, § 5, guarantying religious freedom, and hence an appeal will not lie to the supreme court on the ground that the cause presents a constitutional question.—CITY OF KANSAS CITY v. BAIRD, Mo., 63 S. W. Rep. 496.

16. CONSTITUTIONAL LAW—County Warrants—Payment.—Const. art. 10, § 12, prohibiting any county from becoming indebted in any year in an amount in excess of its revenues, does not invalidate a county warrant which is valid when issued, because the available funds are exhausted before it is reached for payment, but it is payable from the surplus of the revenue collected in subsequent years remaining after paying current expenses for such years.—STATE v. JOHNSON, Mo., 63 S. W. Rep. 390.

17. CONTRACT — Breach of Contract — Damages.—On breach of contract, the damages to be awarded are those naturally arising from the breach of the contract itself, or reasonably in contemplation by the parties at the time of the contract. It is only where a contract is made under special circumstances known to both parties that recovery of damages resulting from its breach may be extended to loss sustained by reason of those circumstances.—SKIRM v. HILLIKER, N. J., 49 Atl. Rep. 679.

18. COUNTIES — Employment of Attorney — Liability for Services.—Where the county court employed plaintiff to defend a suit against the county, and after plaintiff had prepared his defense, the county court, without his knowledge, settled the suit before trial, the county was liable to plaintiff for the agreed compensation.—REYNOLDS v. CLARK CO., Mo., 63 S. W. Rep. 382.

19. COURTS—Delinquent Municipal Taxes—Suit to Collect—Jurisdiction.—Under Const. art. 6, § 28, giving the circuit court superintending control over probate courts, and section 22, giving the circuit court concurrent jurisdiction with inferior courts, the circuit court has jurisdiction of a suit for delinquent taxes against the executor of the taxpayer.—STATE v. EDWARDS, Mo., 63 S. W. Rep. 388.

20. CRIMINAL EVIDENCE — Co-Defendant — Flight.—The flight of one indicted for the same offense cannot be used in evidence against defendant.—LANDERS v. STATE, Tex., 63 S. W. Rep. 557.

21. CRIMINAL EVIDENCE—Impeachment of Witnesses—Admissibility of Evidence.—In a criminal prosecution, a question as to what was the reputation of the prosecuting witness for getting drunk, and afterwards accusing people of stealing from him while in that condition, was improper for the purpose of impeachment, since the inquiry must be as to his reputation for truth and veracity.—HOFFMAN v. STATE, Md., 49 Atl. Rep. 658.

22. CRIMINAL LAW—Homicide—Instructions to Jury.—If defendant unlawfully and intentionally killed deceased, but without malice, he was guilty of voluntary manslaughter; and, as there was some evidence tending to show that such was the fact, the court should have given an instruction on that subject.—GREER v. COMMONWEALTH, Ky., 63 S. W. Rep. 448.

23. CRIMINAL TRIAL — Judge — Disqualification.—Where a judge was disqualified to try a criminal case, the whole proceedings in the case are an absolute nullity, and a judgment rendered thereon is void.—GRAHAM v. STATE, Tex., 63 S. W. Rep. 558.

24. DAMAGES—Construction of Bond — Liquidated Damages.—The amount named in a bond as liquidated damages for its breach will be treated as such if the damages resulting would be very uncertain, and evidence of their amount difficult to obtain, and the fair import of the agreement is that the amount fixed is agreed on to avoid the expense and difficulty of proving actual damage, and the amount is not out of proportion to the actual cash damage.—COMMONWEALTH v. GINN, Ky., 63 S. W. Rep. 467.

25. DEEDS—Mental Capacity of Grantor.—In the absence of undue influence, a deed will not be set aside for want of mental capacity on the part of the grantor unless it appears that he was laboring under such a degree of mental infirmity as rendered him incapable of understanding and protecting his own interests.—LASSITER'S ADMR. v. LASSITER'S EXR., Ky., 63 S. W. Rep. 477.

26. DURESS—Money Paid Under Legal Process—Recovery.—Money paid under legal process in a judicial proceeding with full knowledge of the facts is, in the absence of fraud or duress, not recoverable.—TURNER v. BARBER, N. J., 49 Atl. Rep. 676.

27. EJECTMENT—Construction of Deed—Res Judicata.—Actions of ejectment, though between the same parties, and having the same defenses, and concerning the same title and possession, may be maintained *ad infinitum*, a judgment therein not barring a subsequent action.—SPEED v. ST. LOUIS M. B. TERMINAL RY. CO., Mo., 63 S. W. Rep. 398.

28. EJECTMENT—Stay at Request of Third Party.—Plaintiff brought ejectment. Defendant justified the ouster as an official act while marshal of the United States, in pursuance of an act of congress, and denied any other removal, interference, or possession of the premises. Defendant was no longer an officer of the United States. The attorney of the United States moved that the proceedings be stayed. Held that, as it would be wrong to decide the rights of the United States in a suit against one no longer an officer thereof, the proceedings would be stayed.—LIVINGSTON v. D'ORGENOY, U. S. D. C., D. (La.), 108 Fed. Rep. 469.

29. EQUITY — Cancellation of Notes—Fraud.—Plaintiffs executed to defendant three notes, payable in one, two, and three years, respectively, as a part of the consideration paid for the dissolution of a partnership. An action on the first note, when due, was brought against the plaintiffs, and, one week before

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the trial, plaintiffs discovered fraud on the part of the defendant in the contract of dissolution, and immediately brought this suit for an accounting and the cancellation of the three notes. Held, that plaintiff's election to rescind the contract was within a reasonable time after the discovery of the fraud, and hence plaintiffs were not remitted to an action for damages, the suit to rescind not being barred by delay.—PAQUIN v. MILLIKEN, Mo., 63 S. W. Rep. 417.

30. EQUITY—Jurisdiction—Adequate Remedy at Law.—A bill alleged that complainant, by a contract with defendant, purchased the entire crop of hops to be raised by defendant the ensuing season, and made advances thereon to enable defendant to raise and secure the crop, the agreement being that complainant should market the same, and that, after the advances were deducted, the remainder should be equally divided between the parties; that defendant had refused to deliver the hops, but had secreted the same and falsely understated the amount. An injunction was prayed to restrain defendant from disposing of such hops. Held, that the bill stated a cause of action in equity for an accounting and division of the profits in accordance with the contract; that the allegation of ownership in complainant was merely incidental to such relief, and did not restrict complainant to its remedy at law by replevin or trover,—the entire facts alleged, in effect, making the parties partners in the profits of the crop.—A. J. LUCE HOP CO. v. MERKER, U. S. C. C., D. (Oreg.), 108 Fed. Rep. 465.

31. EVIDENCE — Admissibility—Books of Account.—Books of account of a party to the transactions recorded therein are not admissible, as independent evidence, to charge the other party, in an action against the estate of the party keeping the books.—GILL v. STAYLOR, Md., 49 Atl. Rep. 650.

32. EVIDENCE—Secondary Evidence—Admissibility.—In order to render admissible secondary evidence of the contents of a writing, it must be affirmatively shown that at the time the same is offered the original is not in existence, or is inaccessible or lost. (s) This is not shown by proving that long previous to the trial the person in whose custody the paper was shown to have last been had made an ineffectual search for it, without showing that he had not in the meantime found it, or that it was still inaccessible or lost.—LOTT v. BUCK, Ga., 39 S. E. Rep. 70.

33. EXECUTORS—Power of Executor to Sell Land.—A provision of a will that the executor may act without executing a bond is at all times subject to the review of the courts. A testator devised all his estate to his wife during life or widowhood, providing that after her death, or if she should marry again, his estate should be equally divided among his children. He then provided: "My executor or executrix shall have power and authority to sell and mortgage all or any part of my estate, and make conveyances thereof," and by a subsequent clause appointed his wife executrix, without bond. Held, that the power of sale was a personal trust to the widow, to be exercised by her in her capacity as executrix, and is not limited to a power of sale for purposes of administration.—BUSCH v. RAPP, Ky., 63 S. W. Rep. 479.

34. EXECUTORS AND ADMINISTRATORS — Debts — Sale of Real Estate—Ancestral and General Estate—Preference.—Where a decedent's estate consists in part of ancestral realty and in part of property acquired by purchase, which would go to collateral heirs, and it is necessary to sell real estate for debts, as between the two classes of heirs each class of the realty should bear its proportionate burden.—JENKS v. STEERE, R. I., 49 Atl. Rep. 698.

35. EXECUTORS AND ADMINISTRATORS — Final Settlement—Fraud—Non-Payment of Taxes.—Where defendant made her final settlement as administratrix of an estate in November, 1892, and subsequently taxes were levied against the estate which could not have been paid prior to September, 1893, a bill to set aside the final settlement for defendant's fraud in not paying the taxes was properly dismissed.—STATE v. SHAW, Mo., 63 S. W. Rep. 871.

36. FIRE INSURANCE—Defense of Arson—Evidence.—Where, in an action on a fire policy, the defense was that insured had set the fire, it was not error to admit evidence as to fires caused by an arc lamp in the insured premises previous to the destruction thereof.—PHŒNIX ASSUR. CO. OF LONDON v. STENSON, Tex., 63 S. W. Rep. 543.

37. FRAUDS, STATUTE OF — Rights of Parol Purchaser of Land—Lien for Purchase Price Paid.—In an action by a parol purchaser of land against the heirs of his vendor to enforce the contract of sale, while plaintiff was not entitled to enforce the contract he was entitled to a lien for the purchase money paid and for the value of his improvements, after accounting for rents and profits.—BOGARD v. TURNER, Ky., 63 S. W. Rep. 426.

38. GUARDIAN AND WARD — Liability as Stockholder in National Bank—Limitation of Action.—Under Rev. St. U. S. § 5152, where a guardian, as such, owns stock in a national bank, neither he nor his ward is subject to any personal liability as stockholder, but only the estate of the ward in his hands is liable.—CLARK v. OGILVIE, Ky., 63 S. W. Rep. 429.

39. HIGHWAYS—Liability of Road Supervisor on Bond.—There can be no recovery on the bond of a county supervisor of roads for personal injuries resulting from the breaking of a plank bridge or culvert forming part of a public road.—COLEMAN v. EAKER, Ky., 63 S. W. Rep. 484.

40. HIGHWAYS — Opening — Property Owners—Void Order.—Where a county court ordered a road to be opened without notice to interested parties, its order was void, and conveyed no authority on the overseer to open the road; and hence injunction would lie to restrain the overseer from tearing down and removing a fence in obedience to the county court's order.—MUNROE v. CRAWFORD, Mo., 63 S. W. Rep. 373.

41. INSURANCE—Transfer of Property.—A policy of insurance against fire declared that the transfer of the property insured, without the consent of the insurer, would avoid the policy. When the property covered by such a policy is transferred to a third party, with the consent of the insurer, a new contract arises between the insurer and the transferee of the property, in effect the same as the issuance of a new policy.—VIRGINIA-CAROLINA CHEMICAL CO. v. SUNDRY INS. COS., U. S. C. C., D. (S. Car.), 108 Fed. Rep. 451.

42. INTOXICATING LIQUORS—Validity of City Ordinance Prohibiting Sale.—Local laws prohibiting the sale of liquor, which were in force at the time the constitution was adopted, were not repealed by section 61 of that instrument, but were modified by the general local option law as to procedure, amount of liquor permitted to be sold, and the penalty for selling.—MULLINS v. CITY OF LANCASTER, Ky., 63 S. W. Rep. 475.

43. JUDGMENT AGAINST CORPORATION — Effect as Evidence against Stockholder — Impeachment for Fraud.—Under the law of Kansas, a judgment against a corporation is not conclusive against a stockholder who was not a party to the action, if it was obtained through fraud or collusion, although it can only be impeached for fraud or want of jurisdiction; hence, under the "full faith and credit" clause of the constitution, such a judgment rendered by a court of Kansas is required to be given the same effect, but no greater, in an action against a stockholder in a court of another jurisdiction.—BALL v. WARRINGTON, U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 472.

44. JUDICIAL SALES — Inadequacy of Price—Effect of Political Meeting upon Bidding.—A judgment sustaining exceptions to a commissioner's report of sale on the ground that the price was grossly inadequate, and that the sale took place at the time and in the immediate vicinity of a heated political meeting, will not be disturbed, the evidence being conflicting as to whether

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the circumstances were such as to interfere with the property bringing a fair price.—MORRIS v. MCCADDEN, Ky., 63 S. W. Rep. 435.

45. LANDLORD AND TENANT — Eviction — Abandonment by Lessee.—The reletting by a landlord of a part of leased premises to a third person is an eviction that during its continuance suspends the whole rent. —DOLTON v. STATE, N. J., 49 Atl. Rep. 679.

46. LANDLORD AND TENANT—Tenancy from Year to Year—Evidence.—If a landlord, after the expiration of a term of years, consent to the continued occupation of the premises, a tenancy from year to year arises. Such consent may be inferred from the words or conduct of the parties. If, upon an action for rent before the district court, such consent be inferred from testimony capable of supporting such an inference, a return to that effect establishes the tenancy in this court, and a judgment for the rent due under it will not be disturbed.—YETTER v. STATE, N. J., 49 Atl. Rep. 678.

47. LIBEL AND SLANDER — Words Charging Breach of Trust.—An affidavit by defendant that he paid to plaintiff, for the county treasurer, back taxes of a certain amount, and that the tax bill on which they were paid has never been marked "Paid" upon the tax books, and that no part of the sum has ever been accounted for, is not libelous.—DODGE v. SHIVELEY, Ky., 63 S. W. Rep. 442.

48. LIFE INSURANCE — Assessment Plan—Application —False Answers.—In an action on a life policy, it was error to refuse to charge that, if the jury believe insured in her application answered "No" to the question, "Do you now use or have you ever used opium, chloral, cocaine, or any other narcotic drug?" and that the answer was knowingly untrue, the verdict must be for the defendant, where such issue was raised by the pleadings.—ELLIOTT v. DES MOINES LIFE ASSN., Mo., 63 S. W. Rep. 400.

49. LIMITATIONS—Suit by Next Friend.—The bringing of an action by a father, as next friend, for an injury to his son, does not create the relation of guardian and ward, so as to start the running of limitations against the minor.—GALVESTON, ETC. RY. CO. v. WASHINGTON, Tex., 63 S. W. Rep. 588.

50. MALICIOUS PROSECUTION—Declaration.—In an action for malicious prosecution, a declaration is demurrable which fails to allege the travel and result of the action complained of as malicious, in the court where such action was begun.—HULL v. SPRAGUE, R. I., 49 Atl. Rep. 697.

51. MORTGAGE—Loss—Stale Claim.—A mortgage was 24 years old when a bill to foreclose it was filed. No payment of principal or interest had ever been made or demanded. A portion of the property was claimed and possessed adversely to the mortgagor and his grantee for a time, but such grantee had had actual possession for more than 20 years. Held, that the claim was stale, and the bill should be dismissed.—EDDY v. CAMPBELL, R. I., 49 Atl. Rep. 702.

52. MUNICIPAL CORPORATIONS — Appointment of Officers—Mayor—Deciding Vote.—Pub. Loc. Laws, art. 13, § 180 (Havre de Grace City Charter), authorizes the mayor to cast the deciding vote in case of a tie vote in the city council on any question whatsoever. Section 43 authorizes the mayor to appoint a city treasurer, and present his name to the council for confirmation or rejection. Held, that the mayor could cast the deciding vote confirming such appointee in case of a tie vote in the council.—HECHT v. COALE, Md., 49 Atl. Rep. 668.

53. MUNICIPAL CORPORATIONS — Change of Ward Lines.—A resolution of a city changing ward lines is without force, as such changes can only be made by ordinance, under the statute.—STATE v. CITY OF ELIZABETH, N. J., 49 Atl. Rep. 686.

54. PARTNERSHIP—Dissolution—Death of Partner—Firm Assets.—Where the assets of a partnership dissolved by the death of one of its members were used by a new firm formed by the surviving partner, the old partnership was entitled to a share in the profits of the new firm proportionate to the value of the assets of the old firm used, as compared with the value of the property or services contributed by the new firm, but all the property of the new firm should not be regarded as assets of the old.—PAINTER'S EXR'S v. PAINTER, Cal., 65 Rep. 155.

55. MUNICIPAL CORPORATIONS — Taxation—Annexed Territory—Railroad Right of Way.—Acts 1888, ch. 98, annexing certain territory to Baltimore city, and providing that the tax assessed on all land and property for 1900 shall not exceed the county rate until streets have been opened and a certain number of buildings erected on each block, does not exempt a street railway from the payment of the ordinary city tax rate on its right of way and tracks situated in such territory. —UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE v. MAYOR, ETC. OF BALTIMORE, Md., 49 Atl. Rep. 655.

56. MUNICIPAL CORPORATIONS—Validity of Special Ordinances Violating General Ordinances.—The law-making body of a municipal corporation may pass a special ordinance which is in conflict with a prior general ordinance, when there is nothing in the charter prohibiting this kind of legislation.—BROWN v. ATLANTA RY. & POWER CO., Ga., 39 S. E. Rep. 71.

57. MUNICIPAL CORPORATIONS—Street Improvements —Warrants — Payment.—Where warrants issued for street improvements exceeded the amount which could be lawfully assessed against the property benefited, and the city levied an assessment for the full lawful amount, and there were a sufficient number of outstanding warrants antedating those of plaintiff to absorb the entire assessment, the city was not liable for the payment of plaintiff's warrants out of its general fund, since it neither contracted to pay them, nor misappropriated any fund collected for their payment.—POTTER v. CITY OF NEW WHATCOM, Wash., 65 Pac. Rep. 167.

58. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE— Withdrawal of Case from Jury.—If, in an action by an employee for personal injuries, there is uncertainty, on all the evidence, as to the existence of negligence or contributory negligence, whether arising from a conflict of testimony, or because the facts being undisputed, fair minded men may honestly draw different conclusions therefrom, the case should not be withdrawn from the jury. Neither should it be withdrawn unless the conclusion follows, as a matter of law, that no recovery can be had on any view which can be properly taken of the facts which the evidence tends to establish.—TENNESSEE COAL, IRON & RY. CO. v. CUMBIER, U. S. C. C. of App, Fifth Circuit, 108 Fed. Rep. 19

59. NUISANCE—Rubbish.—Where, at the request of the owner of a lot adjoining plaintiff's, defendant deposited rubbish on such lot, plaintiff in an action for creating a nuisance could not recover because of the unsightly appearance of the lot. A lot owner cannot be held liable for creating a nuisance by depositing rubbish on his lot, to the injury of an adjoining owner, unless foul or unhealthy gases or other substances or orders escape from the lot.—LANE v. CITY OF CONCORD, N. H., 49 Atl. Rep. 687.

60. OFFICERS—Mayor — Eligibility—Real Estate Assessment.—The assessment of city real estate of a value greater than $2,000 to a partnership composed of two persons, by which it is owned in common, is a sufficient assessment against a member of the partnership to prevent him from being ineligible for the office of mayor, under Pub. Loc. Laws, art. 13, § 142, as amended by Act 1890, ch. 180, rendering a person not assessed for city real estate in the sum of $1,000 ineligible for mayor.—VANNEMAN v. PUSEY, Md., 49 Atl. Rep. 659.

61. PARTITION—Parol.—A proceeding in equity to remove a cloud from title and eject defendants, and

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have the title vested in one of the complainants, will not be dismissed because founded on a parol partition between the complainants, where all the parties to the partition joined as complainants, the parol partition being valid.—HALE v. MORGAN, Tenn., 63 S. W. Rep. 506.

62. NOTES — Forgery — Estoppel.—Where money is loaned to an agent for defendant on a note, to which the name of defendant is forged, and the latter knows the facts and receives the proceeds, he is estopped from denying his liability on the note.—CAMPBELL v. CAMPBELL, Cal., 65 Pac. Rep. 184.

63. QUO WARRANTO—Burden of Proof.—The burden of proof is on defendant corporation in *quo warranto* proceedings to show a compliance with the requirements of the law relative to the payment of capital stock prior to organization.—STATE v. HOGAN, Mo., 63 S. W. Rep. 378.

64. RAILROADS—Accident on Tracks—Unavoidable Accident.—Where there is evidence, in an action for injuries received by plaintiff being run over by a train, that he was standing on the track, and, in stepping near the train, slipped under the wheels, it is error to refuse to instruct that, if such facts are found to be true, plaintiff cannot recover, since such evidence tends to show an unavoidable accident.—GALVESTON, H. & S. A. RY. CO. v. WASHINGTON, Tex., 63 S. W. Rep. 534.

65. RAILROADS — Crossing — Contributory Negligence.—A person driving toward a railroad crossing, where his view of the track is obstructed to within 10 feet thereof, and who knows that it is but two or three minutes after the time of the regular train, is not freed from contributory negligence by stopping 35 feet from the track and listening, and then driving forward, but he should stop and listen when about to cross the track.—HOOK v. MISSOURI PAC. RY. CO., Mo., 63 S. W. Rep. 360.

66. RAILROADS—Fence—Open Gates—Killing of Stock.—Under Rev. St. 1889, § 2611, requiring railroad companies to erect and maintain lawful fences with openings and gates therein at all necessary farm crossings, under the penalty of double damages for injuries to stock arising from failure to maintain such fences, etc., a railroad company was not liable for killing stock which had come on the track through a properly constructed sliding gate carelessly left open by some unknown person without the actual or imputable knowledge or notice of the company.—KAVANAUGH v. ATCHISON, T. & S. F. RY. CO., Mo., 63 S. W. Rep. 374.

67. REMOVAL OF CAUSES—Sufficiency of Petition—Allegation of Non-residence.—An averment, in petition for removal on the ground of diversity of citizenship, that the defendant was, at the time of the commencement the suit, and still is, a citizen of another state, named, is a sufficient allegation that he was at the time of the commencement of the suit and when the petition was filed a non resident of the state in which the suit was brought, within the requirements of the removal act of 1887-88, since a person cannot be a resident of two states at the same time. While it is the well-established rule that the fact of such non-residence must clearly appear from the petition or record, and that no fact can be taken by intendment, no set form of words is indispensable, and it is sufficient to allege facts from which such non-residence follows as a necessary legal conclusion.—ZEBERT v. HUNT, U. S. C. C., D. (Ind.), 108 Fed. Rep. 449.

68. SALES—Breach of Warranty—Damages.—Plaintiff alleged that he purchased Paris green of defendants, to kill potato bugs, and that because of the impure and weak character of the article it failed to kill them, and that by reason of such failure plaintiff's crop was ruined. Held, that the alleged damages were not so remote and indefinite as to render the declaration demurrable.—KENT v. HALLIDAY, R. I., 49 Atl. Rep. 700.

69. SALES—Consignment—Record—Assignment.—In an action to recover that sum, and also $46 received by defendant as proceeds of other consigned goods of plaintiff sold by Kelley & Eastman on credit, held, that Kelley & Eastman had no title to the consigned goods, and defendant took none as their assignee; and that the goods, and the purchase price for them, until paid to consignees, were the property of the plaintiff.—RICHARDSON MFG. CO. v. BROOKS, Me., 49 Atl. Rep. 678.

70. SCHOOLS AND SCHOOL DISTRICTS—Creation of Indebtedness in Excess of Constitutional Limit.—Under Const. § 157, a contract by school trustees for the erection of a school house, which created a debt in excess of the revenues provided for the year was void.—GRADY v. LANDRAM, Ky., 63 S. W. Rep. 284.

71. STREET RAILROADS—Legislative Grant—Use of Streets—City's Consent.—The general assembly had in 1891 authority to grant corporate powers to a street-car company, though the consent of the corporate authorities of the town or city in which the lines of street railway were to be located had not been first obtained; but the grant of such powers do not authorize the construction of a line of street railway upon the streets of any town or city until the consent of the corporate authorities had been obtained.—BROWN v. ATLANTA RY. & POWER CO., Ga., 39 S. E. Rep. 71.

72. TAXATION—Effect of Overruling Former Decisions—Liability to Taxation While Decision was in Force.—An opinion holding that banks were not, subject to county taxation, having subsequently been overruled, banks may now be required to pay county taxes for the period during which that opinion was in force, as it merely suspended the collection of such taxes until it was overruled; and this is true though the banks, in conformity to that opinion, paid as state taxes a larger amount than was due on that account, as the state auditor might have been required to refund the excess, the time limited for making application therefor not having expired until after the former opinion was overruled.—BOHANNON v. BANK OF SHELBYVILLE, Ky., 63 S. W. Rep. 474.

73. TAXATION—Exemptions of Property From Sale for Taxes.—Though Const. § 170, exempts from taxation personal property of a person with a family, "not exceeding $250 in value," nothing is exempt from levy and sale for such taxes as the owner does in fact owe.—REAMS v. MCHARGUE, Ky., 63 S. W. Rep. 437.

74. TAXATION—Liability—"From and After."—Under Acts Assem. 1888, ch. 98, § 19 (Annexation Act), providing that "from and after" the year 1900 certain property annexed to Baltimore should be taxed at the city rate, the city rate could not be imposed for the year 1900.—SINDALL v. MAYOR, ETC. OF BALTIMORE, Md., 49 Atl. Rep. 645.

75. TAXATION—Railroads—Right of Way.—Rev. St. 1899, § 9339, requires that not only the land covered by a right of way of a railroad on its main line, stations, etc., but also land covered by side tracks and used as a switch yard, shall be assessed for taxation by the state board of equalization. *Held*, that where a railroad company purchased a lot for use for side tracks, removed buildings, and leveled the land, and constructed a side track across the western portion, and intended to lay a track on the eastern portion as soon as it could acquire title to certain other property, the eastern portion of the lot was a part of the switch yards, and assessable by the state board of equalization, and not by the county assessor.—STATE v. CHICAGO, R. I. & P. RY. CO., Mo., 63 S. W. Rep. 495.

76. TAXATION—Tax Sales—Procedure.—It is not necessary for a borough council, when determining what taxpayers are delinquent, in order to sell property for arrears of taxes, to cause notice to the payers said to be delinquent before ordering the statutory proceedings to sell to perfect the tax lien.—STATE v. BOROUGH OF SEA ISLE CITY, N. J., 49 Atl. Rep. 685.

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Central Law Journal.

ST. LOUIS, MO., OCTOBER 11, 1901.

The recent case of French v. Paving Co., 19 Sup. Ct. Rep. 187, 43 L. Ed. 443, has evidently not settled the celebrated controversy over the validity of assessments for street improvements on abutting property owners when in excess of benefits received. It is an axiom so true that even the supreme court cannot disregard it, that no question is ever settled until it is settled right. The ink was hardly dry on the opinion of Justice Shiras, in the case just referred to, when the question was again raised and again decided in favor of the property owner, on a ground claimed to be distinguishable from both the cases of Norwood v. Baker and that of French v. Paving Company. This was in the recent decision of White v. City of Tacoma, 109 Fed. Rep. 32, in which case it was held that while state laws providing for the assessment of the cost of street improvements on abutting property are not necessarily unconstitutional, because the assessments are made in accordance with the front-foot rule, nevertheless where, in practical operation they do confiscate property, they are obnoxious to the fourteenth amendment to the constitution of the United States, and it is the duty of the courts to declare them void. It was also held that special assessments for street improvements do, in practical effect, take property for public use without compensation, and, therefore, deprive the owner of such property without due process of law, unless the property assessed is benefited by the improvement to an extent substantially equal to the amount of the assessment. This statement of the law is apparently right in the teeth of the latest decision of the supreme court, but the principles expressed and adhered to are so just and uncontrovertible that they must ultimately and necessarily become the law of the land. The facts in this case were very free from ambiguity and complications, and afforded opportunity for a clear cut decision. The plaintiff, in a bill seeking to remove a cloud from his title alleged to have been created by an unlawful assessment for street improvements, stated that the city in improving a certain street cut it down more than twelve feet below the natural surface of complainant's lot, and that, by reason of such cut, an alley which crossed such street and had been used as a means of egress by complainant's tenants had become impassable, and that the deprivation of the use of the alley had depreciated the value of his property, so that the property was of less value with the street improved than it would have been without the improvement. The court on demurrer, taking the averments as true, said: "These facts certainly make a good case, because the creation of a public benefit at the expense of an individual property owner without any resulting benefit or compensation to him, is contrary to the letter and spirit of the constitution."

Without hesitation we pronounce this decision not only eminently just and equitable, but also among the foremost of the decisions on this question by reason of its clear recognition and elucidation of right principles and sound law. We especially commend the statement of the general rule with which Justice Hanford closes his admirable opinion: "I consider that each case arising under the laws for assessing abutting property to pay for street improvements must depend upon its particular facts. If it appears that an assessment has been levied by competent authority, and that it is fair, and not in excess of the benefits to accrue by reason of the improvements to be paid for, it will be sustained by the courts. It is equally the duty of the courts to restrain the collection of assessments which are shown to be mere attempts to take the property of one for the use of others without compensation to the owner. For reasons already set forth in this opinion, I hold, also, that no determination of the constitutional question involved in this class of cases, by an administrative board or special tribunal created by the state, can stand as a bar to a suit in a national court to test the question whether by means of such determination the state has deprived the complainant of his property without due process of law."

The rule of *caveat emptor* is one of the most valuable of our common law inheritances, and should not be twisted out of its

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old time effectiveness by reason of its working apparent injustice in hard cases. Any modification of its ancient sternness would be a calamity, tending not only to increase litigation but to make weaklings out of the people and encourage them to rely more on the strong arm of the court than upon their own common sense and judgment. Entertaining such views we, of course, are inclined to commend most emphatically the decision of the court in the recent case of Brown v. Smith, 109 Fed. Rep. 26, where it was held that one who contracts for the purchase of real estate in reliance on the representations and statement of the vendor as to its character and value, but after he has visited and examined it for himself, and has had the means and opportunity of verifying such statements, cannot avoid the contract on the ground that they were false or exaggerated. The court expresses itself in this language: "Reviewing and considering the testimony, it is manifest that the defendant entered into this contract assuming many things to be true without proper examination, and without using the means of verification at hand. There was no sort of fiduciary relation between him and the plaintiff. They were mere acquaintances, and in their dealings were both on guard, or should have been. He is evidently a gentleman of culture, of intelligence, and experienced in affairs. He is not a ward of the court, nor entitled to its special protection."

NOTES OF IMPORTANT DECISIONS.

TAXATION—RIGHT OF STATE TO TAX VESSELS REGISTERED IN FOREIGN PORT, BUT OPERATING IN THE TAXING STATE.—A very important and much disputed question of law is the right of a state to tax vessels registered under act of congress in the port of another state where such vessels operate exclusively in the taxing state. In the recent case of Northwestern Lumber Co. v. Chehalis County, 64 Pac. Rep. 909, the Supreme Court of Washington held that ocean-going tugs owned by a lumber company, and exclusively used within the state, and managed and operated by residents of the state, are subject to state taxation, though such tugs are registered at a port situated in a foreign state.

Under act of congress (Rev. St. [U. S.] sec. 4319) vessels must be registered at its home port and under the decisions of the United States Supreme Court are taxable only at such port. This whole subject and the authorities *pro* and *con* will be found extensively and exhaustively treated in the case of Johnson v. Merchants' Line, 37 Fla. 499, 19 South. Rep. 640, 37 L. R. A. 518, where the court reached a position just opposite that of the court in the principal case. But it is to be noted that all the states are not content to abide by this position and insist upon their right to tax vessels which operate in their water and receive the protection of their laws. The reason for the position of these states is well stated in the opinion of the court in the principal case: "Sound reasons exist for the right of the state to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and, if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this state. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue law of this state, personal property is taxed at its *situs*, and without reference to the residence of the owner."

ATTORNEY AND CLIENT—CONTINGENT FEES—UNCONSCIONABLE PERCENTAGE AND RIGHT OF CLIENT TO DISCHARGE ATTORNEY.—At a time when the honor of the profession of law was more prominent than its business aspect, the practice of taking contingent fees was frowned upon and placed the offender in a lower and more dishonorable strata of practitioners. Gradually, however, the justice and necessity of such contracts in certain instances have been generally recognized although courts and laymen still view them with suspicion. Two interesting questions arising in connection with such contracts were passed upon in the recent case of Henry v. Vance, 63 S. W. Rep. 273, where the Supreme Court of Kentucky held that, where attorneys, having come into possession of a letter making inquiry as to the heirs of a certain person who had died in Nova Scotia, leaving a large fortune, made a contract with the heirs, whom they had no trouble in indentifying, undertaking to recover their interest in the estate for a contingent fee equal to 35 per cent. of what might be recovered, the fees appear at first blush to be so unconscionable that slight additional circumstances will be held sufficient to sustain the charge of fraud in procuring the contract.

Another important question in the case was the right of a client to discharge his attorney where the latter has agreed to take the case on a contingent fee. On this point the court held that a client may discharge his attorney at any time, with or without cause, even where a contingent fee has been agreed upon; the remedy of the attorney, if the discharge was without cause, being an action on a *quantum meruit* for services already rendered, or, if no services had

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been rendered before the discharge, an action to recover damages for a breach of the contract,—a declaration upon the contract as if constructively performed not being good.

On this point the court said: "The relationship of attorney and client is so peculiarly one of confidence and reliance that it would not do to require a party to continue in his service one whom he distrusts, or whose capacity he no longer believes in, nor to permit the attorney, under such circumstances, to continue the relationship, where the lack of confidence would seriously impair his efficiency, and interfere with his full opportunity to serve the party and the court as his office requires. That the client has the right to discharge his attorney at any time with or without cause, even in a case where a contingent fee has been agreed upon, cannot be well doubted. Mechem, Ag. 856. If the discharge is for cause, the question of fee may become eliminated, or give to the client even a right to an action over. If the discharge is without cause, and after the attorney entered upon and performed part of the services, he will undoubtedly be entitled to recover at least to the extent of the value of the services rendered. But generally the attorney should be relegated to an action to recover on *quantum meruit*, where he has been prevented by the client, or other fact not his fault, from fully discharging the services contemplated by his contract. Moore v. Robinson, 92 Ill. 491; Duke v. Harper, 8 Mo. App. 296; Quint v. Mining Co., 4 Nev. 304; Scobey v. Ross, 5 Ind. 445; Telegraph Co. v. Semmes, 73 Md. 9, 20 Atl. Rep. 127; Wilson v. Barnes, 13 B.Mon. 330, and Bank v. Barclay (Ky.), 60 S. W. Rep. 853."

BANKRUPTCY — PAYMENT OF MONEY AS A PREFERENCE.—That the payment of money is a "transfer of property" within the meaning of the bankrupt act defining preferences is now definitely settled by the decided weight of authority. In the recent case of Landry v. Andrews, 48 Atl. Rep. 1036, the Supreme Court of Rhode Island held that a payment of money by an insolvent in discharge of a debt is a "transfer" of "property," within the provisions of the federal bankrupt law against preferential transfers of property, and, if made to a creditor having reasonable cause to believe that it was made with intent to give a preference, it can be recovered by the trustee in bankruptcy. The court reviews the question as follows:

"The fundamental argument in support of the demurrer is that a payment of money is not a transfer of property within the provisions of the bankrupt law. It is true that the bankrupt law does not specify money as a class of property. In section 60d it even uses apparently distinguishing terms in the words 'pay money or transfer property.' Still we cannot resist the conclusion that the word "property," as used in the law, was intended to include money. The word 'property' is evidently used as a generic term, intended to include money as the readiest and most valuable form of property, since it is the product of all kinds of property reduced to its standard of value. If this is not so, then a bankrupt who could not transfer property to a creditor by way of preference could himself sell the property and transfer the proceeds with impunity. We do not see that the law can be so narrowly construed. Our opinion of the statute is confirmed by the recent decision of the circuit court of appeals, seventh circuit, in Re Ft. Wayne Electric Corp., 99 Fed. Rep. 400, 39 C. C. A. 582; also *In re* Fixen & Co., 4 Am. Bankr. Rep. 10, 96 Fed. Rep. 748. Assuming, then, for the reasons stated, that money is included in the term "property," two questions arise: Is it within the meaning, of a 'transfer' when it is paid to a creditor upon his own debt, or for his benefit, and, if so paid, can it be recovered by the trustee? The word 'transfer,' as defined in the act, includes 'the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.' If an insolvent debtor cannot part with goods in payment of a debt, there is no reason why he should be allowed to part with money for the same purpose. We refer now only to a payment made and received, as alleged in the declaration, with an intent to give a preference over other creditors. Whether a payment, made in the course of business to a creditor who has no reasonable cause to believe that it was so made, is within the law, we are not called upon to decide. This question has arisen, in several cases with varying opinion. See *In re* Ft. Wayne Electric Corp., *supra; In re* Fixen & Co., *supra; In re* Smoke, 4 Am. Bankr. Rep. 434, 104 Fed. Rep. 289; *In re* Hall, 4 Am. Bankr. Rep. 671. These cases differ on the subject whether a payment to an insolvent's creditor in the ordinary course of business is a preference. They all imply that there can be no question when the creditor knows the facts."

THE STIPULATIONS IN TELEGRAPH BLANKS.

It may be laid down as a general rule that telegraph companies are, in their relations to the general public, in a measure subject to the restrictions governing common carriers.[1] They are bound to furnish equal facilities to all persons and corporations belonging to the classes which they undertake to serve.[2] They may not refuse to furnish service because their instruments are patented, or because the license under which they carry on their business is con-

[1] Del. & A. T. & T. Co. v. State, 3 U. S. App. 30; Budd v. N. Y., 143 U. S. 517.

[2] Del. A. T. & T. Co. v. Del., 50 Fed. Rep. 677.

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ditional upon their refusal to carry the messages of certain persons or corporations without the specific authorization of their licensor.[3] They may not, in other words, discriminate against particular persons or corporations. They cannot by any contract with their patrons, wholly exempt themselves from liability for such damage as may ensue by reason of the negligence or ignorance of themselves, their agents, servants or operators.[4] To this extent, at least, telegraph companies may said to be common carriers, and the likeness may be further emphasized inasmuch as telegraph companies are, even as are common carriers, permitted to limit their liability only by special contract where loss is liable to result by reason of the negligence of themselves, their agents or servants.[5]

Opposed to this view, we have that taken by the Massachusetts court in the case of Grinnell v. Telegraph Co.[6] Stating the opinion of the court Gray, C. J., says: "The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received with those delivered cannot be mistaken; their value is easy of estimate and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless if not forwarded immediately; for the transmission of which there must be a single rate of compensation, and the measure of damages for failure to transmit or deliver which has no relation to any value which can be put upon the message itself."

We cannot agree with the learned court in these views. The question concerning the possibility of embezzlement or criminal collusion forms little or no part of the question at issue. If, however, that be material, we cannot see that the possibility is less remote in the case of a telegraphic message than in that of more material matter in transit under the control of a common carrier of goods. The opportunity for fraud, collusion, even actual embezzlement, is as much present in the one case as in the other. May we not compare the position of the telegraph company with that of the warehouseman who becomes bailee of grain, not to return the actual shipment, but a similar quantity of a similar standard, there may not be, beyond a certain point, a possibility of embezzlement, but both may surely have opportunities for larceny. That the message is not to be transmitted in the form in which it is received is immaterial; the Morse code is as pregnant with meaning to a properly competent telegrapher as is the written form in which the message is tendered to the telegraph company for transmission; the liability as to error, no greater in the one form than the other. The possibility of mistake may be guarded against by special contract limiting liability, or specially and expressly stating the valuation of the subject-matter tendered for transmission. If the sender insist upon the telegraph company assuming the common-law liability of the common carrier, wherein lies any hardship? It may charge him such rates as will permit the repetition of the message, and if this latter be accomplished it has, according to its own view, as evidenced by the ordinary stipulation in telegraph blanks covering this point, protected itself against the possibility of error, etc., in so far as it lies in its own power to do so. The measure of damages presents no unusual difficulties; the rule laid down in Hadley v. Baxendale[7] may be followed, and such damages awarded as may fairly and

[3] Mo. ex rel. B. & O. Teleg. Co. v. Bell Telep. Co.

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as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract."

The main question at issue, however, in a consideration of the stipulations in telegraph blanks is: To what extent, if any, may a telegraph company, by special contract, limit or avoid liability for its negligence, or that of its agents or servants? We may assume that where there is error in the transmission of a telegraphic message, in the absence of evidence to the contrary, the presumption must be that the mistake resulted from the fault of the telegraph company.[8] It may be stated, at the outset, that the general, if not universal, form taken by special contracts between telegraph companies and their patrons, limiting liability for error or delay in transmission and delivery, is that of stipulations upon the reverse of the blanks furnished by such companies and upon which messages tendered for transmission are required to be written, or affixed, such stipulations being expressly referred to upon the face of the form. It is held that these stipulations form an integral part of the contract which the sender has entered into when he subscribed his name to his message upon the face of the blank.[9]

There can be no doubt that where a stipulation in a telegraph blank avoids, in general terms, all liability in damages, it is void.[10] It would seem to follow that where the stipulations, taken together, have the effect of permitting the telegraph company to escape all liability, the special contract, if contract it may be termed, is equally void. Telegraph companies, however, do not, as a rule, tender contracts of this nature. They have, in the main, incorporated into their blanks a stipulation avoiding liabilty, beyond the cost to the sender for transmission and delivery, unless the message be repeated by the receiving, to the transmitting office at additional cost to the sender. It may be said that such stipulation is, in general, a telegraph company an insurer, it may limit its liability by special contract with its patrons in any proper manner. It is subject to many accidents that would seem to justify such precautions, yet, acting within its legal rights, it tenders to the public a form of contract which, if accepted, places it in the position of an insurer and protects the user absolutely. Acceptance of the more liberal contract is, in no sense, a *sine qua non*, but the telegraph company limits its liability if the sender fails to avail himself of that form of contract for transmission under which the company accepts general liability. Alvey, J., says:[12] "The appellant (telegraph company) could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own willful misconduct, or gross negligence, or any conduct inconsistent with good faith. * * * It was bound to use due negligence, but not extraordinary care and precaution. The appellee, by requiring the message to be repeated, could have assured himself of its dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or, by special contract for insurance, could have secured himself against all consequences of non-delivery." To this ruling the Maryland court has assented, holding that such regulations will not apply and such stipulations will not be recognized in cases where no effort has been made by the telegraph company or its agents to put the message upon its transit.[13] In Texas such stipulations have been declared valid,[14] the court regarding them as an integral part of the contract between the sender and the telegraph company, and in California[15] the court, while seemingly disposed to accept the validity of stipulations of this nature, holds that where the telegraph company is guilty of gross negligence it is liable for the damages sustained, notwithstanding the special contract limiting liability. It would seem that in these cases a

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its agents, had been guilty of gross negligence and those regarding which, the negligence complained of had been of a less marked character. A distinction certainly difficult to make where the facts upon which it is to be based are entirely in the exclusive possession of the defendant telegraph company.

Possibly the clearest and most logical statement of the law in jurisdictions in which the validity of such stipulations is upheld is that of Hare, J., in the case of Passmore v. Telegraph Co.[16] Here the learned judge says: "A railway, telegraph or other company charged with a duty which concerns the public interest cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety and diminish the loss in event of accident, and declare that, if these are not observed, the injured party shall be considered in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as reason, which is said to be the life of the law, can approve, or at least such as it need not condemn. By no device can a body corporate avoid liability for fraud, for willful wrong, or the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation be valid which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule which, in marking out a path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and as such upheld by the courts."

Of decisions to the contrary, there are many, and the reasons for which the validity of such stipulations is denied are several. In Illinois the court says:[17] "On the question whether the regulation requiring messages to be repeated, printed on the blanks of the company on which a message is written, is a contract, we held that it was not a contract binding in law, for the reason that the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties we held was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at additional cost."

In denying the validity of stipulations of this nature, the tendency, however, has been to base the decision, not upon the lack of contract, but avoiding the contract entirely, upon the ground of public policy.[18] In the case of Ayer v. Telegraph Co.,[19] Emery, J., says: "Is such a stipulation, in the contract of transmission, valid as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void. Telegraph companies are *quasi*-public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately concerns the public. * * * It is essential for the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty than should a carrier of passengers, or any other party engaged in a public business.

This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hard-

[16] 9 Phila. 90, affirmed 78 Pa. St. 238; Teleg. Co. v. Stevenson, 128 Pa. St. 442, 455.

[17] Tyler v. Teleg. Co., 60 Ill. 439, 74 Ill. 170, 171; Teleg. Co. v. Daughtry (Ala.), 7 South. Rep. 660.

[18] Sweatland v. Teleg. Co., 27 Iowa, 433; Teleg. Co. v. Griswold, 37 Ohio St. 301; Teleg. Co. v. Krall, 38 Kan. 679, 17 Pac. Rep. 309; Teleg. Co. Howell, 38 Kan. 685, 17 Pac. Rep. 313; Teleg. Co. v. Short (Ark.), 14 S. W. Rep. 649.

[19] 79 Me. 497.

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ship upon them. They engage in the business voluntarily. They have the entire control of their servants and instruments. They invite the public to intrust messages to them for transmission. They may insist upon their compensation in advance. Why, then, should they refuse to perform the common duty of care and diligence? Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality as a guard against their own negligence? It seems clear to us that having undertaken the business they ought without qualification to do it carefully, or be responsible for their want of care."

Surely, of all the arguments advanced for and against the validity of stipulations, limiting liability, in telegraph blanks, this is the most powerful, and yet it is not unassailable. There are many messages wholly lacking in commercial value, as to which extreme haste, or extraordinary care in transmission and delivery is not essential, messages wherein error is of no particular moment in so far as actual damage to the sender or receiver is concerned; if, as the decision in this case would seem to indicate, the telegraph company is to be permitted to charge rates commensurate with the necessity of repetition to insure absolute correctness, the sender of the non-commercial message is practically paying for insurance upon something, the value of which he will be unable to measure in damages. That the commercial message may be absolutely protected, the tolls upon the dispatch of a purely personal or social nature must be increased. We do not think the solution of the question lies this way, but rather in regarding telegraph companies as common carriers, subject to all the liability of that class, and permitted to qualify their general liability by special contract with their customers as to valuation.

In Indiana the matter has been regulated by statute enacting that "Telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting or delivering dispatches,"[20] and the courts have repeatedly declared stipulations in telegraph blanks to be void;[21] a similar statute being in force in Nebraska.[22] Such statutes have been found, in practice, to work well. Of late years competition has done much to reduce the tolls charged for the transmission and delivery of telegraphic messages. It is, at least, questionable whether it were not better, in the absence of federal control, that uniform statutes should be enacted in the several states similar to that of Indiana, providing, in addition, the maximum rate per mile, or fraction thereof, for telegraphic transmission per word, such rate to be based upon the present generally prevailing charges. Such action would, at least, simplify the entire question. Under the present decisions, the sender's position varies in accordance with the jurisdiction within which he finds himself at the time he delivers his message to the telegraph company for transmission.

In considering the right of the receiver to recover damages against a telegraph company, in cases where stipulations limiting the company's liability have been incorporated in the contract of transmission, there can be no privity of contract between the parties and, consequently, the stipulations cannot be interposed as a defense to an action by the receiver. If we regard the telegraph company as the agent of the sender, the maxim *respondeat superior* must apply, but the better opinion would seem to be that the company is in no proper sense to be regarded as the agent of sender or sendee.[23] There is a decision to be found,[24] holding that the party interested in the dispatch is the real contracting party; we cannot regard this as other than a fiction, utterly untenable. It would seem that the sendee's proper remedy is in an action on the case, an action *ex delicto* for the misfeasance of the agent of the telegraph company in sending an altered message. It has been held that the tort, in such instances, is not of such

[20] 1 G. & H. 611, sec. 2.

[21] Teleg. Co. v. Ward, 23 Ind. 377; Teleg. Co. v. Buchanan, 35 Ind. 429; Teleg. Co. v. Meek, 49 Ind. 53; Teleg. Co. v. Fenton, 52 Ind. 429.

[22] Teleg. Co. v. Lowry, 32 Neb. 732.

[23] Shingleur v. Teleg. Co. (Miss.), 18 S. W. Rep. 425; Teleg. Co. v. Brown (Ind.), 8 N. E. Rep. 171; Teleg. Co. v. Hope, 11 Ill. App. 289.

[24] De Rutte v. Teleg. Co., 30 How. Pr. 403.

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a nature as to require that malice be the gist of the action.[25] The great majority of text-writers have, as a rule, based such recovery upon the duty which the telegraph company, in its *quasi*-public character, owes to anyone beneficially interested in the message,[26] and decisions are to be found in which the same view is taken.[27] We are not prepared to fully accept this view. It would seem better law to permit the receiver to recover such damages as he may have sustained solely on the ground that the telegraph company has been guilty of a tort to his detriment and we do not apprehend that the presence of stipulations limiting liability, in the contract of transmission, would prove a bar to such recovery. Upon this point, the court in De la Grange v. Telegraph Co.,[28] says: "The proposition that the defendants are liable, if at all, only in case the message is repeated as contained in the printed conditions, can be invoked only against the sender of the message, if against any; for it is his message, his language that is to be transmitted, and it is only known to the receiver when delivered and as delivered. He is to be guided by, or informed by what is delivered to him, and he has no opportunity to agree upon any such condition before delivery." If the stipulations be relied upon as a defense to such an action in tort for misfeasance, sufficient notice of the necessity for the repetition of the message, in order to hold the telegraph company liable for negligence or error, must be brought home to the receiver where he has accepted an incorrect message as correct to his detriment.[29] It may be that in time, common knowledge, that such stipulations are ordinarily incorporated in the blanks of telegraph companies, will be held to furnish constructive notice of the necessity of having a telegraphic dispatch repeated in order to insure sender or receiver against negligence or error on the part of the telegraph company; or such knowledge being general, the receiver will, at least, be put upon his inquiry. We do not venture an opinion upon this hypothetical condition of affairs; we do believe that the stipulations in a telegraph blank, limiting the liability of a telegraph company for negligence or error, are void as against the receiver, who has suffered detriment by reason of acceptance of the incorrect as correct; and we regard the receiver's proper remedy as an action *ex delicto* for damages because of the misfeasance of the telegraph company or its agents.

Chicago. Ill. G. C. HAMILTON, LL. M.

[25] Teleg. Co. v. Dryburg, 35 Pa. St. 298.

[26] Grey Com. Tel. sec., 78; Thomp. Elect. secs. 427, 428, 430, 448; Bigelow Torts, p. 614 *et seq.*

[27] Rose's Case, Allen's Tel. Case p. 340; Allen's Case, 66 Miss. 549.

[28] 25 La. Ann. 383, 385.

[29] Harris v. Teleg. Co., 9 Phila. 88.

QUARANTINE — EXCLUSION OF ANIMALS FROM OTHER STATE—REGULATION OF COMMERCE.

SMITH v. ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY OF TEXAS.

Supreme Court of the United States, April 22, 1901.

1. Quarantine regulations established by the governor of the state on recommendation of a live stock sanitary commission in pursuance of Tex. Rev. Stat. 1895, art. 5043c, whereby the importation of all cattle from the state of Louisiana until the 15th day of the following November is prohibited, because the live stock commission had reason to believe that anthrax had or was liable to break out in that state, are a proper exercise of the police power of the state.

2. The presumption which the law attaches to the acts of public officers exists in favor of quarantine regulations established by the governor on the recommendation of a live stock sanitary commission, with respect to the sufficiency of the information on which the regulations were adopted.

3. Proper quarantine regulations restricting the importation of cattle from another state on account of the danger of disease do not make unconstitutional regulations of commerce.

Statement by Mr. Justice McKenna: This case involves the constitutionality of certain quarantine regulations of the state of Texas. The laws of Texas provide for the creation of a live live stock sanitary commission, consisting of three members appointed by the governor, and prescribe their duty. The governor of the state issued the following proclamation:

The Texas live stock commission having reason to believe that charbon or anthrax has or is liable to break out in the state of Louisiana, from this time forth until the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven into the state of Texas from the state of Louisiana. The live stock sanitary commission of the state of Texas hereby orders that any violation of any of the aforesaid rules and regulations by moving of any cattle, mules or horses out of Louisiana into the state of Texas, is contrary to said rules and regulations, and shall be an offense, and punishable as provided by the laws of the state of Texas.

In consequence of this proclamation the railway company refused to deliver certain cattle to their owners, of whom the plaintiff in error was one, which it had received as freight from a con-

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necting carrier, and which had been delivered to the latter in the state of Louisiana. The facts, or as many of them as is necessary to state, are as follows:

The shipment of cattle was made upon a through bill of lading issued by the St. Louis & Southwestern Railway Company, at Plain Dealing, La., for Fort Worth, Tarrant county, Texas, and was a through and continuous shipment. The cattle arrived at Fort Worth on the 28th of August, 1897. The owners were ready to receive them, and tendered the amount of freight due thereon. The tender was rejected, and the delivery of the cattle refused. The cattle remained in the pens of the plaintiff in error, the stock yards at Fort Worth refusing to receive them on account of the proclamation of the governor, and permission, which was asked by the railway company of the live stock sanitary commission, to deliver them to their owners, was also refused on account of the governor's proclamation. Thereafter the railway company shipped the cattle back to Texarkana, to the line of railway from which they were received, by which line they were returned to Plain Dealing, and there tendered to the shippers, who refused to receive them. Thereupon they were sold, after proper advertising, and the proceeds of the sale, less pasturage at Plain Dealing, were tendered to the owners, which was also refused.

Mr. Justice McKenna, after making the foregoing statement, delivered the opinion of the court:

To what extent the police power of the state may be exerted on traffic and intercourse with the state, without conflicting with the commerce clause of the constitution of the United States, has not been precisely defined. In the case of Henderson v. New York, 92 U. S. 259, *sub. nom.* Henderson v. Wickham, 23 L. ed. 543, it was held that statute of the state, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the state, required shipowners to pay a fixed sum for each passenger,—that is, to pay for all passengers,—not limiting the payment to those who might actually become such charge,—was void. Whether the statute would have been valid if so limited was not decided.

In Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550, a statute declaring the same purpose as the New York statute, and apparently directed against persons mentally and physically infirm, and against convicted criminals and immoral women, was also declared void, because it imposed conditions on all passengers, and invested a discretion in officers which could be exercised against all passengers. The court, by Mr. Justice Miller, said:

"We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute, limited to provisions necessary and appropriate to that object alone shall, in a proper controversy, come before us, it will be time enough to decide that question."

In Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, a statute of Missouri which provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever," was held to be in conflict with the clause of the constitution which gives to congress the power to regulate interstate commerce.

The case was an action for damages against the railroad company for bringing cattle into the state in violation of the act. A distinction was made between a proper and an improper exertion of the police power of the state. The former was confined to the prohibition of actually infected or diseased cattle and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid.

The relation of the police power of a state and the power of congress to regulate commerce came up again in Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 31 L. Ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062. The principle which underlies both powers and the range and operation of those powers was considered. The action was against the railroad company for refusing to transport beer from Chicago to Marshalltown, in Iowa. The refusal was attempted to be justified under a statute of Iowa against traffic in intoxicating liquors and the conveyance of the same by an express or railway company into the state, except under certain conditions. The statute was decided to be a regulation of commerce,—to be not within the police power of the state, and therefore void. Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, is of the same general character, and need not be commented upon. See also Scott v. Donald, 165 U. S. 59, 41 L. Ed. 633, 17 Sup. Ct. Rep. 265.

In Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. Rep. 757, some prior cases were reviewed and the court, speaking by Mr. Justice Peckham, said:

"The general rule, to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862,

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it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state, if the inspection prescribed was of such a character, or if it were burdened with such conditions, as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213, and in Scott v. Donald, 165 U. S. 58, 97, 41 L. Ed. 632, 644, 17 Sup. Ct. Rep. 265."

The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle; and their principle does not depend upon the number of states which are embraced in the exclusion. It depends upon whether the police power of the state has been exerted beyond its province,—exerted to regulate interstate commerce—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine*. The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed, not only to the actually diseased, but to what has become exposed to disease. In Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 30 L. Ed. 237, 6 Sup. Ct. Rep. 1114, the quarantine system of Louisiana was sustained. It established a quarantine below New Orleans, provided health officers, and fees for them, to be paid by the ships detained and inspected. The system was held to be a proper exercise of the police power of the state for the protection of health though some of its rules amounted to regulations of commerce with foreign nations and among the states. In Kimmish v. Ball, 129 U. S. 217, 32 L. Ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277, certain sections of the laws of Iowa were passed on. One of them imposed a penalty upon any person who should bring into the state any Texas cattle unless they had been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; or should have in his possession any Texas cattle between the 1st day of November and the 1st day of April following. Another section made any person having in his possession such cattle liable for any damages which might accrue from allowing them to run at large, "and thereby spreading the disease among other cattle, known as the Texas fever." and there was, besides, criminal punishment. The court did not pass upon the first section. In commenting upon the second some pertinent remarks were made on the facts which justified the statute, and the case of Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, was explained. It was said that the case "interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' P. 473, L. Ed. 531. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore, invalid. At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. P. 472, L. Ed. 530. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised."

In Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. Rep. 488, the Husen case was again commented upon, and what the law of Missouri was and was not was again declared. A statute of Kansas, however, which made any person who shall drive or ship into the state "any cattle liable or capable of communicating Texas, splenetic or Spanish fever to any domestic cattle of this state shall be liable * * * for * * * damages," was held not to be a regulation of commerce. It was also held that the statute was not repugnant to the act of congress of March 29, 1884 (23 Stat. at L. 31, ch. 60), known as the animal industry act.

What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. Henderson v. New York, 92 U. S. 259, *sub. nom.* Henderson v. Wickham, 23 L. Ed. 543, and Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550. But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes,—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the court of civil appeals said: "The necessities of such cases often require prompt action. If

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too long delayed the end to be attained by the exercise of the power to declare a quarantine may be defeated and irreparable injury done."

It is urged that it does not appear that the action of the live stock sanitary commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances, or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in Kimmish v. Bell, 129 U. S. 217, 32 L. Ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277. But the presumptions of the law are proof, and such presumptions exist in the pending case, arising from the provisions of and the duties enjoined by the statute, and sanction the action of the sanitary commission and the governor of the state. If they could have been, they should have been met and overcome, and the remarks of the court of civil appeals becomes pertinent:

"The facts in this case are not disputed. The plaintiff sues as for a conversion, because of a refusal to deliver his cattle at Fort Worth. It is necessary to his recovery that he show that it was the legal duty of the defendant company to make such delivery. It is for the breach of this alleged duty he sues; yet it nowhere appears from the record that before the quarantine line in question was established the sanitary commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into. So far as the record shows, every animal of the kind prohibited in the state of Louisiana may have been actually affected with charbon or anthrax, and it conceded that this is a disease different from Texas or splenetic fever, and that it is contagious and infectious and of the most virulent character."

Judgment affirmed.

Mr. Justice Harlan dissenting:

I am unable to concur in the opinion and judgment of the court. The grounds of my dissent are these: (1) The railroad company was bound to discharge its duties as a carrier unless relieved therefrom by such quarantine regulations under the laws of Texas as were consistent with the constitution of the United States. It could not plead in defense of its action the quarantine regulations adopted by the state sanitary commission and the proclamation of the governor of that state, if such regulations and proclamation were void under the constitution of the United States. (2) The authority of the state to establish quarantine regulations for the protection of the health of its people does not authorize it to create an embargo upon all commerce involved in the transportation of live stock from Louisiana to Texas. There does not appear on the face of the transaction any ground whatever for establishing a complete embargo for any given period upon all transportation of live stock from Louisiana to Texas.

I think, therefore, that the regulations and proclamation upon which the defendant relied were to be deemed void and therefore inapplicable to the particular transportation referred to in the complaint.

It seems to me that the present case comes within the principles announced in Henderson v. New York, 92 U. S. 259, *sub nom.* Henderson v. Wickham, 23 L. Ed. 543. That case involved the validity of a statute of New York having for its object the protection of the people of that state against the immigration of foreign paupers. It was held by this court to be unconstitutional, because "its practical result was to impose a burden upon *all* passengers from foreign countries." In that case it was said that, in whatever language a statute was framed, its purpose must be determined by its natural and reasonable effect. So, also, in Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473, 24 L. Ed. 527, 531, we held that a statute of Missouri relating to the bringing into that state of any Texas, Mexican or Indian cattle between certain dates was a plain intrusion upon the exclusive domain of congress. This court said: "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the constitution of the United States was designed to secure." What was said of the Missouri statute may be repeated as to the regulations adopted by the sanitary commission and the proclamation of the governor of Texas forbidding the bringing of cattle into that state from Louisiana. The result in my judgment is, in view of our former decisions, that the quarantine regulations and proclamation in question involved, by their natural and practical operation, an unauthorized obstruction to the freedom of interstate commerce. This must be so, even if the statute of Texas, reasonably interpreted, was itself not repugnant to the constitution of the United States.

Mr. Justice White authorizes me to say that he concurs in these views.

NOTE.—*Quarantine Laws as Regulations of Inter-*

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state Commerce.—No more difficult or confusing question of law exists to day that the right of a state, under its general police power, to enact laws regulating or prohibiting the immigration, introduction or importation into the states of persons, live stock or merchandise which it deems dangerous to the general health or morals. Not only are the authorities of the different state courts in hopeless conflict, but the decisions of the supreme court itself are difficult to reconcile. In the beginning of this discussion we believe we can assert, without fear of being successfully contradicted, that the highest of all laws is that of self-defense, whether of states or individuals, and further, that neither expressly nor impliedly have the states of the American Union surrendered one *iota* of this right to the general government. Therefore, in the exercise of this right, a state may legislate in its own defense, even though its action may affect interstate commerce, if it does not amount to a regulation. Missouri, Kansas & Texas R. R. v. Haber, 169 U. S. 613; Gibbons v. Ogden, 9 Wheat. (U. S.) 1; Vance v. Vandercook Co., 170 U. S. 438; New York, etc. R. R. v. New York, 165 U. S. 628; Sherlock v. Alling, 93 U. S. 99; Michigan Telephone Co. v. Charlotte, 93 Fed. Rep. 11; Lake Shore, etc. R. R. v. Ohio, 173 U. S. 285; Huse v. Glover, 119 U. S. 543; Gulf, etc. R. R. v. Helley, 158 U. S. 98; Morgan Steamship Co. v. Board of Health, 118 U. S. 455; Leloup v. Mobile, 127 U. S. 640; Western Union v. James, 162 U. S. 650; Railroad Commission Cases, 116 U. S. 307. This rule is well stated in the celebrated case of Railroad Co. v. Husen, 95 U. S. 471, which, although going farther than any other case in denying the right of the state, under its police power, to infringe upon the rights of congress over interstate commerce, nevertheless gives this clear recognition of the rights of the state under such circumstances: "It may be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded on the sacred law of self-defense. The same principle, it must be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are self-defensive."

The celebrated case of Gibbons v. Ogden, 9 Wheat. 1, is, of course, the leading case on this question. The decision in that case established forever the complete supremacy of congress over interstate commerce. tection of persons and property as is injurious to hte But even at that time it was foreseen that if everything which a state did, even in its own defense, that affected interstate commerce, were to be nullified, there would be constant friction and bitterness between the states and the federal government. To avoid this Mr. Justice Johnson, in his concurring opinion said: "The same bale of goods, the same

One of the most interesting phases of this question arose about 1875, at the time when the opposition of cattle raisers of the north began to be raised against the importation of cattle inoculated with a disease known as Spanish or Texas fever. Kansas, Missouri, Illinois, Iowa, and other states passed prohibitory laws excluding the introduction of such cattle during certain periods of the year and laying extraordinary liabilities upon those who violated the laws. The first case in which statutes of this kind came before the supreme court was that of Railroad v. Husen, 95 U. S. 465. The statute under consideration was that of Missouri and prohibited the introduction into the state of any "Texas, Mexican or Indian cattle" between the first day of March and the first day of November, except that on interstate railroads or steamboats, such cattle would be permitted to pass through the state provided they were not unloaded at any place within its boundaries, but even in such case the carrier would be liable for existence of the disease at any place along its line, the very fact of its existence being *prima facie* proof of its being communicated by such transportation. The exact ground on which the supreme court held this statute to be unconstitutional was that it prohibited the introduction of *all* Texas, Mexican or Indian cattle "*without any distinction* between such as may be diseased and such as are not." At the same time the court laid down this general rule, that while a state may enact sanitary laws, and for the purpose of self-protection establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the state, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory. In 1888 in the case of Kimmish v. Ball, 129 U. S. 217, the statute of Iowa came before the court, but only that section of it creating a civil liability upon those bringing such cattle into the state and letting them run at large, for all damages that might result. The case is important, however, for its construction of the case of Railroad Co. v. Husen. In the interval between these two decisions, scientists had made a close study of this disease and the districts where it originated and while many of the views expressed were not in harmony, several conclusions had been reached and generally adopted. The court states these conclusions as follows: "That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever is a notorious fact; as is also the fact that cold weather, such as is usual in the winter north of the southern boundary of Missouri and Kansas, destroys the virus of the disease, and thus removes all danger of infection." In discussing the case of Railroad Co. v. Husen, after showing that the ground of the court's objection to the Missouri statute was that it excluded *all* Texas, Mexican or Indian cattle without regard to whether they were diseased or not, Justice Field uses these significant words:

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them without danger of spreading it is devised."

The question again arose in 1897 in the case of Missouri, Kansas & Texas R. R. v. Haber, 169 U. S. 613, the statute of Kansas being in the crucible. This statute was in effect the same as the Missouri statute, except that it excluded *all* cattle liable to impart, or capable of communicating disease. Further on, however, it makes proof that the cattle alleged to caused damage, were brought into the state from south of the thirty-seventh parallel of north latitude, shall be *prima facie* evidence that such cattle were, between the months of February and December, capable of communicating Texas, splenic or Spanish fever. This statute the court held to be valid. After an exhaustive examination of the authorities, Justice Harlan reaches the conclusion that, if a carrier takes diseased cattle into a state, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the state, that does not go beyond the necessities of the case and burden or prohibit interstate commerce, and a statute prescribing as a rule of civil conduct that a person or corporation shall not bring into the state cattle known, or which by proper diligence ought to be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case. In a strong dissenting opinion Justice Brewer attempts to show that this decision practically overrules the case of Railroad Co. v. Husen, and points out some serious results which will likely result from the decision, one of which is especially important. "If," says Justice Brewer, "other northern states follow with like legislation commerce between the two sections of the country in this most important product of portions of the south will be practically interrupted."

It may therefore be safely assumed that the exercise of thepolice power by the states was not surrendered in any particular to the federal government and all state legislation affecting interstate commerce to be valid must come within the legitimate exercise of this power. Robbins v. Taxing District, 120 U. S. 489. But police regulations must be such in fact; a state cannot, under alleged cover of its police power, burden interstate commerce where the regulation goes beyond the necessities of the case. Hall v. De Cuir, 95 U. S. 485; Scott v. Donald, 165 U. S. 91; Brennan v. Titusville, 153 U. S. 289; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345; Chy Lung v. Freeman, 92 U. S. 275; Plessy v. Ferguson, 163 U. S. 537; Schollenberger v. Pennsylvania, 171 U. S. 1. Thus an express declaration that a statute is passed in pursuance of the police power, and as a police regulation is not binding upon the federal courts, and will not sustain the statute if the act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government. Brennan v. Titusville, 153 U. S. 289. The case of Railroad v. Haber, *supra*, has firmly established the rule that in regard to the commerce clause of the constitution, the failure of congress to act is an implied declaration that until congress sees fit to act, the states themselves may act, and make any reasonable regulations in protection of the health and morals of the people. Thus it was said in Mobile County v. Kimball, 102 U. S. 691: "There have been, it is true, expressions by individual judges of this court going to the length that the mere grant of the commercial power, anterior to any action of congress under it, is exclusive of all state authority; but there has been no adjudication of the court to that effect."

JETSAM AND FLOTSAM.

From an address delivered before the Georgia State Bar Association, at Warm Springs, Ga., July 4, 1901, by Mr. Joseph Hansell Merrill, of Thomasville, Ga., we quote the following:

THE BIBLE IN A LAWYER'S LIBRARY.

I had presented to me several years ago five ponderous volumes bound in law sheep, Matthew Henry's Commentaries, inscribed on the inside cover of one of which was, "That my brother may be conversant with the laws of the kingdom of God, as well as those of the commonwealth of Georgia." The result is that, being myself a straggler along after the throng of Bible students, and having seen some of the treasures in this storehouse for lawyers, I thought it would not be amiss to undertake to entertain you with some citations of special interest to lawyers in this book, which has been aptly said to be "A book for all ages and for all nations, for all classes of men and all states of society, for all capacities of intellect and all necessities of the soul. It is so conservative as to make it a duty to revere the past; so progressive as to be in advance of the most enlightened age."

We study the old Grecian Law, the Civil Law, the Code of Napoleon, the English Common Law, why not the Mosaic? For pure water, which is the emblem of truth, we trace the stream to its fountain head. If there be a human fountain head for law, surely that is Moses. If the measure be antiquity or wisdom, or the number who obey, or the length of time influenced, he stands pre eminently above all others, even leaving out of consideration all question of divine inspiration. Judging by my own experience, it will be a surprise to note to what an extent the Mosaic law is the foundation of our own. I was first led to study this by a reference from William on Executors to Numbers 27: 8—11, the Mosaic law, on the subject of descent, in a case I had where there was no wife or children or brothers or sisters. I have since had occasion often to consult it, to compare our laws with that, and at times found considerable help. We find in the twentieth chapter of Exodus the first giving of the Ten Commandments, the foundation of all the law, of which all else is but an elaboration, since the germ of it all is contained in them. To them we trace all the acts which we call *malum in se*. By the light of them we determine what is right and what is wrong, which is the objective point in all our reasoning. They are the constitution, and all laws that cannot stand the test of their requirements should be abrogated. Let us see what are some of these laws on subjects which we are dealing every day. In the twenty first chapter of Exodus, immediately following the decalogue, after disposing of the question of slavery, with which we are done, we come in the twelfth verse to the subject of homicides. For a deliberate killing the penalty is, "He shall surely be put to death." While, "If God deliver him into his hand" (a peculiar way of stating an accidental killing), a city of refuge is provided. This is not the first time the death penalty is ordered. We find the same law given to Noah (Genesis 9:6), "Whoso sheddeth man's blood, by man shall his blood be shed." The next subject treated is kidknaping, one of very lively interest to us during the past year. The law is, "he that stealeth a man and selleth him, or if he be found in his hand, he shall be surely put to death." When we read of the agony of parents suffering from this crime we feel that the Mosaic penalty is more

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appropriate than our four to seven years in the penitentiary. In the matter of larceny (25:7), if goods be stolen double restitution shall be made. This was good authority for our similar provision in the double penalty for selling mortgaged property, but slavery and imprisonment for debt having been abolished, it was dropped out as unconstitutional. Double damages also for trespasses of cattle. The law of inheritance is given in Numbers 27:8—11, "If a man die and have no son ye shall cause his inheritance to pass to his daughter; if he have no daughter, then to his brethren; if he have no brethren, then to his father's brethern; if his father have no brethren, then to his kinsman that is next to him of his family." And what are these laws to us? Go one step further with me and recognize their divine inspiration. "On the two tables of stone hang all the law and the prophets." Proclaimed from the summit of Mt. Sinai, in the earliest authentic history of man, they have been and are to-day a light to the world, showing the path of right, of justice, of peace, of happiness. In the Bible we have that law that is inexorable, that must be, always is, and always will be, obeyed. Given its violation the penalty never fails to follow. Glorify God if we will by obeying and experiencing his mercies. If not in this way, then we shall glorify him by vindicating his justice.

To the student of oratory, and I take it we are all such, the Bible is of great value. It abounds in the most apt illustrations, most striking, dramatic scenes; from it can be made the most effective quotations, because, as the people sang: "Saul has slain his thousands, but David his tens of thousands," so in a lawyer's regulation audience of twelve, or the politician's "vast concourse," where one has read Skakespeare, ten have read the Bible, are familiar with it, and instantly grasp your idea. It is remarkable to note how many of "The World's Best Orations" (Brewer) have the words, phrases, ideas of the Bible in their climaxes. One of the most effective speeches I ever heard made in our court house, was made by one of our bar defending a farmer in a suit by a horse dealer, the plea breach of warranty; and it consisted of almost nothing but the preoration: "Gentlemen, you have all read in your Bibles how a certain man went from Jerusalem down to Jericho and fell among thieves. Well, this defendant left his farm up here in the country, and came down to Thomasville and fell among—horse traders." As a graceful and effective speaker, the Apostle Paul never had a human superior. Note the delicate compliment with which he begins his defense before Agrippa. "I think myself happy, King Agrippa, because I shall answer for myself this day before thee, especially because I know thee to be expert in all questions and customs which are among the Jews." Hear him at Athens, a city full of statues to gods and goddesses. "Ye men of Athens, I perceive that in all things ye are very religious. For as I passed by and beheld your devotions I found an altar with this inscription, 'To the Unknown God;' whom therefore ye ignorantly worship, him declare I unto you." How beautifully he catches their attention by referring to something they are already interested in. They start off on common ground, well acquainted. Contrast the effect of this style of speaking with that of the man who plunges into what he has to say, like a schoolboy into his declamation. Those inclined to skyscraping oratory, by which they shout over juries heads, and then wonder why they rarely get a verdict, could profitably study the style of the Lord himself, unquestionably the most forceful speaker the world has known. See how constantly he uses the expressions, the experiences, the customs, the surroundings of the every day life of his audiences.

BOOK REVIEWS.

WILLIAMS ON MUNICIPAL LIABILITY FOR TORT.

A new book of vital importance to city solicitors and lawyers having suits against municipalities for tort and negligence is that entitled, "The Liability of Municipal Corporations for Tort," by Waterman L. Williams, A. B., LL. B. The book treats very fully the rules that govern the liability of such corporations in the different classes of tort and negligence cases, and the general principles on which these rules rest as they have become clear and well settled. Mr. Williams, in determining these rules, carefully considers these three points: First. The character of the corporation chargeable with liability for the tort. Second. The nature of the duty from the breach of which the tort resulted. Third. The means at the command of the corporation for the performance of that duty. Published by Little, Brown & Company, Boston, Mass.

BURDICK ON SALES.

An advance in the preparation of legal text-books is the distinction that is being closely observed between books for the busy lawyer and practitioner and those for the law student and theorist. It is almost impossible at this day to write a book on any important legal subject that will be suitable to both lawyer and student. The latter require a clear understanding of the principles of law without being confused with their extensive application, the former demand the complete and exhaustive analysis of the decided cases, with every shadow of distinction which experience and wisdom has dictated in the application of the general rules of law. In the student's text-book the method is synthetical—building up general principles from decided cases—in the lawyer's text-book, the method is analytical, tearing apart the general principles and showing their application under a thousand different conditions. A most notable example of the student's text-book and one, by the way, which the author claims to be useful only to students, is the Law of Sales of Personal Property by Francis M. Burdick, Professor of Law in Columbia University. It is a compact little book covering the entire subject of Sales in 284 pages. The style is clear, concise and accurate. This is a revised edition of this work but is practically a new edition. Among the most important subjects which have received fuller treatment are "Reservation of the Right of Disposal," "Condition and Warranties," and "Interest as Damages." On "Conditions and Warranties" Professor Burdick contributed an article to the *Columbia Law Review* for February, which has attracted much attention: and the pith of that article is to be found in the chapter given to that branch of the subject, which is based, not on theory, but on an analysis of the leading cases and on a careful, consistent use of the terms, "conditions" and "warranties." On some doubtful questions discussed in the earlier edition, cases decided in the last few years have thrown effective light, and these cases are carefully studied and cited; notably is this the case in discussing the question of the "Premature Repudiation of His Contract by the Purchaser." Published by Little, Brown & Company, Boston, Mass.

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BOOKS RECEIVED.

Handbook of Equity Jurisprudence. By James W. Eaton, of the Albany Bar. Professor of Law in the Albany Law School, and Lecturer in the Boston University School of Law. St. Paul, Minn.: West Publishing Co., 1901. Sheep, pp. 734. Price, $3.75. Review will follow.

The Law of Contracts. By Edward Avery Harriman, of the Chicago Bar, Professor of Law in the Northwestern University Law School. Second Edition, Revised and Enlarged. Boston: Little, Brown & Company, 1901. Sheep, pp. 410. Price, $3.50. Review will follow.

Handbook of Admiralty Law. By Robert M. Hughes, M. A. of the Norfolk (Va.) Bar. St. Paul, Minn.: West Publishing Co., 1901. Sheep, pp. 503. Price, $3.75. Review will follow.

HUMORS OF THE LAW.

LORD ELDON'S APOLOGY.

On one occasion, says the *Green Bag*, a junior counsel, on their lordships giving judgment against his client, exclaimed that he was surprised at their decision. This was construed into a contempt of court, and the young barrister was ordered to attend at the bar the next morning. Fearful of the consequences, he consulted his friend John Scott (afterward Lord Eldon), who told him to be perfectly at ease, for he would apologize for him in a way that would avert any unpleasant result. Accordingly when the name of the delinquent was called, Scott rose and coolly addressed the judges: "I am very sorry, my lords," he said, "that my young friend has so far forgotten himself as to treat your lordships with disrespect; he is extremely penitent, and you will kindly ascribe his unintentional insult to his ignorance. You must see at once that it did originate in that. He said he was surprised at the decision of your lordships. Now, if he had not been ignorant of what takes place in this court every day—had he known you but half so long as I have done—he would not be surprised at anything you did."

An aged professor, after lecturing on the distinction between trespass and case, asked one of the pupils: "Mr. B. suppose I should be walking in the public street and you should throw a rock and put out one of my eyes, what sort of an action would I have?" "An action on the case," was the ready answer. "Why so?" "Because Blackstone lays it down that an action on the case is the proper remedy of obstructing ancient lights."

The following story of the late Mr. Batten, K. C., is told by the *Western Mail*. Before Mr. Batten took sick he had already had a successful business career, holding a large number of company directorships, and on one occasion he found himself acting as counsel against one of the companies of which he was director. Nevertheless, this truly Gilbertian position of the K. C. did not prevent him making an elaborate case against his own company. On sitting down after his lengthy argument, Mr. Batten was told by the chairman of the parliamentary committee — the tribunal by which the case was tried—that they had heard enough, and added, "We decide in your favor." Here the chairman paused, Mr. Batten smiling triumphantly in the meantime, and then the chairman continued, "as director." Naturally, the committee were convulsed with laughter, in which Mr. Batten himself joined.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADVERSE POSSESSION — Rights of Trespasser.—One who enters upon lands as a trespasser, and asserts a claim of ownership thereto, may have such adverse possession of the property as may be tacked to a succeeding possession in privity and ripen into title.—PEARSON V. ADAMS, Ala., 29 South. Rep. 977.

2. BANKRUPTCY—Avoidance of Liens—Attachments.—An attachment on mesne process under the statutes of Massachusetts, which creates a lien, under the decisions of the courts, enforceable, however, only by obtaining judgment and issuing execution thereon within a limited time, is not discharged, under Bankr. Act 1898, § 67f, by the filing of a petition in bankruptcy against the defendant more than four months after such attachment was levied, although the judgment was not obtained until within the four months; nor are the judgment and execution issued thereon rendered void by such section, since they do not affect with a lien the property attached, but only enforce the lien already existing, and which, having attached more than four months before the filing of the petition, is, by necessary implication, preserved by the act.—IN RE BLAIR, U. S. D. C., D. (Mass.), 108 Fed. Rep. 529.

3. BANKRUPTCY—Avoidance of Liens—Attachments.—V. S. § 1791, provides that "personal property attached on mesne process shall be held to respond to the judgment rendered thereon 30 days from the time it is rendered; and unless the plaintiff within 30 days from the rendition of final judgment takes such property in execution it shall be discharged from such process." The decisions of the supreme court of the state treat such attachment as an inchoate lien, which must be perfected by the creditor by obtaining judgment and taking out execution within 30 days. Held, that where such an attachment was made of property of a bankrupt more than four months prior to the filing of the petition in bankruptcy, but judgment was obtained and execution issued within the four months, such judgment and execution were void, so far as related to the attached property and the property affected was discharged, under Bankr. Act 1898, § 67f.—IN RE JOHNSON, U. S. C. D., D. (Vt.), 108 Fed. Rep. 373.

4. BANKRUPTCY — Discharge — Fraudulent Concealment of Assets.—Facts and circumstances showing a fraudulent concealment of assets by a bankrupt, which will defeat his right to a discharge, must be proved, and will not be deduced as a matter of doubtful inference, from other facts and circumstances.—IN RE CONN, U. S. D. C., D. (Oreg.), 108 Fed. Rep. 525.

5. BANKRUPTCY — Election of Trustee—Authority of Attorney to Vote.—The mere relation of attorney at law for creditors of a bankrupt does not authorize

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such attorney to vote in behalf of his clients at the election of trustee.—IN RE SCULLY, U. S. D. C., E. D. (Pa.), 108 Fed. Rep. 872.

6. BANKRUPTCY — Secret Partner in Bankrupt.—Where a person was adjudged a bankrupt, as sole owner of a business conducted in the name of a company, and has been treated as such sole owner throughout the proceedings,—the only assets received by the trustee being the property of such business, and the only creditors those of the concern,—distribution of the estate will be made on that basis, notwithstanding evidence showing that another person was a secret partner in the business, which interest he denies.—IN RE HARRIS, U. S. D. C., N. D. (Ohio), 108 Fed. Rep. 517.

7. BANKRUPTCY—Stay of Attachment Suit—Vacation after Bankrupt's Discharge.—A stay order restraining the prosecution of an action against a bankrupt, entered under Bankr. Act 1898, § 11a, is in its nature temporary only, and should ordinarily be vacated as a matter of course, on application of the creditor, after the bankrupt has been discharged. The fact that the bankrupt had given a bond in the action to release an attachment prior to his bankruptcy, and the effect of the discharge on the liability of the sureties under the state statute, are matters which cannot be taken into consideration by the court on a motion to vacate such stay; but both parties alike should be remitted to their rights, remedies, and defenses under the law in the court in which the action is pending.—IN RE ROSENTHAL, U. S. D. C., S. D. (N. Y.), 108 Fed. Rep. 868.

8. BANKRUPTCY—Stay of Execution against Trustee.—The assets of a bankrupt in the custody of a court of bankruptcy are distributable under its order alone, and are not subject to levy by a sheriff to satisfy a judgment against the trustee, who is entitled to an order restraining such a threatened levy.—IN RE NEELY, U. S. D. C., S. D. (N. Y.), 108 Fed. Rep. 871.

9. BENEFICIAL ASSOCIATIONS—Assessments—Records—Evidence.—Where, in an action on a benefit certificate, defendant introduced parol evidence to show that at a certain meeting deceased was reported for non-payment of dues, and at a subsequent meeting suspended, defendant could not be heard to complain of a charge requiring defendant to establish such facts by more than a preponderance of the evidence; it appearing that a record of such actions should have been kept, the notice which would come to deceased from the records being essential.—WALLACE v. FRATERNAL MYSTIC CIRCLE, Mich., 86 N. W. Rep. 853.

10. BENEFIT INSURANCE — Agents — Scope of Authority.—Where a representative of a mutual benefit insurance company, within the scope of his authority, accepts a surrender of a benefit certificate, and a fee for the issuance of a new one, with knowledge that the holder of the certificate is in arrears for dues or assessments, the effect of his so doing is not avoided by evidence that he acted in ignorance of the legal consequences.—MODERN WOODMEN OF AMERICA v. LANE, Neb., 86 N. W. Rep. 943.

11. BONDS — Bona Fide Purchaser — Railroads—Lien of Laborers.—Where a purchaser gave a note to his vendor for the purchase price of railroad mortgage bonds, held that such note cannot be impounded to pay the debts of the vendor, though due to laborers for the construction of the roadbed.—UNION TRUST CO. v. DETROIT & R. ST. C. RY., Mich., 86 N. W. Rep. 788.

12. BONDS—Funding Excessive Debt Presumptively Valid if Any Part of the Debt Funded Might Have Been So.—Each county bond is a separate promise, and the basis of a separate cause of action against a county. Where the facts and conditions might have been such under the law that any part of the excessive debt funded might have been valid, the legal presumption is, in an action on the bond, that these facts and conditions existed, and that the bond in action was issued o fund a valid portion of the debt, because the presumption is that the county officers faithfully discharged their duties, and issued the bond only after ascertaining the validity of the debt for which it was exchanged.—BOARD OF COMRS. OF LAKE CO. v. KEMPE FIVE CENTS SAV. BANK, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 505.

13. BOUNDARIES—Evidence—Declaration of Deceased Surveyor.—Under the rule established by decision in Texas, which, as a rule of property, is binding upon the federal courts sitting in that state, declarations of a deceased surveyor in regard to the lines and corners of a survey which was originally made by him, made on the ground while pointing out a monument placed there by him in making the survey, are admissible in evidence in an action involving the location of the survey, although at the time the declarations were made he was part owner of the land embraced in such survey, and interested in a controversy then pending as to its boundaries. The objection that such declarations were self-serving is not fatal, since they could not be used as evidence during his lifetime, or while his testimony was obtainable.—TRACY v. EGGLESTON, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 323.

14. BROKERS — Commissions.—Evidence is admissible, in an action for commission for effecting the exchange of real estate, of conversations between plaintiff and the person with whom defendant afterwards exchanged lands, in reference to such exchange, where the statements therein were thereafter communicated to defendant.—HUFF v. COLE'S ESTATE, Mich., 86 N. W. Rep. 885.

15. BUILDING AND LOAN ASSOCIATIONS—Trust Deed—Extortionate Contract.—A building and loan trust deed securing $2,000, which is procured by fraudulent representations that it is given only to secure the principal and 6 per cent. interest, when the deed requires the mortgagor to pay $24 per month on 40 shares of stock, 20 of which are for the sole benefit of the company, and $10 per month interest until the shares of a par value of $100 per share are paid for, will be canceled for fraud on the suit of the mortgagor coupled with an offer to do equity by paying the principal with 6 per cent. interest.—INGE v. INTERSTATE BLDG. & LOAN ASSN., Miss., 29 South. Rep. 998.

16. CARRIERS OF PASSENGERS — Breach of Contract—Assumption of Risk by Passenger.—Plaintiff secured a ticket from the defendant company for transportation from Detroit to Chicago and return over connecting roads. It was represented that the ticket included a berth on a connecting boat, but the purser on the boat refused to honor the same, and plaintiff, refusing to pay the price demanded, slept on a couch in the cabin, and sues for physical pain suffered from a cold contracted from the fact that the cabin door was open all night. Held, that plaintiff assumed the risk of sleeping on she couch in the cabin, and could not recover.—MEWETHY v. DETROIT, ETC. R. CO., Mich., 86 N. W. Rep. 627.

17. CHATTEL MORTGAGE—Bill of Sale.—An assignment of error upon the refusal of the court to give a request will not be considered, when no exception is taken.—WETMORE v. MOLONEY, Mich., 86 N. W. Rep. 808.

18. COMMON LAW—Adoption—Effect on Prior Law as to Married Women—Lien of Judgment on Land Fraudulently Conveyed.—The adoption of the common law of England by Ariz. Laws 1865, No. 68, so far as that law is not repugnant to or inconsistent with the constitution of the United States, Bill of Rights, or laws and customs of the territory, does not include an adoption of the common-law rule which precludes a husband from making a conveyance directly to his wife without the intervention of a trustee, since the pre-existing laws of the territory provide for community property of husband and wife, allowing the wife to have separate property and the absolute disposition thereof.—LUHRS v HANCOCK, U. S. S. C., 21 Sup. Ct. Rep. 726.

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19. CONSTITUTIONAL LAW — Appeal by State — Equal Protection of the Laws.—The allowance of an appeal to the state from the court of one district, but not from another district, of the state in case of the grant of a new trial to an accused person, is not a denial of the equal protection of the laws guaranteed by U. S. Const. 14th Amend.—MALLETT v. NORTH CAROLINA, U. S. S. C., 21 Sup. Ct. Rep. 780.

20. CONTRACT—Construction of Government Work—Action by Breach.—Where a contract for the construction of a dry dock for the United States provided for constant inspection of the work by the government as it progressed, and such inspections were made, and on its completion the dock was examined by the board having the matter in charge, and accepted and paid for, the government is bound by such acceptance, and, in the absence of fraud, is estopped to thereafter claim that the work was not done in accordance with the contract.—UNITED STATES v. WALSH, U. S. C. C., S. D. (N. Y.), 108 Fed. Rep. 502.

21. CONTRACT—Guaranty—Varying Written Contract.—Where a written guaranty was conditioned to collect certain claims, and to pay the full amount due on a note attached, an affidavit of defense averring that the obligors were not able to collect, and substituting for an absolute agreement to pay on a day certain one to pay only in case they collected, was insufficient, as varying the terms of the written instrument.—KENT v. SILVER, U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 365.

22. CONTRACT — Performance — Sunday Contract.—Where one party to a Sunday contract performs his part of it on week days, and the other accepts what is done, he must pay for what he receives.—BOLLIN v. HOOPER, Mich., 86 N. W. Rep. 795.

23. CONTRACT—Void Contract—Ratification.—A contract void because executed on Sunday cannot be made valid by ratifications.—ACME ELECTRICAL, ILLUSTRATING & ADVERTISING CO. v. VAN DERBECK, Mich., 86 E. W. Rep. 786.

24. CONVERSION—Evidence.—In an action for conversion of logs upon which the plaintiff had a lien, held, the evidence sustains the verdict, and the trial court committed no reversible errors in its rulings as to the admission of evidence, nor as to its instructions to the jury.—CARVER v. CROOKSTON LUMBER CO., Minn., 86 N. W. Rep. 671.

25. CREDITORS' BILL—Decree—Interest.—Where the decree in a suit in the nature of a creditors' bill orders a defendant to pay a fund in his hands into court forthwith, interest is chargeable thereon as upon any other judgment, without an express direction to that effect in the decree.—STUART v. BURCHAM, Neb., 86 N. W. Rep. 898.

26. CRIMINAL EVIDENCE—Bad Character of Accused.—It may be shown on cross-examination of defendant in a murder case, as going to his credibility, that he had been convicted of many atrocious crimes, and on his trials therefor he had denied his guilt.—PEOPLE v. HIGGINS, Mich., 86 N. W. Rep. 812.

27. DEEDS — Description — Indefiniteness.—Where a deed purports to convey "all our right, title, claim, and interest in tract of land belonging to B, deceased, situated in" a certain county and state, the deed conveys nothing, since the description is destitute of *data* sufficient to identify any tract, and points to nothing that would authorize extrinsic evidence to make it more definite.—BUNCKLEY v. JONES, Miss., 29 South. Rep. 1000.

28. EJECTMENT—Receiver.— In an action of ejectment a receiver will not be appointed to take charge

10,986, recognizes the fact that plaintiff may lawfully have obtained possession before a motion for a new trial, and provides that he may maintain possession pending a new trial.—DAWSON v. CHIPPEWA CIRCUIT JUDGE, Mich., 86 N. W. Rep. 801.

30. EQUITY—Liability of Trustee for Default of Co-Trustee—Laches.—The fact that no intention to hold a trustee for the defalcation of a co-trustee was ever disclosed until more than two years after the former's death and nearly six years after the latter's death tends to show that the effort to so hold him was an afterthought, not entitled to the approval of a court of equity.—COLBURN v. GRANT, U. S. S. C., 21 Sup. Ct. Rep. 787.

31. EQUITY—Second Mortgagee.—One who, after the mortgaging of land, takes a deed from the mortgagor as security, and by arrangement with the mortgagor takes a tax deed for the benefit of the latter, and as security, is a second mortgagee, so that his interest is cut off by foreclosure of the first mortgage, and he has no standing to maintain suit to quiet title against the purchaser at such foreclosure.—VREELAND v. MONNIER, Mich., 86 N. W. Rep. 819.

32. EVIDENCE—Self-Serving Statements and Hearsay Deposited in a Public Office Incompetent Evidence.—The self-serving statements of a county or municipality, made by its officers or agents, and written statements of third parties deposited or filed in its offices, are incompetent evidence to prove the facts they relate, in an issue between it and a private party, in the absence of statutory provisions which qualify them. The same rules of evidence govern the trial of an issue between a private party and a municipal corporation which control the trial of a like issue between individuals.—BOARD OF COMRS. OF LAKE CO. v. KEENE FIVE-CENTS SAV. BANK, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 505.

33. FEDERAL JURISDICTION—Sufficiency of Amount in Controversy.—The jurisdiction of a federal court in a controversy between citizens of different states, in which the matter in dispute is alleged to be over the sum or value of $2,000, is not terminated by *ex parte* affidavits denying that the property is of the value alleged, unless this fact is made to appear to the satisfaction of the court.—PUT-IN-BAY WATERWORKS, LIGHT, & RY. CO. v. RYAN, U. S. S. C., 21 Sup. Ct. Rep. 709.

34. FEES — Enlargement by Government — Commissioners.—The government has no authority to enlarge the fees above provided for (except from his contingent funds), or to impose an additional obligation upon the county for necessary stenographic services in making a transcript of the evidence received on the hearing and reported to the executive.—HILLMAN v. BOARD OF COMRS., HENNEPIN CO., Minn., 86 N. W. Rep. 890.

35. FRAUD—Representations — Annual Statement of Assets and Liabilities.—In an action to rescind a sale on the ground of false and fraudulent representations as to the financial condition of the vendee, a corporation, held, (1) that the annual statement, published by authority of the vendee, showing its debts and assets, is addressed to the world; (2) that a party dealing with the vendee has a right to rely on such statement; (3) that the source from which such person receives such statement is immaterial.—HAMILTON BROWN SHOE CO. v. MILLIKEN, Neb., 86 N. W. Rep. 918.

36. FRAUD—Representations to Mercantile Agency.—Where it is sought to establish fraud in representations made to a mercantile agency upon whose report

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money, avail himself of the benefit of the rule of part performance to take the agreement out of the statute of frauds, the only way in which legal right can be conferred on defendant being by reduction of the agreement to writing.—SCHULTZ v. HUFFMAN, Mich., 86 N. W. Rep. 823.

38. GUARDIAN AND WARD—Funds—Taxation to Guardian.—The loaning of a ward's money by a guardian, at his own discretion, after permission has been granted him by the court to take and use such funds at a certain rate of interest, is an appropriation of the funds to his use, and renders him liable to taxation thereon.—CLAYTON v. TOWN OF TUPELO, Miss., 29 South. Rep. 994.

39. HIGHWAYS — Grading Roads — Damages.—Nominal damages are not recoverable in an action against a county for damages alleged to have been sustained by reason of the grading of a street adjacent to the property of the owner, on the theory that the board of county commissioners were guilty of a breach of official duty to the plaintiff in not serving notice and having an assessment of damages sustained and special benefits received in the manner provided by statute.—OMAHA LOAN & TRUST CO. v. DOUGLAS CO., Neb. 86 N. W. Rep. 936.

40. HOMICIDE—Evidence.—On a trial under an indictment for murder, where circumstances are proven tending to show defendant's guilt, and there is evidence of defendant's flight after the killing, it is competent for the sheriff, who arrested the defendant next day after the homicide, to testify that, upon making the arrest, he found a pistol in the possession of the defendant, in his coat pocket; such pistol being fully identified as the one with which the defendant shot the deceased.—MAXWELL v. STATE, Ala., 29 South. Rep. 961.

41. HOMICIDE — Excusable — Dangerous Weapon.—Under Rev. St. 1898, § 4367, providing that homicide is excusable when committed by accident or misfortune, in the heat of passion, on any sudden and sufficient provocation, or in sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner, the jury might find the killing accidental, and on sudden and sufficient provocation, or that the chair was not a dangerous weapon.—CAMPBELL v. STATE, Wis., 86 N. W. Rep. 855.

42. HOMICIDE — Manslaughter—Flight—Unavoidable Killing.—Where defendant was on trial for manslaughter, it was error to charge that unless, at the time of the killing, defendant was in real or apparent danger at the hands of the deceased, and the killing was unavoidable, the jury must convict him, since flight, which is one of the means of avoiding danger which was necessary to be made at common law, is not required in Mississippi.—MCCALL v. STATE, Miss., 29 South. Rep. 1003.

43. HOMICIDE—Self-Defense.—One who is the aggressor or who is at fault in bringing on the difficulty with another in his own house cannot, after slaying his adversary, claim in self-defense that he was under no duty to retreat from his castle.—MAXWELL v. STATE, Ala., 29 South. Rep. 961.

44. ILLEGAL TAX—Collection — Injunction.—An injunction will lie to restrain the collection of personal taxes by distress, when the assessment was without jurisdiction.—ROTHWELL v. KNOX CO., Neb., 86 N. W. Rep. 814.

45. INSURANCE—Proofs of Loss.—Where a policy of insurance provides that proofs of loss shall be furnished within 60 days after the fire, and that no suit shall be brought unless the policy has been complied with, and within 12 months after the fire, a suit brought before the expiration of 120 days from the time proofs of loss were filed.—PUTZE v. SAGINAW VAL. MUT. FIRE INS. CO. OF SAGINAW, Mich., 86 N. W. Rep. 814.

46. INSURANCE—Avoidance of Policy for Breach of Conditions—Ownership of Property.—It is the settled law of Alabama that a vendee of land in actual possession, exercising acts of ownership under a valid executory contract of purchase, and holding the bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner in fee-simple of said land, within the meaning of a policy of insurance which is conditioned that "the entire policy shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee-simple." Held, that the same rule as to title applies with equal or greater reason to personal property which passes by delivery, unless the parties have expressly stipulated otherwise.—PENNSYLVANIA FIRE INS. CO. v. HUGHES, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 497.

47. JUDGMENT—Collateral Attack.—The title of a purchaser on a sale under a judgment of foreclosure cannot be attacked collaterally on the ground of the insanity of a mortgagor.—LUHRS v. HANCOCK, U. S. S. C., 21 Sup. Ct. Rep. 726.

48. JUDGMENT — Res Judicata — Habeas Corpus.—Judgment for plaintiff in *habeas corpus* proceedings, in which the person who had caused his arrest appeared and was heard, is *res judicata* in an action by such plaintiff against such person for false imprisonment; Comp. Laws, § 9885, providing that a person having the relation to the *habeas corpus* proceedings borne by defendant has a right to notice and opportunity to be heard.—CASTOR v. BATES, Mich., 86 N. W. Rep. 810.

49. JURISDICTION OF FEDERAL COURTS — Federal Question.—Where the declaration in an action for illegally denying to plaintiff the right to vote at a national election shows that the sole ground of defendants' action was the refusal of plaintiff to comply with a state law, which is admittedly valid, and applies alike to all voters within the districts where it is in force, but which was extended to the district in which plaintiff resided by an act which he claims is in conflict with the state constitution and void, it affirmatively appears from such declaration that the case involves no federal question which can give a court of the United States jurisdiction.—SWAFFORD v. TEMPLETON, U. S. C. C., E. D. (Tenn.), 108 Fed. Rep. 309.

50. JUSTICES OF THE PEACE — Jurisdiction — Service of Summons.—Service of a summons by the justice of the peace issuing the same is a nullity, and hence confers no jurisdiction of the defendant's person.—MCDUGLE v. FILMER, Miss., 29 South. Rep. 996.

51. LIFE INSURANCE — Avoidance of Policy—Breach of Warranty.—A negative answer by an applicant for life insurance to the question in the application whether he ever had "any serious illness, constitutional disease, or surgical operation," is not a false representation which will avoid the policy as a breach of warranty because he has had a slight illness, or because he once broke his leg, which was set and attended to by a physician.—CARUTHERS v. KANSAS MUT. LIFE INS. CO., U. S. C. C., E. D. (Ark.), 108 Fed. Rep. 487.

52. LIMITATIONS—Insurance—Recovery of Premiums

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ployee to show both defect in machine, with negligence in providing it, and also negligence in permitting floor on which he stood to operate it to be wet and slippery, when accompanied, also, by instruction to find for employer if the machine was not defective, although there was no evidence that the admittedly wet and slippery condition of the floor was due to negligence.—SWIFT & CO. v. HOLOUBEK, Neb., 86 N. W. Rep. 900.

54. MASTER AND SERVANT — Duty of Master — Appliances and Place to Work.—A master owes a positive duty to his servants to use ordinary care to furnish appliances reasonably safe for their use considering the nature of the service, and to provide a safe place to work, and keep it in suitable condition. Where he delegates such duty to another, he is responsible for its proper performance by such other, although the latter may be, as to other matters, a fellow-servant with the other employees, for whose negligence the master is not responsible to whom.—LAFAYETTE BRIDGE CO. v. OLSEN, U. S. C. C. of App., Seventh Circuit, 108 Fed. Rep. 335.

55. MASTER AND SERVANT — Injury to Employee—Assumption of Risk.—The presence of a hook on the rear of a locomotive tender, for supporting the hose of the air brake when not coupled, being apparent, and its danger known, and it having been replaced every time the brakeman knocked it off, he assumes the risk of being caught thereby, where he continues to climb over the end of the tender.—CRAWFORD v. DETROIT, ETC. CO., Mich., 86 N. W. Rep. 817.

56. MORTGAGES—Waiver of Title—Levy of Execution.—The acceptance of a mortgage on property is not necessarily a waiver of title by the mortgagee, subjecting it to levy, if the parties understood that it was not a waiver.—STACK v. OLMSTED, Mich., 86 N. W. Rep. 851.

57. MUNICIPAL CORPORATIONS—Mandamus to City—Tax Levy.—City authorities not required by *mandamus* to levy tax for water supply in excess of limit on such tax existing at time of contract.—STATE v. CITY OF WAHOO, Neb., 86 N. W. Rep. 928.

58. MUNICIPAL CORPORATIONS—Sidewalks—Defects—Notice of Injury.—Where a person injured by falling on a defective sidewalk serves a claim, and describes the location of the defect as on a certain side of a named street, between two other named streets, and the city receives and acts on the notice without objection, the notice is sufficiently definite as to the locality.—WHEELER v. CITY OF DETROIT, Mich., 86 N. W. Rep. 822.

59. MUTUAL BENEFIT COMPANY — Insolvency — Distribution of Funds.—Defendants and others held matured certificates in a mutual benefit company, and, on failure of the company to pay the certificates, an agreement was made whereby the amounts were to be paid in installments, and mortgages were to be assigned to defendants to secure the deferred payments. The mortgages were never assigned, but defendants acted as a committee in receiving and distributing the cash payments without knowledge of the company's insolvency. Held, that defendants were not liable, as trustees, to the receiver of the company, for the sums distributed.—CALKINS v. BEEKMAN, Mich., 86 N. W. Rep. 825.

60. NEGLIGENCE—Contributory Negligence—Dangerous Premises.—Where an employee in a sawmill, while on his way to discharge a duty which he has been ordered to perform, in passing along one of the open, public thoroughfares of the mill, stops to exchange a remark with a fellow employee concerning the operation of the machinery of the mill, and is struck and injured by a belt which breaks at the moment, he will not be held guilty of such contributory negligence as will preclude his recovery of damages because he happened to stop in front of (though eight feet away from) the pulley which carried the offending belt. If the place was too unsafe to be used for such a purpose, it ought not to have been kept open as a common passage or thoroughfare.—MOORE v. W. R. PICKERING LUMBER CO., La., 29 South. Rep. 990.

61. NEGLIGENCE — Dangerous Premises — Owner's Duty.—One who goes upon the premises of another by express or implied invitation of the owner may recover damages for an injury caused by a failure on the part of such owner to keep the premises in a reasonably safe condition.—TUCKER v. DRAPER, Neb., 86 N. W. Rep. 917.

62. NUISANCE — Abatement—Agent.—An "agent," as defined by section 10, ch. 10, of the charter of the city of St. Paul, is one who has general control of the premises. One whose authority is limited to merely the renting of premises and the collection of rents is not such an agent, and his authority to abate a nuisance will not be presumed.—CITY OF ST. PAUL v. CLARK, Minn., 86 N. W. Rep. 893.

63. PLEA IN MITIGATION OF DAMAGES—Evidence of Good Faith.—In those states where by statute a plea in mitigation of damages may be filed in connection with a plea of justification, and evidence in support of the former plea may be received although the latter plea is not established, an issue concerning the good faith of the defendant inheres in every action for slander or libel where a plea in justification is filed and is not sustained by the proof, since the jury, in determining whether punitive damages should be assessed, are entitled to consider whether the plea was interposed in good or in bad faith, and evidence having any legitimate tendency to develop the defendant's motive should be received.—KANSAS CITY STAR CO. v. CARLISLE, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 845.

64. PUBLIC LANDS— Entry— Filing—Right of Possession.—Where an application for the entry of land is legally and properly made for a homestead under the land laws of the United States, the right to possession thereof inures to the person making such entry, as against a trespasser.—HASTY v. BONNESS, Minn., 86 N. W. Rep. 896.

65. RAILROADS—Negligence—Death of Employee.—Under Comp. Laws, § 6818, requiring railroads companies to block frogs, it is the duty of the railroad companies to make the frogs as nearly safe as possible, and evidence that the blocking of a certain frog was old and worn by the flanges is sufficient to render the question of a company's negligence one for the jury.—JONES v. FLINT & P. M. R. CO., Mich., 86 N. W. Rep. 888.

66. RAILROADS— Relief Department — Claims— Release.—Deceased was killed on the defendant railway while on duty as fireman, and left a widow and two minor children, and was a member of the defendant company's relief department, which had a rule that, in case of the death of a member, the benefits would not be paid until the parties entitled to sue had executed a release to the company of all claims for damages. Held, that the execution of a release by plaintiff as the widow and beneficiary of deceased, and an acceptance of a $1,000 benefit therefor, did not bar an action by her as administrator of deceased's estate.—COWEN v. RAY, U. S. C. C. of App., Seventh Circuit, 108 Fed. Rep. 820.

67. RAILROADS—Right of Way—Liability of Railroads— Damages.— Where a railroad company has entered upon the land of another and constructed its road through them without the owner's consent, and without condemnation proceedings, the measure of compensation to which the owner is entitled is the value of the land when taken by the railroad company, and the injury or diminution in value caused to the contiguous lands, together with interests on said sums thus ascertained from the date of the taking.—SOUTHERN RY. CO. v. COWAN, Ala., 29 South. Rep. 985.

68. RECEIVERS— Validity of Judgment Against— Prior Discharge.—A judgment in an action against the receivers of a railroad is valid, where at the time of

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its rendition they had not been discharged in the suit in which they were originally appointed, although the receivership was subsequently extended to another suit against the company, and in such suit they had been discharged prior to the judgment.—MCCARLEY V. MCGHEE, U. S. C. C., N. D. (Ala.), 108 Fed. Rep. 494.

69. SALES—Contract of Sale—Title.—An arrangement whereby chattels are conveyed at a price certain, with a provision that the vendee may, if he fails to resell them, return them to the vendor, is a contract of sale.—OMAHA NAT. BANK V. KRAUS, Neb., 86 N. W. Rep. 906.

70. SALE—Land—Contract—Description.—In a contract for the sale of land a description by name is sufficient if it can be indentified by extrinsic evidence not contradictory of the contract.—GARVEY V. PARKHURST, Mich., 86 N. W. Rep. 802

71. SALE—Rescission—Fraud.—Rescission of a sale on the ground of fraud is justified on evidence that the purchaser said that he was in as good pecuniary condition and had as good credit at the bank as ever, and could meet his paper when due; that he had not as good credit at the bank as previously; and that a month later, on account of threatened suit by creditors, he formed a corporation, to which he conveyed all his property except his home and some lots, which he conveyed to his wife.—CLARK V. WILLIAM MUNROE CO., Mich., 86 N. W. Rep. 816.

72. SALE — Written Contract — Oral Warranties.—Warranties cannot be added by parol to a written contract which on its face purports to contain the whole agreement of the parties. But where, in an action for the price of a cash register, the contract of sale being in writing, defendant pleaded that the seller represented to him that the machine could not be manipulated to his prejudice, and that in reliance thereon he purchased the register, which in truth could be manipulated, defendant might give evidence to show the purchase induced by deceit.—HALLWOOD CASH-REGISTER CO. V. MILLARD, Mich., 86 N. W. Rep. 833.

73. SHIPS AND SHIPPING—Collision—Action for Damages to Tow—Master of Tug as Libelant.—The master of a tug is a common-law bailee of a tow and her cargo which are in his charge with a lien thereon for the towage services rendered, and as such he is entitled to maintain an action against another vessel for a collision in which his tow and her cargo are lost, and in such action to recover their full value, holding the amount remaining, after deducting his own loss, in trust for the owner. In such case the owners of the tow and cargo may intervene as co-libelants, if they desire, or the respondent may bring in the tug, under admiralty rule 59, by petition showing her to have been in fault, in which case a substitution of the owners of the tow and cargo as libelants is the proper course.—THE MERCEDES, U. S. D. C., S. D. (N. Y.), 108 Fed. Rep. 559.

74. SPECIFIC PERFORMANCE—Cloud on Title.—Where defendant contracted to purchase land on delivery of an abstract showing a good title clear of all incumbrances, and it appeared that plaintiff's title was obtained under a foreclosure sale which took place 18 1-2 years after the entry of decree, on which state of facts defendant's counsel advised that the title was not perfect, there was such doubt as to the validity of the title that plaintiff was not entitled to enforce specific performance.—WALKER V. GILLMAN, Mich., 86 N. W. Rep. 880.

75. STATES—Action Against State—Damages to Property.—Under Ann. Code, § 4248, providing that any person having a claim against the state, after demand made of the auditor of public accounts therefor, and his refusal to issue a warrant in payment thereof, may sue the state, a party renting land to the state is not entitled to sue such state for bad husbandry in breach of the lease, since such claim, being unliquidated, is not such a one as the auditor can audit.—HALL V. STATE, Miss., 29 South. Rep. 994.

76. TAXATION—Deliquent Taxes—Interest.—Interest cannot be collected on deliquent taxes before they are reduced to judgment, since interest is not allowed at common law, and Code 1892, § § 2848, 2860, only allows interest on money due under contracts and judgments.—ILLINOIS CENT. R. CO. V. ADAMS, Miss., 29 South. Rep. 996.

77. TAXATION—Exceeding Statutory Limit—Injunction.—"When a tax is void,—that is, when there is no tax which the plaintiff is in equity bound to pay,—he may invoke the aid of a court of equity to protect his rights by an injunction, notwithstanding section 144, ch. 77, art. 1, Comp. St. 1899."—GRAND ISLAND & W. C. R. CO. V. DAWES COUNTY, Neb., 86 N. W. Rep. 964.

78. TAXATION—Personal Property—Assessment to Wrong Party.—Under Comp. Laws, § 3886, requiring property to be assessed "to the owner" on the second Monday of April, and section 3840, providing that no change of location or sale of any personal property after the 1st day of May shall affect the assessment of for such year, the assessment of personal property of the Fergerson Hardware Company, Limited, in the name of its predecessor, the Ferguson Hardware Company, gave no tax lien on the goods, and the purchaser at a valid chattel mortgage foreclosure sale after the 1st of May could replevin them from the tax collector.—CHIPPEWA HARDWARE CO. V. ATWOOD, Mich., 86 N. W. Rep. 854.

79. TAXATION—Tax Judgment—Action to Annul.—In an action under section 1610, Gen. St. 1894, to have a tax judgment annulled and vacated, upon which a certificate regular on its face has been issued, the court may, as a condition to its order setting aside such judgment, require, as a condition therefor, that subsequent taxes paid by the holder of the certificate, and tacked to the same, must be paid by the plaintiff.—ROBERT P. LEWIS CO. V. KNOWLTON, Minn., 86 N. W. Rep. 875.

80. TAXATION—Tax Sale—Rights of Purchaser.—A purhaser of lands at an invalid tax sale is subrogated to the rights of the county.—GREEN V. HELLMAN Neb., 86 N. W. Rep. 912.

81. TAXATION.—Void—Levy.— Where the board of supervisors voted salaries to the sheriff and other officers, and such salaries were included in the tax levy, tax deeds based thereon are void.—COLLINS V. REA, Mich., 86 N. W. Rep. 811.

82. VENDOR AND PURCHASER—Default of Vendee—Recovery of Payment Made.—A vendee in a contract for the sale of lands, which provides for the forfeiture to the vendor of all payments made as liquidated damages in case of default in any of the payments, and for the right of the vendor to rescind the contract on such default, cannot while so in default maintain an action against the vendor to recover back money paid in part performance of said contract on the ground of a rescission of the contract by the vendor.—MALOY V. MUIR, Neb., 86 N. W. Rep. 916.

83. WILLS—Constructions—Life Estate.—A will consisting of a single sentence in the German language, of which the following is, as nearly as possible, a literal translation into English, omitting names: "I do will and bequeath to my wife all my property, she has entire control ('Sie habt zu verfuegen') over the same after my death as long as she lives,"—devises a life estate only, and the reversion at the death of the testator vests in his heir or heirs at law.—SCHIMPF V. RHODEWALD, Neb., 86 N. W. Rep. 908.

84. WITNESSES—Competency—Wife as Interested Party.—Under Comp. Laws, § 10,212, providing that in actions against decedents' estates the opposite party shall not be permitted to testify to matters which, if true, must have been equally within the knowledge of decedent, a wife of complainant in an action against a decedent's estate for damages for a breach of an agreement is not a party in interest and incompetent to testify.—DUNN V. DUNN'S ESTATE, Mich., 86 N. W. Rep. 901.

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Central Law Journal.

ST. LOUIS, MO., OCTOBER 18, 1901.

Government by injunction has been most severely condemned, not altogether justly, but at the same time not altogether without reason. The application of this extraordinary and most arbitrary of all legal remedies by courts of equity has been with most marked frequency of late years, especially in the settlement of disputes between labor and capital, and has given rise to much discussion as to its probable abuse. A recent decision by Judge Hammond of the United States District Court at Memphis, handed down a few weeks ago, enters largely into the ethics of the question and arrives at the conclusion that the jurisdiction of equity is practically supreme and unlimited in the protection by injunction not only of property, but of personal rights as well, and irrespective of the fact whether the act complained of is punishable as a crime or not. The case which has been responsible more than any other for this clear extension of equity jurisdiction is that of *In re* Debs, 158 U. S. 564. The exact holding of this case was that a court of equity has jurisdiction to enjoin the obstruction of the mails and highways used in interstate commerce, though such obstruction amounts to a public nuisance, for which a criminal prosecution would lie, and that the punishment imposed by such court for violation of its injunction is not an exercise of criminal jurisdiction. The point, however, which distinguished this case from others and made it the stepping stone, whether so intended or not, to a wider exercise of equitable powers of injunction was the strong disclaimer by the court of any desire to rest its decision on any rights of property which the United States might or might not have in the carriage of the mails as a prerequisite to the jurisdiction of the court to restrain or remove by injunction any obstruction to the exercise of any of the powers of government where no other equally satisfactory or adequate remedy is at hand. This absolutely dismisses the question whether the act enjoined might be punished as a crime or not, and its effect is clearly observed in the decision of Judge Hammond in the case of Southern Railway Co. v. Machinists' Union, just referred to. This case was a suit for injunction prohibiting members of a certain labor union from the commission of acts of violence and intimidation against non-union employees of the complainant. The court concerned itself principally with what it termed the personal liberty of the non-union workmen, and based its right to grant relief on the ground that no police or other protection was afforded them, "which is really," says the court, "the chief reason why resort must be had to courts of equity; ordinary police protection being ineffective in fact whatever cause may produce that insufficiency; the condition of non-protection, in fact, being all with which equity is concerned." Then follows this sweeping statement of the extent of the court's jurisdiction to grant injunctions in such cases, which we believe evidences the most advanced position which has yet been taken on this important question:

"The suggestion that the same constitution which safeguards the personal liberty of the 'scab' and his employer guarantees to its violators trial by jury for their crimes or offenses arising out of the violation is not an answer to the fact that prosecutions and consequent convictions are either wholly wanting or ineffectual for the protection of the 'scabs' and their employers. The Debs case settles that the same constitution also guarantees the equitable remedy. It is not, indeed, as the able counsel of defendants argued, a concurrent remedy with that afforded by criminal prosecution, and it is one dependent, as he says, upon conditions in which mere police failure is not included, but that failure is none the less the occasion of the resort to equity—the paramount necessity for it. The equitable remedy is a wholly independent one arising out of conditions of inadequacy of that other likewise wholly independent remedy of an action at law for damages, and upon neither of these does the remedy of criminal prosecution have the least bearing. Except that if the criminal law be so thoroughly executed that there could be no violation of or offenses against the personal liberty of the 'scabs' and their employers, there would then be no occasion for actions

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at law for damages or bills in equity for injunction. That is all the relation that the criminal law has to such suits as this. *Re* Debs, 158 U. S. 564, 594."

We have quoted this case in advance of its appearance in the Reporters, because of its unique importance in this day of labor troubles and disputes. Undoubtedly this extension of equity jurisdiction, although not abrogating the general rule that equity never interferes by injunction to prevent the commission of a crime, nevertheless undermines it with another exception so far reaching as to eventually make the rule itself a very precarious foundation to build upon. Whether this will be a calamity is not altogether certain, depending more upon the character of the men into whose hands this extraordinary power is committed than upon any inherent injustice in the rule itself.

NOTES OF IMPORTANT DECISIONS.

UNFAIR TRADE — MALICIOUSLY INDUCING ONE'S CUSTOMERS TO QUIT TRADING WITH HIM.—The unanimous judgment of the House of Lords in Quinn v. Leatham is particularly important, because it clearly shows that an action can still be maintained against persons who maliciously induces a man's customers not to deal with him, or his servants not to continue in his employment. The contrary has, no doubt, been inferred by many people from the decision of the same tribunal in Allen v. Flood. In that celebrated case, however, said the lords who decided Quinn v. Leatham, the facts on which the majority based their decisions were that the appellant merely informed the respondents' employer that, unless he dismissed the respondents, his other workmen would refuse to work for him, and to give such information truthfully, however maliciouly, cannot infringe any right. Yet the right of every man to earn his living in his own way, to deal with persons who are willing to deal with him, is recognized by law. An interference with this right, it is now laid down, by threats of serious damage or annoyance is *prima facie* actionable, even when the coercion is applied, not to the man himself, but to others for the purpose of injuring him. Whether in a particular case the interference with a man's business or employment is wrongful must be to a large extent a question of fact. In Quinn v. Leatham the jury found that the appellant had acted wrongfully and maliciously, and this verdict was abundantly justified by the facts of the case.—*Solicitors' Journal.*

CARRIERS OF PASSENGERS—REASONABLENESS OF TIME LIMIT REGULATIONS.—It is almost an axiom of law that carriers will be permitted to make any regulations for the conduct of its business which is reasonable. An American, however, feels any limitation on his personal rights so sensitively that he will instinctively protest against it. This fact probably accounts for the continuous litigation over this question, and especially that phase of it regarding the right of a carrier to place a time limit on its contract of transportation by merely printing same on the ticket, but not bringing it expressly to the attention of the passenger. This was the question discussed in the case of Coburn v. Railroad, 29 South Rep. 882, where the Supreme Court of Louisiana held that a purchaser of a railroad passenger ticket must take notice of the time limitation printed or stamped on the face of the ticket, and that a limit of one day on such a ticket was not unreasonably short.

Subject to the qualification of reasonableness, time limits in railroad tickets are valid, and the holder of such a ticket must start upon his passage within the time prescribed or forfeit his right to passage. Elmore v. Sands, 54 N. Y. 512; Shedd v. Railroad, 40 Vt. 88; Lillis v. Railroad, 64 Mo. 464; Heffron v. Railroad, 92 Mich. 406; McRae v. Railroad, 88 N. Car. 526; Pennington v. Railroad, 62 Md. 95; Howard v. Railroad, 61 Miss. 194; Powell v. Railroad, 25 Ohio St. 70. The conditions generally reads that "this ticket will not be good unless used on or before a certain date. This, however, does not require him to commence his passage until midnight of the last day, although he cannot reach his destination until after the expiration of the time limited. Auerbach v. Railroad, 89 N. Y. 281; Georgia, etc. R. R. v. Bigelow, 68 Ga. 219; Evans v. Railroad, 11 Mo. App. 463; Lundy v. Railroad, 66 Cal. 191, 56 Am. Rep. 100.

LANDLORD AND TENANT—"CROPPERS"—FAILURE OF TENANT TO COMPLY WITH CONTRACT.—A "cropper" is a term applied to a person hired by the land owner to cultivate the land, receiving for his compensation a portion of the crops raised. In a number of states, statutes have been passed defining the rights and liabilities attaching to this peculiar tenancy. These statutes are little more than declaratory of the common law. Thus, in the recent case of Wood v. Garrison, 62 S. W. Rep. 728, the Supreme Court of Kentucky held that § 2327 of statutes, providing that "when a tenant enters or holds premises by virtue of a contract, in which it is stipulated that he is to labor for his landlord, and he fails to begin such labor, or if, having begun, without good cause fails to comply with his contract, his right to the premises shall at once cease, and he shall abandon them without demand or notice," applies where the tenant is to furnish labor and the landlord everything else, and the tenant is to receive as compensation either money or a given proportion of the crop; and therefore where such a tenant, after beginning to work, failed to continue, the landlord was entitled to maintain forcible detainer. The court said in part:

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"It is everywhere admitted (see cases previously cited) that under a pure or unqualified cropping contract the entire legal ownership of the crop is in the owner of the land until division. As was said by Rodman, J., in Harrison v. Ricks, 71 N. Car. 11: 'A cropper has no estate in the land. That remains in the landlord. Consequently, although he has in some sense the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide to the cropper his share. In short, he is a laborer receiving pay in a share of the crop.' Under the facts of this case as stated above, appellee appears to come within the definition of the term 'cropper,' which is a tenancy contemplated and included in section 2327. If such a tenant fails to begin the labor contracted to be done by him, or, having begun, without good cause fails to continue it, the landlord may maintain forcible detainer, and dispossess him; and he might also be entitled to such of the remedies provided in section 2325 as were applicable to the state of the case."

STATUTES — CONTEMPORANEOUS CONSTRUCTION.—One of the most insidious temptations of courts or judges in arriving at the meaning of a statute is to resort to extrinsic or contemporaneous construction, whenever the words taken in their ordinary meaning do not appeal to their preconceived opinion as to what the law ought to be, or what they think the legislature had in mind when they passed the law, and the mistake is not unfrequently made that to find out and effectuate the *intention* of the legislature in passing a certain act is perfectly legitimate, whether there is any ambiguity in the meaning of the words or not. The intention of the legislature or the evils they intended to remedy, are absolutely immaterial, where the words they have used, when taken in their ordinary usage, admit only of one interpretation. This rule was well stated by the court in the case of Southern Railway Company v. Local Union, decided October 5, 1901, by Judge E. S. Hammond of the U. S. District Court at Memphis. The statute which was the subject of construction provided that it should not be lawful for any person knowingly to hire, decoy or entice away, any one, male or female, who is at the time under contract or employ of another; and any person so under contract or in the employ of another leaving their employ without good and sufficient cause, before the expiration of the time for which they were employed, shall be liable for the damages the employer may reasonably sustain by such violation of the contract. The court said:

"It may be conceded that it is not at all likely that the Tennessee legislature intended to make by this statute a law against strikes and strikers and the labor unions. But this consideration can not control the courts in the construction of statutes, if they be broad enough in the language used to cover the case of strikes and the labor unions. If the legislature intends to limit its enactment they must do so by the terms of the act itself, and no other limitation is authoritative where the language is unambiguous and construes itself. It is not permissible to go outside the statute, plain in its words, as covering all labor contracts and laborers, and to say, on any consideration whatever, that there was an intention to limit it to a particular class of laborers, white or black, or however else such classification may be made, as of agricultural or industrial workmen: not when the subject-matter and the language used comprehend these and all other classes." The following authorities are directly in point and sustain the position of the court: Lake County v. Rollins, 130 U. S. 662; St. Paul, etc. Railroad v. Phelps, 137 U. S. 528; Hamilton v. Rathbone, 175 U. S. 414, 419; Dewey v. United States, 178 U. S. 510, 521.

FIRE INSURANCE—CONSTITUTIONALITY OF ANTI-COMPACT LAWS.—Anti-trust legislation under the spur of popular prejudice sometimes oversteps the bounds of reason by attacking legitimate enterprise and infringing the right and freedom of contract. This is especially so in statutes attempting to control the right of insurance companies to enter into agreements fixing the rates of insurance. This is a very important question at the present time, and one on which the authorities are not altogether clear or harmonious. In the recent case of Niagara Fire Insurance Co. v. Cornell, decided by the United States Circuit Court for the district of Nebraska, the question of the constitutionality of a law which prohibited insurance companies organized and existing under the laws of other States from entering into any agreement with respect to the question of rates, was decided in favor of the insurance companies. The Nebraska legislature in 1897 passed a bill in reference to trusts, defining the same, providing means for their suppression, and for the punishment of the violator of the statutes. It specifically referred to fire insurance companies, and in the definition of a trust recites that "a combination of capital, skill, or acts by persons with intent to prevent competition in fire insurance, or by which they shall in any manner establish or settle the price of fire insurance, with the intent to prevent free competition, is in violation of the statute." It will be well to note in this connection that this language is much stronger than has usually been employed by legislatures in arriving at the same end. The complainants insisted that the statutes were in conflict with both the state and federal constitutions for various reasons, and prayed for an injunction to restrain the state through its officials from enforcing the statutes. The case of Paul v. Virginia was cited by the attorney-general as a strong argument in favor of any law which the State of Nebraska might make permitting foreign insurance corporations to do business in that state; and the court held that questions of the license fees, and fees for local agents, as well as respecting suits to be brought against insurance companies, and many other

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subjects of a similar character might be legislated into the statute books, and that the foreign insurance companies would be required to consent thereto, and that the state had a right to exclude foreign corporations from doing business therein. The court didn't hold the statute to be unconstitutional because it provided a fee to the prosecuting attorney in each case brought against insurance companies, although the Supreme Court of the United States in Texas and Kansas cases had held similar laws to be unconstitutional, but it did hold that the statute in question was unconstitutional because under the terms of the statute "an agreement to lower the rates becomes unlawful if that statute is valid." The court intimates that such a provision is not the exercise of a police power on which so much stress was laid by the attorney-general in his application of the case of Paul v. Virginia.

The statute under consideration was intended to prevent any combination of capital or skill, or acts whereby the price of any article, commodity, use or merchandise may be fixed, and is intended to prevent restrictions in trade, the limiting of the production, or the increase or decrease of the price of any commodity, and to prevent competition in insurance, or in making, transporting, selling or purchasing any article, or to fix any standard whereby its price to the public shall in any manner be established, or to enter into any contract whereby any party is not to deal in any article below a certain price, or by which the parties agree to keep the price at any sum. The statute also declares that any persons violating the same shall be conspirators, and punished accordingly, that any corporation of the state violating the same shall have its corporate existence declared forfeited by suit, and any foreign corporation violating the same is to be driven from the state, that all contracts in violation of the statute are absolutely void, that any purchaser of a commodity in violation of the statute can plead the violation as a complete defense, and any person injured in his business, property or employment by any violation of the statute can recover damages, any person or corporation accused of violating the statute can be compelled to furnish all books and papers on the question, and finally the statute exempts any assembly or association of laboring men from the provisions of the statutes. The court in its decision says:

"It cannot be said of this statute that any one material provision may be held void and allow the balance of the statute to stand and be enforced. Of some statutes that rule can be invoked. If this statute is valid two men in the same line of business cannot form a partnership if he tends to maintain prices. Nor can a corporation be formed by two or more, if by so doing the price is maintained. The statute is not a step, but it is a long stride, hundreds of years backward, when monarchs, cabinet officers and every parliament decreed the price to be paid for a day's labor, and the cost of all necessaries of life, even to the loaf of bread." The court further says on this same subject: "Jurists and statesmen, practically without conflict, have repeatedly said 'the right of contract is the greatest of all blessings enjoyed by a free people, and guaranteed us by a constitution so long as that instrument may last." And the court quoting from the constitution that "no man shall be deprived of the equal protection of the laws," calls attention to the fact that "the statute expressly excepts from its provisions assemblies or associations of laboring men." The court holds that the case of Waters-Pierce Oil Co. against the state of Texas, 177 U. S. 28, does not cover this case because that in the Texas case the corporation entered the state and was licensed at a time when there was a valid statute prohibiting certain corporations from doing certain things, and that the complainants in the present case were rightfully in Nebraska when these illegal or unconstitutional statutes were passed. The court distinctly holds that the legislature of Nebraska can place onerous burdens on foreign insurance companies, and they can discriminate in favor of Nebraska insurance companies, but says that "the statutes with which I am dealing apply to all insurance companies, resident and foreign, and the statutes are equally void, in my judgment, as to all."

TERMINATION OF EXTRAORDINARY LIABILITY OF CARRIER OF FREIGHT.

It is the policy of the law to secure from common carriers the highest degree of care and diligence with reference to the goods intrusted to them. Before the introduction of railroads the carrier by land was liable for loss of or damage to goods intrusted to him for transportation till they reached the hands of the consignee, unless the loss or damage was occasioned by the act of God or of the public enemy.[1] The rule that the liability of the carrier is that of an insurer against loss or damage[2] has been long held to be subject to exception in cases where the loss or damage is occasioned by,

1. The act of God;[3]

[1] Merchants' Disp. T. Co. v. Hallock, 64 Ill. 286.

[2] Willock v. Pa. R. Co., 166 Pa. St. 184, 45 Am. St. Rep. 674; McCarthy v. L. & N. R. Co., 102 Ala. 193.

[3] In this term are included accidents which are the result of natural causes, and which are beyond human power to prevent; as earthquake, lightning, death, etc. Long v. Pa. R. Co., 147 Pa. St. 343; Merchants' Disp. T. Co. v. Smith, 76 Ill. 542; Maybin v. S. C. R. Co., 8 Rich. (L.) 240, 64 Am. Dec. 753.

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2. The act of the public enemy;[4]
3. The act of the public authority;[5]
4. The act of the shipper;[6]
5. The inherent nature of the goods.[7]

The basis of the carrier's libility is the trust reposed in him; and the liability can arise on a complete delivery to him of the goods for transportation, and the delivery must be for immediate transportation; otherwise, the liability of the carrier will be that of warehouseman merely.[8] However, to constitute delivery and acceptance no receipt or other writing is necessary.[9] Thus, to illustrate, if goods are delivered at a railway company's storehouse to be kept till further orders and directions as to shipping, destination, etc., the company is liable, not as carrier, but as warehouseman.[10] And so, after the goods are delivered to the carrier, if anything remains to be done by the shipper to conform to the law or the contract, the relation of shipper and carrier has not begun.[11] Where a railway company allows wool to be stored in its warehouse without any arrangement as to shipment, it will be held liable in case of destruction by fire only on proof of gross negligence.[12] The liability of the carrier when acting in that capacity has been explained as the liability of an insurer; and the exceptions to the rule have been set out. As contradistinguished from the high degree of liability attaching to the carrier as a carrier, a warehouseman is responsible for ordinary care merely, and is not liable for the destruction of the property by fire or by inevitable casualty, or for its loss by theft.[13] It will be clearly seen that by reason of the different duties and the varying nature of the liability it is frequently of the utmost importance to determine when the carrier's duties as a carrier cease, and when his duties and consequent liability as a warehouseman begin. As to this there are two widely divergent views. But fortunately the courts of the various states have, as a general thing, taken their stand squarely on the one side or on the other. One set of courts follows the rule laid down in 1854 by the Supreme Court of Massachusetts, and which is known as

The Massachusetts Rule.—This is, that the liability of carrier as carrier is ended when he has carried the goods to their destination and has placed them in his warehouse to await delivery to the consignee. From that moment he is responsible as warehouseman only. This rule has been adopted in Illinois, Indiana, Iowa, Georgia, Missouri, North Carolina, Tennessee and South Carolina. The other view was adopted by the New Hampshire court in 1856, and is commonly referred to as

The New Hampshire Rule.—Under this view the liability of the carrier, as such, is perpetuated until the consignee has had a reasonable time after the arrival of the goods to inspect them and take them away in the usual course of business. This is the rule more generally adopted, as will be seen by reference to the decisions hereafter cited from the courts of Alabama, Arkansas, Connecticut, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New York,

[4] Coggs v. Bernard, 2 Ld. Raym. 909; Liv. L. C. Liverpool S. S. Co. v. Phœnix Ins. Co., 129 U. S. 397. Mobs, robbers, and strikers cannot be classed as public enemies, as the term is used in this exception; otherwise with pirates who are the Ishmaelites of commerce. R. Co. v. Nevill, 60 Ark. 375, 46 Am. St. Rep. 208. While a mere refusal of his employees to work does not relieve the carriers from liability (Pittsburgh, Ft. Wayne & C. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; Haas v. K. C., Ft. S. & G. R. Co., 81 Ga. 742), the rule is otherwise where there is an accompanying feature of intimidation and mob violence which the carrier cannot overcome. Empire Transp. Co. v. P. & R. Coal, etc. Co., 35 L. R. A. 623, and cases cited in note.

[5] As where goods are seized in transit, and condemned to destruction because they are infected by disease, or where intoxicating liquors are destined to a use contrary to the laws of the states. R. Co. v. O'Donnell, 49 Ohio St. 489, 34 Am. St. Rep. 579.

[6] As where he conceals from the carrier the character of the goods shipped, and such concealment is the cause of the loss. McCarthy v. Louisville R. Co., 102 Ala. 193, 48 Am. St. Rep. 29.

[7] As perish[illegible] fruits or [illegible]

case is Norway Plains Co. v. Boston, etc., R. Co.,[14] though the rule was announced in the previous case of Thomas v. Boston, etc., R. R. Co.[15] Under this rule the carrier's liability does not cease until the goods are unloaded from the car,[16] though neither notice nor delivery to the consignee personally is necessary to relieve the carrier from his liability as insurer.[17] "It is part of the company's duty as carrier," said the Supreme Court of Massachusetts in Rice v. Boston & W. R. Co.,[18] "when it has brought the goods to their destination, or to the terminus of its road, to unload them with due care and to place them where they will be reasonably safe and free from injury." The contract for carriage calls, not merely for the transportation to a particular point, but also for the delivery of the merchandise to the consignee, or putting it into a suitable place where it can be received by him. Thus, where a cargo of assorted coal was unloaded on the ground at the place of destination, and could not be gathered up without taking up dirt and mixing the different kinds of coal, there was a recovery for the damage.[19]

In Norway Plains Co. v. Boston & M. R. Co.,[20] these points were covered by Chief Justice Shaw in the following language: "Although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. * * * We may then say in the case of goods transported by railway, either that it is not the duty of the company as common carriers to deliver the goods to the consignee, which is more strictly conformable to the facts, or, in analogy to the old rule that delivery is necessary, it may be said that delivery by themselves as common carriers to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to loses occasioned by their fault or negligence." If the consignee is not ready to receive the goods on arrival, the carrier can discharge himself of his liability by storing them safely in charge of competent servants, and ready to be delivered when called for by the proper parties.[21] The rights of the parties are not affected by the fact that the merchandise is placed on a platform, instead of being unloaded directly into the warehouse.[22]

Modification Depending on the Nature of the Consignment.—No absolute rule can be laid down which will cover, in all cases, the acts which will relieve the carrier of his liability. In an important Iowa case[23] Rothrock, J., said that the carrier's "duties must vary according to the nature of the consignment. In the cited cases[24] the property was such that it could be removed from the cars and placed in an ordinary depot warehouse. But in the case at bar the grain was in bulk. It was not expected by the parties that it would be removed from the car by the railroad company and carried into its warehouse. It was its duty to place it in such a position on its track that it could be safely, and with a reasonable degree of convenience, unloaded by the plaintiff; and it was the right of the plaintiff to refuse to unload the car until it was so placed; and so long as the defendant, in obedience to its obligation as a common carrier, was required to move the car upon the track, its liability as such common carrier did not cease." And so in Pindell v. St. Louis & H. R. Co.,[25] it was held

[14] 1 Gray, 266, 61 Am. Dec. 423.
[15] 10 Met. 472, 43 Am. Dec. 444.
[16] Chicago & N. W. R. Co. v. Bensby, 69 Ill. 630.
[17] Porter v. Chicago, R. I. & P. R. Co., 20 Ill. 407, 71 Am. Dec. 286; Merchants' Disp. T. Co. v. Moore, 88

[21] Gashweiler v. Wabash, St. L. & P. R. Co., 83 Mo. 112; Buddy v. Wabash, St. L. & P. R. Co., 20 Mo. App. 206; Cahn v. Mich. Cent. R. Co., 71 Ill. 96.

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that if the railroad company notifies the consignee of the arrival of a carload of wheat, and places it in a safe place awaiting his action, it is not liable, in the absence of negligence, for the subsequent destruction of the wheat by fire. Other cases than those already cited holding that a railroad company becomes a warehouseman, as matter of law, when the duty of transportation is over and it has assumed the position of warehouseman as a matter of fact, will be found in the note below.[26]

California.—The Massachusetts rule was adopted in this state by the case of Jackson v. Sacramento Valley R. Co.,[27] but subsequently the rule was changed by legislative enactment providing that "if, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it." And the sentiment of the courts of that state is in harmony with the change; for, in Wilson v. Cal. Cent. R. Co.,[28] Van Clief, J., said: "The rule requiring railroad companies to give notice to consignees of the arrival of their goods, so far as practicable, in order to reduce the liability of the carrier to that of a warehouseman, irrespective of statutory enactment, seems to be founded upon the better reason, and supported by the weight of authority in the states and in England."

Georgia.—In Rome R. Co. v. Sullivan,[29] one of the judges made some observations seeming to indicate the necessity of notice, but such remarks were *obiter dicta*, the question of notice not being involved. In a late case[30] it was held that notice is unnecessary if the goods arrive in the usual time, the carrier being relieved of his carrier's liability in such a case by depositing the goods in a safe place ready for delivery on demand.[31] But if the freight does not arrive within the accustomed time, notice must be given and a reasonable time allowed for removal. The decision of this case was effected by a provision of the Code.[32]

Tennessee.—In this state, by an act of 1870, the carrier was required to give notice of the arrival of goods at their destination, but this has been construed not to extend the carrier's liability. Tennessee, though it has been said in some places to be among those states which follow the New Hampshire rule, has uniformly and firmly adhered to the Massachusetts doctrine.[33]

2. *The New Hampshire Rule.*—The leading case on this line of authority is Moses v. Boston & M. R. Co.,[34] where the Massachusetts doctrine, while acknowledged to be of a practical character, is said to sacrifice the approved principles of the common law to considerations of convenience and expediency. McClellan, J., in Columbus & W. R. Co. v. Ludden,[35] in an able opinion, declared the position of these courts to be "that the liability of a common carrier by rail as an insurer of the consignment continues throughout the transit and until the goods have been unloaded from the cars and deposited in the depot or warehouse of the carrier, or otherwise made ready for delivery, and a reasonable time thereafter has elapsed to afford the consignee an opportunity to come and take them away, and that only after the lapse of a reasonable time, beginning when the transit is complete and the shipment is ready for delivery, will the liability, in the absence of special stipulation of the carrier, as such be converted into the less rigid and exacting liability of a warehouseman for reward." "The rule adopted in Massachusett," said Seymour, J., in Graves v. Hartford & N. Y. S. B. Co.,[36] "puts an end to the carrier's responsibility as such, just where that responsibility is of the highest value to the shipper. Between the deposit

[26] Rice v. Hart, 118 Mass. 201, 19 Am. Rep. 433; Blaisdell v. Com. R. R. Co., 145 Mass. 132; Neal v. Wilmington & W. R. Co., 53 N Car. 482; Turrentine v. Wilmington & W. R. Co., 100 N. Car. 375; Norris & E. R. Co. v. Ayers, 29 N. J. L. 393; McCarty v. N.

[31] Almond v. Ga. R. & Bkg. Co., 95 Ga. 725.

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of the goods on the platform and their delivery to the consignee, they are exposed to theft, depredation and injury by strangers and by the carrier's employees. In making delivery, care is needed to avoid mistakes and attention required to see if the good are uninjured. During the whole process of delivery, until fully completed, the goods should remain in the care of the carrier upon the full responsibility pertaining to him as such." "If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight house, and after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases.' "[37]

When the question was first presented to the Supreme Court of Michigan, the court was equally divided and no decision was reached. This case, however, is important for a valuable opinion of Justice Cooley, in which that eminent jurist discussed the question on its merits and reviewed the authorities.[38] This opinion evidently bore fruit, for very soon after, in the case of Buckley v. Gt. West. R. Co., this court declared its adhesion to the New Hampshire view.[39] A good statement of the considerations that have induced the adoption of this rule is to be found in the opinion of Peters, J., in Mobile & G. R. Co. v. Prewitt.[40] Speaking of a consignment of goods in care of the railway company, he said it could not be considered that such a bailment was without hire, though no storage charges had beeen demanded. "The accommodation itself is one that has a strong tendency to bring business to the company. * * * Thus the company is paid for the use of its depots by the increase of its business." Other cases supporting these propositions are to be found in the note.[41] What is a reasonable time for removal of the goods within the meaning of this rule must always be a question to be determined in view of the facts of the case; and, the facts not being in dispute, this question is for the decision of the court.[42] It is such time as will enable one living in the vicinity of the place of delivery to inspect and remove the goods in the ordinary course of business, and in the usual business hours.[43] In one case where three days had passed after notification to the consignee and request to remove the goods, this was held sufficient time to relieve the carrier of his extraordinary liability.[44] In another case the consignee was notified on a Saturday of the arrival of cotton at the carrier's dock, but left part of it there till the following Wednesday, when it was burned. The carrier was liable only in case negligence on his part was shown.[45]

Modification by Usage or Contract.—In any case, however, the whole question of liability may be governed by customary usage or special contract.[46] For example, goods were consigned to the shipper's order, with a direction that a third person should be notified of their arrival at place of destination. It was held that such notice relieved the company of liability as carrier.[47] In a recent Georgia case,[48] it was held that in order

Arthur v. St. P. & D. R. Co., 38 Minn. 965; Burlington & M. R. Co. v. Arms, 15 Neb. 69; L. L. & G. R. Co. v. Norris, 16 Kan. 333; Maigvan v. New Orleans, J. & G. N. R Co., 24 La. Ann. 333; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773; Winslow v. Vermont R. Co., 42 Vt. 700, 1 Am. Rep. 365; Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350; Berry v. W. Va. & R. R. Co. (W. Va.), 30 S. E. Rep. 143; Backhaus v. C. & N. W. R. Co. (Wis.), 66 N. W. Rep. 400; Mo. Pac. R. Co. v. Wichita, etc. Grove Co. (Kan.), 40 Pac. Rep. 899; Mo. Pac. R. Co. v. Nevill, 60 Ark. 375; Kirk v. C., M. & St. P. R. Co. (Minn.), 60 N. W. Rep. 1084. In the last case the goods were left in the car for 48 hours after they had reached their destination. In the absence of proof of any custom to deliver such goods from the car, the company was held liable as carrier for their destruction.

[42] Laporte v. Wells, Fargo & Co.'s Exp. Co., 48 N. Y. St. 292.

[43] L. L. & G. R. Co. v. Norris, 16 Kan. 333; Kinney v. St. Paul & P. R. Co., 19 Minn. 251; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773.

[44] Anniston & A. R. Co. v. Ledbetter (Ala.)

[45] Wymanskill Knitting Co. v. Murray, 90 Hun, 554.

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to change the general rule of liability in that state by proof of the company's custom of notifying consignees of the arrival of goods, the usage must be shown to be of an established nature, and the notices indicative of an intention on the part of the company to remain liable as carrier till the consignee had had reasonable time to remove the goods. In this case the evidence was held insufficient to show usage varying the rule.[49]

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[49] See further as illustrating this modification: Reiss v. Tex. & P. R. Co., 98 Fed. Rep. 533; Norton v. The Richard Winslow, 67 Fed. Rep. 359; American Sugar Refinery Co. v. Ghee (Ga.), 21 S. E. Rep. 383; Frank Bros. v. Cent. R. Co., 9 Pa. Sup. Ct. Rep. 129; Tex. & P. R. Co. v. Clayton, 84 Fed. Rep. 305.

CONTEMPT—BRIBING WITNESS—POWER OF COURT TO PUNISH.

FISHER v. McDANIEL.

Supreme Court of Wyoming, May 23, 1901.

1. The attempt to bribe witnesses while attending a trial in which they are to testify, which occurs in the hallway of the court house, or adjoining the building on the outside, is punishable as a contempt occurring in the presence of the court.

2. A court has jurisdiction to punish an act in contempt of court, though such act is also an indictable offense.

POTTER, C. J.: Upon the petition of Belle Fisher, claiming to be unlawfully imprisoned in the jail of Carbon county by the sheriff of that county, a writ of *habeas corpus* was allowed by one of the justices of this court, and made returnable before the court. It appears that one Martin W. Foley was being tried in the district court of Carbon county, on the charge of murder, from the 9th day of July, 1900, to the 14th day of that month, inclusive. On the last-named date the county and prosecuting attorney presented an information charging that the petitioner herein on the 12th day of July, 1900, pending the trial of the Foley case, corruptly approached two of the witnesses for the state and attempted to bribe them to testify falsely in said case, and praying that she be ordered to appear and show cause why she should not be punished for contempt of court. And the court found the defendant to be in contempt of court and fined her in the sum of five hundred dollars and costs and confinement in the county jail of Carbon county, at Rawlins, for the term of six months.

The first and principal contention on behalf of the petitioner is that her alleged conduct did not constitute a contempt, and hence that the court was without jurisdiction in the premises, and its judgment void. In her petition plaintiff charges that her offense was not alleged or proven to have been committed in the presence of the court, or so near thereto as to obstruct the procedure of the court; and the argument of her counsel is based upon that assumption. It is contended that an attempt to bribe a witness out of the presence of the court is not a contempt of court, but was punishable at common law as a crime, and was so punishable by statute in this state. It is not claimed that the court is without jurisdiction to punish as a contempt an act also indictable or punishable as an offense against the criminal laws, but it is conceded that the fact that an act is otherwise indictable does not deprive the court of the essential power to punish the same act as a contempt. It is, however, insisted that the offense charged against petitioner is not, and never was, a contempt of court. Counsel admit that the legislature cannot, by making an act indictable, interfere with the inherent authority of a court to punish for contempt; but they argue that neither the legislature nor the court is authorized to declare a crime to be a contempt which has always been punishable as a distinct, indictable offense at common law. It is practically conceded, if not in so many words, that the attempt to bribe a witness in the presence of the court, or so near thereto as to interrupt its orderly procedure, would amount to a contempt of court. In respect, therefore, to the question of jurisdiction, the contention of plaintiff's counsel is confined to the proposition that the acts charged to have been committed did not occur in the presence of the court, or so near thereto as to interfere with its procedure. The information against the petitioner alleged that her conduct complained of occurred at the city of Rawlins, in the county of Carbon. The court was in session in that city. But the affidavits attached to the information, and upon which it was founded, were more specific. The witness Isherwood deposed that he was corruptly approached by the petitioner near the court house, and that she proposed that if he modify his testimony in the Foley case, and swear falsely from the evidence given by him at a former trial, she would pay him $300. According to the affidavit of the witness Stafford, he was approached by petitioner in the court house, and the proposition made to him was that if he would change his testimony she would do the right thing,—"meaning that she would compensate" the witness for so changing his testimony and swearing falsely. On the hearing, Isherwood, being asked to state the circumstances of the attempt of the petitioner to bribe him, testified as to the place where it occurred as follows: "At that time I was supposed to be upstairs as a witness. I went downstairs to go to the water-closet. When I got down past the corner, Miss Fisher called me, and I stopped." He then related the conversation between the petitioner and himself, in which the attempt was made to induce him to change his testimony. Stafford testified that he was approached by the petitioner in the hall of

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the court house, downstairs, in the corridors between the two doors, and at that place the proposition was made to him to give false testimony. Both parties were in attendance upon the court as witnesses for the state in the criminal case already mentioned. Miss Fisher denied having made any corrupt propositions to either witness, but in giving her version of the affair she fixed the place of the conversation as "downstairs here," and again, "there in the stairway." She stated that several persons were present, and some talk ensued, which she related, and that Dr. Stafford turned aside in the little hallway, and she had some further conversation with him there. She admitted, however, having met Isherwood at the corner of the court house, or "in" the corner, but denied having attempted to induce him to swear falsely.

In the case of *Ex parte* Savin, 131 U. S. 267, 9 Sup. Ct. Rep. 699, 33 L. Ed. 150, it appeared that the petitioner had been adjudged guilty of contempt for having improperly endeavored to deter a witness from testifying in a case in behalf of the government; the offense of petitioner having been committed once in the jury room temporarily used for witnesses, and once in the hallway of the court building, immediately adjoining the the court room. The question arose whether the misbehavior occurred in the presence of the court. It was held that it did. The court said: "The jury room and hallway where the misbehavior occurred were parts of the place in which the court was required by law to hold its sessions." And after quoting the following from Bacon, in his essay on Judicature: "The place of justice is an hallowed place; and therefore not only the bench, but the footpace and precincts and purprise thereof, ought to be preserved against scandal and corruption,"—the court said further: "We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. * * * If, while Flores was in the court room, waiting to be called as a witness, the appellant had attempted to deter him from testifying on behalf of the government, or had there offered him money not to testify against Gougon, it could not be doubted that he would have been guilty of misbehavior in the presence of the court, although the judge might not have been personally cognizant at the time of what occurred. But if such attempt and offer occurred in the hallway just outside of the court room, or

ciple laid down in that case, no doubt can exist but that the offense of petitioner, within legal contemplation, was committed in the presence of the court. The bribing of witnesses or jurors strikes at the very foundation of judicial determination, and the court would be shorn of much of its efficiency in the administration of justice if it possessed not the power to protect itself against such reprehensible conduct as the corrupt interference with witnesses in the very precincts of the court, where the witnesses assemble in obedience to subpœna, and while waiting to be called to give their testimony. Witnesses are not usually required to remain constantly in the court room, and if they are in the hallway, witness room, if any, or about the building, within easy call, the purpose of their attendance is ordinarily observed, until they are required to take the stand. When in the building in obedience to subpœna or order of court they are in attendance upon the court and subject to its order, and we are not inclined to adopt so technical a construction of the law as would permit a person to station himself within the building where the court is held, and there attempt to corruptly influence the testimony of witnesses, without fear of being punished for contempt. The argument of counsel that such conduct would not be in the presence of the court, or so near thereto as to interfere with its procedure or obstruct the administration of justice is, to say the least, unreasonable. It is, moreover, opposed not only by the decision of the United States Supreme Court in the Savin case, but by other eminent authorities. In Sinnott v. State, 11 Lea, 281, it was held that one was guilty of contempt who approached the deputy sheriff, while engaged in summoning jurors, with a list of names of persons whom he endeavored to induce the deputy to summon as jurors, and also approached another deputy and sought to induce him to summon a certain person upon the panel, to the sheriff unknown, although neither of said acts were committed in the court house or in the actual presence of the court. The statute provided that a "willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice," is a contempt, and also that an abuse of or unlawful interference with the process or proceedings of the court is a contempt. The court said: "The attempt of defendant to induce the officers of the court to summon as jurors in the particular case then to be tried certain persons specified by him, in preference to others, or, in common parlance, to 'pack a jury,' was an unlawful inter-

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from court to avoid the service of a subpœna upon him, and thereby prevented the government from using him as a witness upon a criminal trial. He was adjudged guilty of contempt, and it was held that the act was punishable as a contempt, though it was done at the residence of the witness, at some distance from the court house, in the town where the court was sitting, on the ground that it constituted a misbehavior so near to the court as to obstruct the administration of justice. The learned judge stated in the opinion that, had the particular misbehavior charged occurred anywhere within the building where the court was held, it would have been misbehavior in the presence of the court, and added: "If it is a contempt to bribe a witness in front of the court house door, is it not a contempt to attempt to do the same thing on the street opposite the court building, or four blocks away? Is not the result the same? Is not the motive of the accused the same? What difference does it make whether the attempt was made on the ground owned by the United States, or at the residence of the witness in the same town, four blocks, or about one-quarter of a mile, away from the court building? In one case the misbehavior would be construed to be in the presence of the court, and in the other 'so near thereto as to obstruct the administration of justice,' and the statute, in clear language, is made to apply to both cases." See, also, *Ex parte* Cuddy, 131 U. S. 280, 9 Sup. Ct. Rep. 703, 33 L. Ed. 154; Montgomery v. Judge, 100 Mich. 436, 59 N. W. Rep. 148; Langdon v. Judges, 76 Mich. 358, 43 N. W. Rep. 310; Hale v. State, 55 Ohio St. 210, 45 N. E. Rep. 199, 36 L. R. A. 254; Steube v. State, 3 Ohio C. C. 383. In Hale v. State the party adjudged to be in contempt had, by promising to pay the expenses of a witness who had been subpœnaed, induced her to leave the county, and thereby prevented her appearance as a witness at the trial of a criminal case. The act was held to be a contempt of court, and punishable as such, notwithstanding that it was by statute constituted a distinct criminal offense, and that no express provision of the statute made the statutory punishment cumulative. It is well settled that, if an act is a contempt of court, the fact that the same act is indictable as a criminal offense does not take away the jurisdiction of the court to punish the offender as for a contempt. We understand this general principle to be conceded, while it is contended that a different rule governs this case. We do not think so. The case comes fairly within the general doctrine, and we apprehend that enough has been said to render further discussion unnecessary.

It is insisted that as section 5087 of the Revised Statutes, providing for the punishment as a misdemeanor of one guilty of disobeying a subpœna, expressly states that it shall not prevent summary proceedings for contempt, while section 5088 contains no such reference to contempt proceedings, and is not, therefore, expressly rendered cumulative, the remedy under the last-named section for the acts covered thereby is sole and exclusive, and deprives the court of the power to punish such acts as for a contempt. Under similar statutory provisions the contrary was held in Hale v. State, 55 Ohio St. 210, 45 N. E. Rep. 199, 36 L. R. A. 254, upon facts already alluded to in referring to that case. The statute in question (section 5088) provides that "whoever corruptly or by force, or threats or threatening letters, endeavors to influence, intimidate or impede any juror, witness or officer in the discharge of his duty; or by threats or force obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice in any court of this state, shall be fined not more than one thousand dollars, to which may be added imprisonment in the county jail not more than sixty days nor less than ten days." The act of the petitioner clearly amounting to a contempt, bearing in mind the general rule above adverted to (that making an act indictable as an offense does not invade the power of a court to punish for contempt), we are not disposed to hold that petitioner was liable to be proceeded against only under section 5088. The power to punish for contempts in *facie curiæ* is inherent in all courts of superior jurisdiction. Legislative authority is not required for its existence or exercise. In this state, indeed, there is no statute conferring the power in such a case as the one at bar. We are clearly of the opinion that section 5088 is not exclusive, and that, where the act amounts to a contempt, it may be punished as such.

NOTE—*Contempt of Court.—1. Power to Punish for Contempt Where Other Remedies Exist.* —The power to punish for contempt cannot be abridged by the legislature, at least over courts created by the constitution. This is the general rule. Hawes v. State, 46 Neb. 150; Matter v. Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78; Hale v. State, 55 Ohio St. 210; Cheadle v. State, 110 Ind. 301, 59 Am. Rep. 199; *In re* Chadwick, 109 Mich. 588. It would seem to follow, *a fortiori*, that if the legislature cannot directly abridge the power of a court to punish for contempt, it certainly cannot do so indirectly by making the offense indictable, or making provision for other remedies. It is therefore well settled that the indictability of an offense is no bar to its summary punishment as for contempt. United States v. Debs, 158 U. S. 564, 64 Fed. Rep. 724; *Ex parte* Acock, 84 Cal. 50; Burke v. Territory, 2 Okla. 499; Pledger v. State, 77 Ga. 242; *In re* Hughes (N. Mex. 1895), 43 Pac. Rep. 692; State v. District Court, 52 Minn. 263; Matter of Griffin, 98 N. Car. 225; Cartwright's Case, 114 Mass. 230. And it is a general rule that a contempt, though punishable by criminal prosecution of any character, is also punishable in contempt proceedings. United States v. Debs, 158 U. S. 564; *Ex parte* Savin, 131 U. S. 267; State v. Faulds, 17 Mont. 140, 42 Pac. Rep. 285; *In re* Cartwright, 114 Mass. 230; *Ex parte* Bergman, 3 Wyo. 396, 26 Pac. Rep. 914. Thus, in *Ex parte* Savin, *supra*, it was held that while the same offense, which constitutes the contempt, is embraced in Rev. St. U. S., sec. 5399, and punishable by indictment, that method of procedure is not conclusive, and the court may proceed

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summarily as for contempt. Some earlier cases held to a contrary rule, denying the right of the court to punish for contempt where acts were otherwise punishable. State v. Blackwell, 10 S. Car. 35; State v. Blocker, 14 Ala. 450; *In re* Kerrigan, 33 N. J. Law, 344.

2. *Misconduct "in Presence of" Court.*—What constitutes "in the presence of" the court, in order to give court jurisdiction to punish the offense for contempt, is sometimes a difficult question, and is best settled by reference to the authorities. Thus, in *Ex parte* Savin, 131 U. S. 267, 9 Sup. Ct. Rep. 699, it was held that attempts by persuasion and offer of money to deter a witness duly subpœnaed from testifying in behalf of the government, such attempts being made in the witness room, immediately adjacent to, and in the hallway of, the court room, and while the court was in session, constitute misbehavior in the presence of the court. So, also, it has been held that a contempt in the piazza of the court house, into which the windows of the court room open, is a contempt in the presence of the court. United States v. Carter, 3 Cranch (C. C.), 423. But a peculiar case arose recently in Missouri, where a commitment for contempt "for making a murderous assault upon a person named, in the court's presence," was held to be illegal where the evidence showed that the assault occurred in the rotunda, outside of the court room, and that because of a swinging door, and the density of the crowd, and the nearsightedness of the judge, he could not have seen the occurrence, and that his subsequent inquiries showed that he did not, in fact, see it. *Ex parte* O'Brien, 127 Mo. 477, 30 S. W. Rep. 158. In this case, however, there were other vital defects in the record on which the court laid great stress in nullifying the commitment. In the case of Commonwealth v. Stuart, 2 Va. Cas. 320, it was held that the making of an affray and riot, accompanied with great noise and turbulence, at a tavern, near the court house, where the judge of the court was, and of which the rioters were advised, during a night of the term, but the court being then in recess, is not a contempt of court. On the other hand, however, it has been held that misbehavior in the court room, in the presence of the judge, after the adjournment of court from one day to the next, but while the judge is attending to business, is punishable as a contempt. Baker v. State, 82 Ga. 776, 9 S. E. Rep. 743, 14 Am. St. Rep. 192. Judges, however, are not proof against rough handling or insult when not acting in their judicial capacity, and they may not use their prerogatives as judges to avenge themselves for private wrongs or insults. For instance, to demand loudly and arrogantly of a justice merely engaged in writing a letter requiring his official signature, money which had been collected by him, does not authorize a punishment for contempt. Such writing will admit of interruption. Winship v. People, 51 Ill. 296. So, also, an insult to a parish judge, acting as auctioneer, is not a comtempt of him in his judicial capacity, and cannot be so punished. Detournian v. Dormenon, 1 Mart. (La.) 138. See also Fitler v. Probasco, 2 Browne (Pa.), 137, where it was held that a justice cannot punish summarily for a contempt while he is acting ministerially and not judicially.

3. *Tampering with Witnesses and Jurors as Contempt of Court—Bribing.*—Statutes in nearly every state specifically provide that any person, giving or offering any witness, or person about to be called as a witness, anything of value to influence his testimony, or to keep him from testifying, is guilty of bribery. These statutes also provide punishment. We have seen, however, that such statutes, although they may define the offense, do not exclude the jurisdiction of the court to punish them as for contempt. *Ex parte* Savin, 131 U. S. 267, 9 Sup. Ct. Rep. 699. Moreover, the court is not limited by the definition of the offense by any statute but is allowed a large discretion in decreeing what acts are a contempt. Thus, merely an attempt to create a belief that a juror or other officer of the court having active duties to perform upon a trial can be bribed, is a contempt of court. Little v. State, 90 Ind. 338, 46 Am. Rep. 224. But we must look to the decided cases for a clear solution of this question, as of nearly all questions under contempt proceedings, as the decision in such proceedings is controlled not so much by strict rules as upon the nature and facts of each particular case. Preventing the attendance of witnesses or inducing them to keep away from the trial is, of course, contempt of court. Thus, it has been held that bribing a person, who is known to be a material witness, to remain away from court, is a contempt of court, whether such person has been subpœnaed or not, and though punishable by indictment is also punishable as a contempt committed by misbehavior "so near" the court "as to obstruct the administration of justice." *In re* Brule, 71 Fed. Rep. 943. On the other hand, however, it has been held that a *supersedeas*, issued in blank as to the names of the parties to the case, is not a valid process upon which to prosecute a rule for contempt, charging one with attempt to bribe another to warn witnesses to avoid service of such subpœnas. Dobb v. State, 55 Ga. 273. So also it has been held that until a party has been supbœnaed to attend before the grand jury, or a subpœna has been issued for him, it is not a contempt of court for a person to induce him to absent himself in order that he may not be subpœnaed. McConnell v. State, 46 Ind. 298. In Michigan, however, the rule is the same as is in the federal courts. A recent case in that state holds that under How. Ann. St., sec. 7257, providing a punishment for one who unlawfully detains a witness while going to or remaining at the court where the suit is noticed for trial, it is not necessary, in order to constitute the offense described, that the witness should have been subpœnaed. Montgomery v. Palmer, 100 Mich. 436, 59 N. W. Rep. 148. In that case one L inquired of the deputy sheriff whether he had a subpœna for one B, as a witness, and was told that he had not. Early the next morning L gave B money, and B immediately left the state. B's testimony was material. The court held that there was a sufficient basis on which to issue a writ requiring L to show cause why he should not be punished for contempt of court. Merely assisting a person to get away, where it is their own desire and free will, is not contempt; there must be pursuasion or coercion on the part of the defendant. Whitten v. State, 36 Ind. 196. For other cases holding it to be contempt to prevent the attendance of witnesses in court, see McCarthy v. State, 89 Tenn. 543, 15 S. W. Rep. 737: Commonwealth v. Feely, 2 Va. Cas. 1; *In re* Whetstone, 9 Utah, 156, 33 Pac. Rep. 634; Haskett v. State, 51 Ind. 176.

Approaching jurors or witnesses in court for the purpose of influencing their action is, of course, a most flagrant contempt of court: Cuddy, Petitioner, 131 U. S. 280; Little v. State, 90 Ind. 338; Langdon v. Judges of Wayne Circuit Court, 76 Mich. 358, 43 N. W. Rep. 310; Gandy v. State, 13 Neb. 445. In the famous case of United States v. Burr, Fed. Cas. No. 14,692f,

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it was held that a offer of a sum money to a witness to remove his objections to going without the jurisdiction of the court to testify was not necessarily an attempt to contaminate the source, and a contempt of court in which it was administered. In Beattie v. People, 33 Ill. App. 651, it was held that an attorney who knowingly procures evidence with the intention of deceiving and obstructing justice is guilty of contempt. So also, in Gibson v. Tilton, 1 Bland (Md.), 352, 17 Am. Dec. 306, it was held that though parties could not be prosecuted for a false oath taken in another state, yet, if they knowingly use testimony supported by such spurious oath, they may be punished as for contempt for practicing an imposition upon the court.

CORRESPONDENCE.

ANARCHY—A NOVEL SUGGESTION FOR ITS SUPPRESSION.

To the Editor of the Central Law Journal:

I have read your editorial appearing on page 241, in regard to the assassination of President McKinley, in which you undertake to point out some remedies, and in this connection I wish to suggest that, while anarchism is, to some extent, respectable in Russia, there is no place for it or any part of it in the United States; and that there is possibly a remedy, and I am inclined to the opinion that congress, under the constitution, has a right to define treason. It is fully demonstrated that the death penalty has no terrors for persons who think that they can become martyrs by giving up their life for a cause, and that the death penalty is not a success as a deterrent of crime. There is a large party of respectable adherents to the last part of the above sentence. There is no punishment so severe as exile. This, I think, is not confined to human beings, but extends to the animal kingdom. Any man can determine the severity of such punishment by examining himself. I would therefore suggest as a remedy for anarchism in this country,—deportation. Not such as Russia inflicts, because it is too severe. We have recently acquired some very habitable islands, and my suggestion is: 1st, that congress define treason by statute, and that the definition include that whoever, in any way, utters or proclaims that there should be no law or no government, shall be guilty of treason; and that 2d, whoever is guilty of treason (in addition to the penalties now prescribed) that the penalty shall be deportation to an island (far at sea) where no laws, rules or regulations shall be inaugurated or maintained. And further that no representative of this country shall be there further than sufficient soldiers to see that the above rule is maintained. This, I think, would result in this class of people being placed in a community such as they advocate, and it is wholly immaterial to all the decent people whether they or any of them survive or not, except that they do not starve to death. The advocate of anarchism so long as he keeps his mouth shut, or his pen from paper, is, in my opinion, absolutely harmless. I think the above scheme would give him an opportunity to demonstrate his form of government, and also at the same time protect all law-abiding people from his influence.

RECTOR C. HITT.

BOOK REVIEWS.

HARRIMAN ON CONTRACTS.

The object and characterization of this work is well summed up in the opening paragraph of the author's preface: "In preparing an American treatise on the Law of Contracts at the beginning of the twentieth century, the author has striven to present that branch of the law in its true relation, both to the history of the past and to the probable developments of the future; for the lawyer must be both historian and prophet. Such a presentation of the law must, above all things, be accurate; but the accuracy must often be rather that of the artist who paints a landscape, than that of the mathematician who states the equation of a curve." In other words, as we would more clumsily express it,—it is a bird's eye view of the law of contract, and as such, is very accurately and very cleverly prepared. We desire also to most highly commend the mechanical execution of this work,—it is certainly the acme of the printers' and binders' arts. Nothing in the way of a law book has so delighted our eye than this very neat little volume, with its clear, beautiful type, its elegant paper, and its rich binding in the best quality of law sheep. Bound in one volume of 410 pages, and published by Little, Brown & Co., Boston, Mass.

HUGHES ON ADMIRALTY.

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HUMORS OF THE LAW.

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98. FIXTURES—Not Severed—Conveyance by Deed.—In order to convey legal title to the fixtures not actually severed from the realty, the contract must be in writing and executed with the same formality as a deed.—JOHNSTON v. PHILADELPHIA MORTG. & TRUST CO., Ala., 30 South. Rep. 156.

99. FRAUDULENT CONVEYANCES — Surety and Co-Surety.—A surety held an existing creditor of a co-surety, and entitled to protection against fraudulent conveyance by such co-surety.—WASHINGTON v. NORWOOD, Ala., 30 South. Rep. 405.

100. GAMING — Gambling in Stock and Bonds.—Presumption of intent to make a gambling contract held not to arise from the fact that the seller of stock did not own it at the time.—CLEWS v. JAMIESON, U. S. S. C., 21 Sup. Ct. Rep. 845.

101. GARNISHMENT— Oral Testimony.—A garnishee cannot be charged on oral testimony.—WIGHTMAN v. KRUGER, R. I., 49 Atl. Rep. 895.

102. GUARANTY—Guarantor's Death.—A guaranty for future advances ceases on the guarantor's death and notice thereof to the guarantee.—VALENTINE v. DONOHOE-KELLEY BANKING CO., Cal., 65 Pac. Rep. 881.

103. HIGHWAYS — Driving — Wrong Side. — Where plaintiff, driving to the left of the center of a paved street, collided with defendant's vehicle coming in the opposite direction, held, that she was negligent in driving on the wrong side of the road.—WINTER v. HARRIS, R. I., 49 Atl. Rep. 898.

104. HOMICIDE— Aider or Abettor— Evidence. — On indictment for murder, evidence held to show defendant guilty as an aider or abettor, though he did not fire the fatal shot.—THOMAS v. STATE, Ala., 30 South. Rep. 391.

105. HOMICIDE— Evidence — Course of Bullet. — On trial for homicide of police officer, evidence as to course of bullet which struck and killed another officer at the time held admissible.—MILLER v. STATE, Ala., 30 South. Rep. 379.

106. HOMICIDE—Evidence—Identification.—Any testimony as to what occurred on the night of a homicide, tending to identify the defendants as having been at the place of the killing on that night, held admissible.—MILLER v. STATE, Ala., 30 South. Rep. 379.

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107. HOMICIDE—Evidence—Number of Shells.—Where several shots were fired at the time of the killing of a policeman, evidence of the number of shells in the pistol carried by the police officer held admissible.—MILLER v. STATE, Ala., 30 South. Rep. 879.

108. HOMICIDE—Evidence—Relation of Defendant to Paramour.—Evidence as to relations existing between defendant and his paramour, a co-defendant, held admissible as disclosing motive for the murder.—CADDELL v. STATE, Ala., 30 South. Rep. 76.

109. HOMICIDE — Evidence— Threats.— On trial for murder, where evidence is conflicting as to whether the killing was in self defense, previous threats may be shown in evidence.—HARKNESS v. STATE, Ala., 30 South. Rep. 78.

110. HOMICIDE—Evidence—Warrant of Arrest.—In a prosecution for assault in an attempt to arrest, evidence of a person accompanying the constable that the latter had a warrant for defendant held competent.—ZIMMERMAN v. STATE, Ala., 30 South. Rep. 18.

111. HOMICIDE — Officers of the Law—Citizens.—In a prosecution for resisting arrest, instructions that persons accompanying officer to assist in the arrest were not officers of the law are erroneous.—ZIMMERMAN v. STATE, Ala., 30 South. Rep. 18.

112. HOMICIDE—Self-Defense—Bringing on Difficulty. —Charges invoking doctrine of self-defense, but making no reference to the bringing on of the difficulty, held properly refused.—FORD v. STATE, Ala., 30 South. Rep. 27.

113. HOMICIDE—Self-Defense—Retreat.—A charge as to self-defense, not including the element of retreat, held properly refused.—FORD v. STATE, Ala., 30 South. Rep. 27.

114. HUSBAND AND WIFE — Abandonment—Wife's Conveyance.—Where husband abandons wife she can convey her separate property without her husband's joining in conveyance.—BIELER v. DREHER, Ala., 30 South. Rep. 22.

115. INDICTMENT AND INFORMATION — Variance—Wrong Name.—Where indictment avers name of deceased to be "Ad Smith, alias Age Smith," and the evidence shows that his name was "Adger Smith," but he was commonly called "Age Smith," there is no variance.—FORD v. STATE, Ala., 30 South. Rep. 27.

116. INNKEEPERS—Fraud—Criminal Action.—Reliance on fraudulent representations by an innkeeper, inducing him to furnish board to another, held a necessary element of the offense defined by Code, § 4755.—CHAUNCEY v. STATE, Ala., 30 South. Rep. 403.

117. INNKEEPERS — Imprisonment for Debt—Constitutional Law.—Code, § 4755, making it a crime to obtain board or lodging from an innkeeper by fraudulent representations, held not unconstitutional as authorizing imprisonment for debt.—CHAUNCEY v. STATE, Ala., 30 South. Rep. 403.

118. INTEREST — Payment of Principal.—Under Civ. Code, § 3290, held, that the payment of the principal of a note which was surrendered to the guarantor's executor relieved his estate from a further claim for interest.—VALENTINE v. DONOHOE-KELLY BANKING CO., Cal., 65 Pac. Rep. 881.

119. INTERNAL REVENUE — Illegal Assessment.—One from whom internal revenue taxes have been illegally exacted under threat of distraint on their recovery is entitled to interest from the date of payment.—MCCLAIN v. PENNSYLVANIA CO., U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 618.

120. INTERNAL REVENUE—Legacy and Inheritance Tax.—The provisions of the war revenue act of 1898 imposing taxes on legacies and inheritances operates only upon the estates of persons dying after the date of its passage.—MCLAIN v. PENNSYLVANIA CO., U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 618.

121. INTOXICATING LIQUORS — Malt Liquors—Non-Intoxicant.—The legislature can prohibit sale of malt liquor, whether intoxicating or not, in connection with other liquors.—FEIBELMAN v. STATE, Ala., 30 South. Rep. 884.

122. JUDGMENT—Default — Disclaiming Defendant.— In ejectment it was error to refuse a disclaiming defendant right to participate after default; it subsequently appearing that other lands in which he was interested were involved.—BALFOUR-GUTHRIE INV. CO. v. SAWDAY, Cal., 65 Pac. Rep. 100.

123. JUDGMENT — Dismissal — Effect.—A decree dismissing a libel *in rem* against a vessel for repairs, held not an adjudication of the non-liability of the owners for such repairs.—MORRIS v. BARTLETT, U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 675.

124. JUDICIAL SALES—Bill to Correct Description.— Bill to correct description of lands sold under decree in probate can be maintained only where parties in interest had legal notice when decree was rendered and the lands sold for their full value, which has been fully paid.—VAUGHAN v. HUDSON, Ala., 30 South. Rep. 75.

125. JURY — Quashing Venire — Juryman Not Summoned.—That one of the persons drawn to serve on special venire in capital case was not summoned, held no ground for quashing the venire.—CADDELL v. STATE, Ala., 30 South. Rep. 76.

126. JUSTICES OF THE PEACE — Jurisdiction.—ANN. Code, § 653, giving jurisdiction over foreign executors by publication of summons, held not to affect a case where summons was personally had.—WILLIAMS v. STEWART, Miss., 30 South. Rep. 1.

127. LARCENY — Concealment and Conversion.— Where a person takes tortious possession of property, and thereafter conceals it and feloniously converts it to his own use or to the use of another, he is guilty of larceny.—DOZIER v. STATE, Ala., 30 South. Rep. 396.

128. LARCENY — Evidence — Value of Property.—In a prosecution for larceny, it was competent for the state to show what the value of the property alleged to have been stolen was at the time of the taking.—DOZIER v. STATE, Ala., 30 South. Rep. 396.

129. LOST INSTRUMENTS — Defective Affidavit.—In an action on a lost note, that affidavit of loss required by Code is defective, constitutes no ground of objection to the complaint.—TAPSCOTT v. GIBSON, Ala., 30 South. Rep. 23.

130. MALICIOUS PROSECUTION—Damages—Mental Distress.—Deprivation of liberty, oppression, mental trouble, and loss of business standing are results naturally flowing from malicious prosecution, and need not be pleaded.—TEN CATE v. FANSLER, Okla., 65 Pac. Rep. 875.

131. MALICIOUS PROSECUTION—Payment of Money to Secure Liberty.—Payment of money to secure liberty of one imprisoned in malicious prosecution must be specially pleaded, in order to be recovered.—TEN CATE v. FANSLER, Okla., 65 Pac. Rep. 875.

132. MALICIOUS PROSECUTION — Wrongful Attachment.—To maintain action for wrongful attachment, it is not necessary that the attachment suit should have been terminated.—ALSOP v. LIDDEN, Ala., 30 South. Rep. 461.

133. MANDAMUS — Officer — State Treasurer.—A state treasurer will not be compelled by *mandamus* to do an act in violation of constitution, though the attorney general has advised him that it would not be a violation of such constitution.—PARK v. CANDLER, Ga., 39 S. E. Rep. 89.

134. MANDAMUS—Tribunals—Ultra Vires Acts.—*Mandamus* will not lie to command an inferior tribunal to do that which it could not have done without such mandate.—EX PARTE CAMPBELL, Ala., 30 South. Rep. 885.

135. MASTER AND SERVANT—Master's Duty — Inspection.—Master's duty to inspect apparatus about which servant is employed cannot be delegated.—NEWTON v. VULCAN IRON WORKS, Pa., 49 Atl. Rep. 339.

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136. MASTER AND SERVANT—Master's Liability—Test.—Test of employer's liability for defective machinery is whether it was reasonably safe for the purpose for which it was used.—KENNEDY V. ALDEN COAL CO., Pa., 49 Atl. Rep. 941.

137. MECHANICS' LIENS — Owner's Liability — Ultra Vires Contracts.—It is no objection to the claim of a material-man to a mechanic's lien that the contractor had no power under its charter to make the contract.—GENERAL FIRE-EXTINGUISHER CO. V. MAGEE CARPET WORKS, Pa., 49 Atl. Rep. 866.

138. MECHANICS' LIENS — Payment by Owner—Right of Material-Men.—That owner voluntarily paid a bill in excess of the contract price of the building, did not prejudice a material-man furnishing materials to the contractor.—SOUTHERN CALIFORNIA LUMBER CO. V. JONES, Cal., 65 Pac. Rep. 378.

139. MECHANICS' LIENS — Pleading General Issue.—Defendant in mechanic's lien, having pleaded general issue, waives defect in claim.—GENERAL FIRE-EXTINGUISHER CO. V. MAGEE CARPET WORKS, Pa., 49 Atl. Rep. 866.

140. MINES AND MINERALS—Blood Veins—Surface Location.—Blind veins underneath prior lode claims belong to the surface location under Rev. St. U. S. § 2322.—CALHOUN GOLD-MIN. CO. V. AJAX GOLD MIN. CO., U. S. S. C., 21 Sup. Ct. Rep. 885.

141. MINES AND MINERALS—Exploration—Mechanic's Lien.—A mining expert who contracted to explore certain mines held not entitled to assert a mechanic's lien on the property for such services under Mechanic's Lien Act.—LINDEMANN V. BELDEN CONSOL. MIN. & MILL. CO., Colo., 65 Pac. Rep. 408.

142. MINES AND MINERALS — Patents — Collateral Attack.—Patents of lode-mining claims cannot be collaterally attacked by evidence that on a subsequent location of a tunnel site no ore had been discovered in the lode claims.—CALHOUN GOLD-MIN. CO. V. AJAX GOLD-MIN. CO., U. S. S. C., 21 Sup. Ct. Rep. 835.

143. MORTGAGES — Bona Fide Indorsee — Equities.—Where a negotiable note secured by a trust deed is transferred before maturity to a *bona fide* indorsee, his rights under the trust deed are not subject to defenses existing between the maker and payee.—COWING V. CLOUD, Colo., 65 Pac. Rep. 417.

144. MORTGAGES — Parties — Second Mortgagee.—In an action to foreclose a prior mortgage, it was not necessary to make a second mortgagee of church property, whose mortgage was made by the president and secretary of the trustees individually, a party.—SHACKLETON V. ALLEN CHAPEL AFRICAN M. E. CHURCH, Mont., 65 Pac. Rep. 428.

145. MORTGAGES — Priming — Right of Record Mortgages.—Rights of mortgage creditors second in rank held recognized as priming the mortgage first in rank to the extent that it was without consideration when the mortgage creditors second in rank acquired their rights.—WAMSLEY V. RESWEBBER, La., 30 South. Rep. 5.

146. MUNICIPAL CORPORATIONS—Bonds—Irregularity.—Bonds for payment of street improvements issued under Act May 28, 1889, held valid, though assessment was invalid because of the irregularity in passage of city ordinance.—GABLE V. CITY OF ALTOONA, Pa., 49 Atl. Rep. 867.

147. MUNICIPAL CORPORATIONS—Contract—Ordinance or Resolution.—Where statutes governing cities do not require a contract to be entered into by ordinance, a city cannot avoid a contract, which it recognized as valid on the ground that its execution was authorized only by a resolution.—OGDEN CITY V. WEAVER, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 564.

148. MUNICIPAL CORPORATIONS — Negligence—Steam Roller.—No other notice to travelers of a steam roller on the street is necessary than a view of the roller itself.—DISTRICT OF COLUMBIA V. MOULTON, U. S. S. C., 21 Sup. Ct. Rep. 840.

149. NEGLIGENCE—Children—Excavation.—One making excavation held not bound to so guard it as to prevent injury to children who come upon it without his invitation.—SAVANNAH, ETC. RY. CO. V. BEAVERS, Ga., 39 S. E. Rep. 82.

150. NEGLIGENCE—Children—Open Cellar.—Premises located 80 feet from a city street, containing an unguarded open cellar, held not particularly attractive to children, so as to render the owner liable for injuries.—LOFTUS V. DEHAIL, Cal., 65 Pac. Rep. 379.

151. NEGLIGENCE—Proximate Cause.—Violence of a playmate held the proximate cause of plaintiff's injuries, so that the owner of property on which the injury occurred was not liable.—LOFTUS V. DEHAIL, Cal., 65 Pac. Rep. 379.

152. NEW TRIAL—Amount too Trivial.—Amount involved in an action against a garnishee held too trivial to justify the granting of a petition for a new trial, though error appeared.—WIGHTMAN V. KRUGER, 49 Atl. Rep. 895.

153. NEW TRIAL—Modification of Judgment.—Where plaintiff failed to comply with order requiring him to consent to a modification of the judgment held to entitle defendant to a new trial.—BONELLI V. JONES, R. I., Nev., 65 Pac. Rep. 374.

154. PARTIES—Waiver.—An objection that plaintiff's co-tenant should have been joined in an action held waived, where it was not made in writing before the commencement of trial.—DARILL V. DODDS, Miss., 30 South. Rep. 4.

155. PARTNERSHIP—Dissolution—Service of Process.—Service of process on a commerical partnership during its continuance may be made by service on one of the members, which will be service on all; but, after dissolution, service must be made on each member intended to be sued.—LEVY V. RICH, La., 30 South. Rep. 877.

156. PLEADING — Amended and Substituted Pleadings.—An amended petition may be filed, instead of attempting to file a substitute for the original petition, which, with all the records, have been lost.—DISTRICT OF COLUMBIA V. TALTY, U. S. S. C., 21 Sup. Ct. Rep. 896.

157. PLEADING—Amendment.—The statutes of Missouri do not authorized a plaintiff to amend his petition in vacation before the term to which the summons is returnable.—PETERSON V CHICAGO, M. & St. P. RY. CO., U. S. C. C., W. D. Mo., 108 Fed. Rep. 561.

158. PLEADING — Amendment — After Trial Commenced.—The court, after trial has been entered upon, can allow amendment to complaint to correspond with the evidence.—TAPSCOTT V. GIBSON, Ala., 30 South. Rep. 28.

159. PLEADING—Puis Darrein Continuance.—Matter arising after suit brought, but before issue joined, is not proper matter for a *puis darrein* continuance.—LINDSAY V. BARNETT, Ala., 30 South. Rep. 895.

160. PLEDGES—Banks—Assignment of Mortgage.—An assignment of a mortgage to a bank by a stockholder of a corporation to secure a corporate debt was a pledge, and he occupied the position of surety.—VALENTINE V. DONOHOE-KELLY BANKING CO., Cal., 65 Pac. Rep. 381.

161. PRINCIPAL AND SURETY—Fraudulent Conveyance of Co-Surety.—Surety on administrator's bond held entitled, at any time within 10 years after final settlement of the administration, to maintain bill to set aside conveyance of co-surety as fraudulent against him.—WASHINGTON V. NORWOOD, Ala., 30 South. Rep. 405.

162. PRINCIPAL AND SURETY—Right of Contribution.—Right of contribution accrues only when surety pays more than his share of the common liability.—WASHINGTON V. NORWOOD, Ala., 30 South. Rep. 405.

163. PROHIBITION—Final Hearing—Interlocutory Order—Where, on application for a writ of prohibition, a rule *nisi* is granted, it is no objection that the judg-

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ment prohibited respondents from doing the acts complained of until final hearing.—EX PARTE CAMPBELL, Ala., 30 South. Rep. 385.

164. QUIETING TITLE — Contract of Share. — The grantees of a mining claim, in consideration of a contract to work the mine and give part of the minerals to the grantor, cannot have their titles quieted as against the grantor and his assigns.—DOWING V. RADEMACHER, Cal., 65 Pac. Rep. 385.

165. QUIETING TITLE—Description—Judgment.—In an action to quiet title, a judgment in favor of plaintiff, relating to land other than that described in the complaint, was erroneous, as not within the issues.—BALFOUR-GUTHRIE INV. CO. V. SAWDAY, Cal., 65 Pac. Rep. 375.

166. REFORMATION OF INSTRUMENTS — Possession of Plaintiff Under Deed.—In order to maintain bill to correct description of lands in a deed, it is not necessary that complainant should be in possession.—BEILER V. DREHER, Ala., 30 South. Rep. 22.

167. REMOVAL OF CAUSES—A pending Petition.—The unauthorized filing of an amended petition in vacation, reducing the amount of the damage prayed for below, $2,000, held not to affect defendant's right of removal.—PETERSON V. CHICAGO, ETC. RY. CO., U. S. C. C., W. D. (Mo.), 108 Fed. Rep. 561.

168. SHERIFFS AND CONSTABLES — Negligence — Indemnity.—Constables selling goods under distress for rent, held not entitled to recover on indemnity bond; his liability for damages being caused by his own neglect.—BLAIR V. BORING, Pa., 49 Atl. Rep. 885.

169. SHIPPING — State Pilot — Owner's Liability.—A ship owner is not liable for injuries caused by negligence of pilot accepted by vessel under Laws N. Y. 1892.—HOMER RAMSDELL TRANSP. CO. V. LA COMPAGNIE GENERALE TRANSATIANTIQUE, U. S. S. C., 21 Sup. Ct. Rep. 881.

170. STATUTES — Construction.—Where an act must be construed either as unconstitutional or as repealing a former act by implication, the latter construction will be adopted.—PARK V. CANDLER, Ga., 39 S. E. Rep. 89.

171. STATUTES — Construction by Federal Court of State Statutes.—Construction by a state court of a state statute held binding on the Supreme Court of the United States.—COMMERCIAL NAT. BANK V. CHAMBERS, U. S. S. C., 21 Sup. Ct. Rep. 866.

172. STATUTES — Repeal — Effect.—Where an act attempts to repeal prior legislation not *germane* to the general subject, it will not vitiate the entire act.—COMMONWEALTH V. MOIR, Pa., 49 Atl. Rep. 351.

173. STATUTES—Title.—Act March 7, 1901, relating to cities of the second class, held not unconstitutional as not expressing the subject in the title.—COMMONWEALTH V. MOIR, Pa., 49 Atl. Rep. 351.

174 STATUTES — Title—Undisclosed Subjects.—Act of 1898 to equalize taxation for state and county purposes, held unconstitutional, as embracing subjects not disclosed in its title.—EQUITABLE GUAR. & TRUST CO. V. DONAHOE. Del., 49 Atl. Rep. 372.

175. STIPULATIONS — Evidence — Unauthenticated Copies.—Agreements between counsel, permitting unauthenticated copies of documents to be offered in evidence liberally construed.—LEVY V. RICH, La., 30 South. Rep. 377.

176. TAXATION—Assessment—Capital Stock.—Refusal to deduct the value of real estate owned in other states by national bank from the value of its shares of stock, held not to unlawfully discriminate against such bank under United States constitution.—COMMERCIAL NAT. BANK V. CHAMBERS, U. S. S. C., 21 Sup. Ct. Rep. 868.

177. TAXATION — Assessment—Computation.—Where the roadbed and rolling stock of a railroad was worth $11,000 per mile, and assessable value of the rolling stock was $1,000 per mile, it was error to reduce the $11,000 by 50 per cent. and then subtract $1,000, to find the assessable value of the roadbed per mile.—OREGON & C. R. CO. V. JACKSON CO., Oreg., 65 Pac. Rep. 369.

178. TAXATION—Assessment—Judgment on Appeal.—Where circuit court, on appeal, affirmed judgment of commissioners' court raising an assessment for taxation, it was error to render further judgment for the taxes due on the assessment as raised.—EX PARTE HOWARD-HARRISON IRON CO., Ala., 30 South. Rep. 400.

179. TAXATION—Capital Stock — Computation.—Gen. St. § 3886, authorizing deduction of real estate forming part of the capital stock in computing the taxable value of corporate stock, does not authorize the deduction of real estate held to respond to particular liabilities.—APPEAL OF CUTLER, Conn , 49 Atl. Rep. 338.

180. TAXATION—National Banks—Assessment.—Rev. St. U. S. § 5219, forbidding taxation of shareholders in national banks at a greater degree than other moneyed capital, does not include capital which does not come in competition with the business of national banks.—COMMERCIAL NAT. BANK V. CHAMBERS, U. S. C. C., 21 Sup. Ct. Rep. 863.

181. TAXATION — Redemption — Enhanced Value.—Where a purchaser of swamp lands made improvements after suit to redeem, he must account from that date for the full rental value of the property as enhanced by the subsequent improvements.—BAIRD V. MCNAMARA, Miss., 30 South. Rep. 69.

182. TRESPASS—Proof—Reasonable Doubt.—In a civil action for trespass by defendant's hogs, plaintiff held not required to prove his case beyond a reasonable doubt.—SMITH V. SMITH, Colo., 65 Pac. Rep. 401.

183. TRESPASS — Proof of Title. — Evidence of title from the state to plaintiff, without showing title in the state and that plaintiff had paid the taxes held not sufficient to support an action to recover the statutory penalty for cutting trees from the property.—DARILL V. DODDS, Miss., 30 South. Rep. 4.

184. TRUSTS AND TRUSTEES — Resulting Trusts.—Where agent for the sale of a patent purchased lands with his own funds, and verbally agreed to sell land to his principal whenever the latter could realize the money, held, no resulting trust in favor of the principal.—NAGENGAST V. ALZ, Md., 49 Atl., Rep. 383.

185. USURY — Conflict of Laws.— Where contract is made in one state, to be performed in another, the parties may stipulate for highest legal interest allowed in either state.—PIONEER SAVING & LOAN CO. V. NOBLE MACHER, Ala., 30 South. Rep. 79.

186. WILLS—"Heirs of Money"—Definition.—The term "heirs of money," in a will, construed to mean those to whom bequests of money were made, as distinguished from those to whom specific articles of property were bequeathed or bequests of sums for specific purposes, and not "next of kin."—COOK V. FIRST UNIVERSALIST CHURCH, R. I., 49 Atl. Rep. 389.

187. WILLS—Legatees—Who Are. — The giving in a will to testator's wife of money in conformity with a marriage settlement held not to make her a legatee within other provisions of the will.—IN RE PENTZ'S ESTATE, Pa., 49 Atl. Rep. 361.

188. WITNESSES— Cross-Examination — Defendant.—Defendant, in an action to contest his right to an office, held not subject to cross examination as to campaign expenses not referred to in his testimony in chief.—BRADLEY V. CLARK, Cal., 65 Pac. Rep. 395,

189. WITNESSES — Privilege — Incrimination.— A witness against a person charged with violations of the purity of elections act held not privileged from testifying on the ground that his testimony would tend to criminate himself and degrade his character.—BRADLEY V. CLARK, Cal., 65 Pac. Rep. 395.

190. WORK AND LABOR— Separating Items.— On a count for services rendered, where plaintiff grouped three items and alleged a single charge for the value of the services in all, it was not improper for the court to segregate the items and allow judgment for one of them.—CONROY V. WALTERS, Cal., 65 Pac. Rep. 367.

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Central Law Journal.

ST. LOUIS, MO., OCTOBER 25, 1901.

The *Venie Congres International de l' Anthropologie Criminelle* "passed the following resolution at its meeting, September 9–14, 1901, at Amsterdam: "The members of the fifth International Congress of Criminal Anthropology are in favor of the establishment of psycho-physical laboratories for the practical application of physiological psychology to sociological and abnormal or pathological data, especially as found in institutions for the criminal, pauper, and defective classes, and in hospitals, and also as may be observed in schools and other institutions." This congress consisted of most distinguished jurists, medico-legalists and scientists, representing the highest authority of Europe. It meets once in five years.

In our country, up to the present time, four national and fourteen state medical associations, and three city academies of medicine have passed the same resolution, with definite reference to the immediate establishment of a national laboratory for that purpose, to be under the supervision and control of the department of the interior at Washington. We earnestly commend to bar associations and to members of the bar in every state of the Union the same interested consideration of this important question. Now that it has been clearly made evident that imprisonment nor even the death penalty is sufficient to deter the criminal man, it is clearly the duty of public-spirited citizens, and especially members of the bar, to whom the people properly look for guidance in such matters, to seek diligently to promote every legitimate attempt toward the solution of this most difficult and most important problem.

The suggestion has been made, and is being quite generally advocated, that congress be asked to make an attempt to take the life of the President of the United States treason. This suggestion is made in ignorance of the law. We made no comment on it, however, at the time it was first made, because we believed it to be merely a product of the excitement of the hour. Since then, however, reputable law journals and a political convention in the State of Rhode Island have formally adopted the suggestion.

Treason against the United States is unique in one particular, it is the only crime defined by the constitution. Article 3, section 3, says: "Treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." Treason is the highest and most infamous of crimes. Its punishment is most ignominious and severe; its stigma being worse than death. For this reason, undoubtedly, the wise framers of the constitution thought best to define it and place it within limits beyond which it could not be extended. Otherwise in times of great political or other national excitement, one faction, in power, might make certain acts or insults of an opposing faction treason, however innocent might be those acts of any of the essentials of treason. Congress, therefore, has absolutely no right or power to restrict, extend or otherwise impair the constitutional definition. That question was firmly settled by the supreme court in the early cases of United States v. Greathouse, 2 Abb. (U. S.) 364, and United States v. Hanway, 2 Wall. Jr. (U. S.) 139.

In the United States the leading case upon the essentials of the crime came up in connection with an alleged scheme of Vice-President Burr to concentrate an armed force at New Orleans and establish a southwestern confederacy. Burr was indicted and tried, but the jury found him not guilty. *In re* Burr, 4 Cranch (U. S.), 469. Bollman, a confederate, was also arrested but was discharged on *habeas corpus* by the supreme court. *Ex parte* Bollman, 4 Cranch (U. S.), 135. In this case Marshall, J., said: "A combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such conspiracy into execution; some actual force or violence must be used in pursuance of such design." In the case of United States v. Hoxie, 1 Paine (U. S.), 265, it was held that a resistance of the execution of a law of the United States accompanied with any degree of force, if for a private purpose, is not treason. To constitute that offense,

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the reason or object of the resistance must be of a public or general character. So also in United States v. Prior, 3 Wash. (U. S.) 234, it was held that going from the British squadron to the shore, for the purpose of peaceably procuring provisions for the enemy did not amount to an act of treason, as this conduct rested in intention, which is not punishable by our laws. These cases are cited to show how jealously the supreme court has resisted any enlargement or restriction of the crime of treason, even by construction of the courts.

It is very evident, therefore, that an attempt to take the life of the President of the United States cannot be made treason within the definition of the constitution, and that congress has absolutely no power to enlarge that definition so as to include such an act and made it treasonable. Whether it would be wise to amend the constitution for this purpose, is, at least, doubtful. That this was not a case carelessly overlooked by the framers of the constitution is made very evident by an examination of sec. 3, of article 3, of the constitution. Notice first the careful choice of words in defining the crime; second, the wise provision for proof on sufficient testimony; and third, its limitation on congress in relation to the kind of punishment to be prescribed. These facts show the care with which this subject was considered and the importance which was attached to it. But, further than this, the use of the word "only," limiting the statement of what acts should constitute the crime of treason shows a deliberate judgment to exclude every other act that might possibly be construed to be treason, or which in other countries might by custom come within that term, and to settle absolutely, as far as this country was concerned, the exact boundary of this most infamous crime. Treason in a free country is necessarily limited to the very acts which define it in our own constitution. If it goes beyond that it clothes the offices and officers of government with a false sanctity like that of kings and emperors which is destructive of all principles of democracy. Neither would it be any deterrent to the crime it is proposed to check; on the contrary it would serve only to fan the flame of discontent by showing a tendency to follow in the foot steps of monarchical governments. The president must be one of the people, he must mix with them; he must be accessible. If he must, by constitutional fiat, be clothed with a false sanctity and placed on a pedestal out of the reach of the common people, because he cannot trust his life in their hands, there is an end of Republican government and a return to monarchical principles. We have absolute confidence, however, in the ability of the American people to correct the evils of anarchism and its teaching without uprooting their own constitution or the safeguards of Republican government. Better let the tares and the wheat grow together than to destroy the wheat with the tares.

NOTES OF IMPORTANT DECISIONS.

EVIDENCE—PHOTOGRAPH OF SIGNATURES AS EVIDENCE.—Whether photographs are admissible in evidence is now well settled in the affirmative. Considering the general accuracy of photographic reproductions it would seem that there could be no more objection to their introduction than to those of letter-press copies which are so generally used as evidence. In the recent case of First National Bank v. Wisdom's Executors, 63 S. W. Rep. 461, the Supreme Court of Kentucky held that where the signature of an instrument was in question, the signature in contest and certain genuine signatures of W having been enlarged and reproduced by photography, the photographs were admissible in evidence, after proof by the photographers of their accuracy. The court said:

"Appellees had the signature in contest and two other signatures of the testator, one at the foot of a check and one on the back of a note, both clearly genuine, enlarged and reproduced by photography. These photographs were exhibited to the jury after proof by the photographers of their accuracy. Appellant complains of the admission of the photographs. But they were only a more enduring form of exhibiting the signatures to the jury as under a magnifying glass. Such evidence has often been held competent. Luco v. U. S., 23 How. 541, 16 L. Ed. 545; Marcy v. Barnes, 16 Gray, 161, 77 Am. Dec. 405; Eborn v. Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; U. S. v. Ortiz, 176 U. S. 430, 20 Sup. Ct. 466, 44 L. Ed. 529."

PARTITION—TITLE AND INTEREST CONVEYED BY VOLUNTARY DEEDS IN PARTITION.—Some perplexing questions often arise on voluntary partition of lands, especially after marriage of one of the tenants in common before partition. At the time of partition and the passing of the deeds separating the interests of all in common to interests in severalty, does the marriage of

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one of the tenants in any manner affect her interest? This question arose in the recent case of Palmer v. Alexander, 62 S. W. Rep. 691, where the Supreme Court of Missouri held that where, after deed is executed in partition to a single woman, she marries, and another deed is subsequently executed to correct a defective description, naming the wife and her husband as grantees, the husband acquires no right by the entirety, but only the right to which he is entitled as husband. The court said: "The precise question here involved has so recently been exhaustively examined and decided in an opinion by Brace, P. J., in Whitsett v. Wamack (Mo.) 59 S. W. Rep. 961, that nothing more remains to be said upon the subject. It was there held that a voluntary partition conveys no new title—makes no degree. It only adjusts the rights of the parties to the possession. Each does not take the allottment by purchase, but is as much seised of it by descent from the common ancestor as of the undivided share before partition. Alln. Partit. 124. The deed of partition destroys the unity of possession, and henceforward each holds his share in severalty; but such deed confers no new title or additional estate in the land. 2 Bl. Comm. 186. * * * The title being already in him, the deed merely designated his share by metes and bounds, and allotted it to be held in severalty."

LETTERS—MISTAKES IN DELIVERY—DAMAGES FOR RETENTION. — Revised Statutes of the United States, sec. 3892, provide that any person who shall obstruct the correspondence of another shall be punishable by fine. Whether this statute also gives a right of action for damages was never definitely decided until the recent decision of Cohen v. Cohen, 63 S. W. Rep. (Texas, 1901,) 544. In this case plaintiffs brought suit on account of their failure to consummate the sale of certain real estate alleged to be owned by them in Houston. They averred, in substance, that appellant got a letter from the post office at San Antonio addressed to appellee, A. Cohen, containing information with reference to the proposed sale of the property, and that appellant negligently retained possession of the letter for several days, and in consequence of which appellees were unable to comply with requests made upon them in the letter, and as a result thereof the proposed purchaser refused to buy the property. The case was tried before a jnry, and judgment was rendered in favor of appellees for actual damages in the sum of $700. The court held that defendant was liable for damages sustained by reason of plaintiff's failure to sell certain property which would have been sold but for the negligent retention of the letter. The reasoning of the court is that the statute, though penal, imposed upon defendant a duty not to interfere or obstruct the correspondence of the plaintiff, and on breach of this duty he was liable for damages proximately resulting therefrom. This rule, however, is not applicable to the postmaster-general. He is not responsible to third persons either for his own default or that of his deputies. The deputies, however, are answerable for their own negligence or that of their subordinates for wrongfully detaining a letter. Dunlap v. Munroe, 7 Cranch (U. S.), 242; Stack v. Harris, 5 Burr. 2709; Teall v. Felton, 12 How. (U.S.) 284; Bishop v. Williamson, 11 Me. 495: Christy v. Smith, 23 Vt. 663; Fitzgerald v. Burrell, 106 Mass. 446.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR CRIME OF THE WIFE.—The liability of a husband for the crimes of his wife is governed by rules as old as the common law. The general rule is that a husband is liable for the crimes of his wife committed during coverture in his presence and with his knowledge and consent. Hensly v. State, 52 Ala. 10; Commonwealth v. Wood, 97 Mass. 225; Miller v. State, 25 Wis. 384; Goldstein v. People, 82 N. Y. 231; Edwards v. State, 27 Ark. 493; State v. Potter, 42 Vt. 495; State v. Banks, 48 Ind. 197. If act is done under coercion in the husband's presence, he alone is liable; if done in his presence by the wife of her own free will, both are jointly liable; if committed out of his presence but with his concurrence, the husband is liable, but if committed out of his presence and without his knowledge or consent, wife alone is liable. The greatest difficulty, however, in this question is as to the liability of the wife for acts committed partly within and partly out of the husband's presence. This phase of the question arose in an interesting form in the case of State v. Miller, 62 S. W. Rep. 692, where the Supreme Court of Missouri held that where a wife, whose husband was incarcerated after conviction for murder, at his instigation procured a revolver, which she carried and delivered to him in the jail, such offense was committed in the husband's presence, though he was not present when she procured and conveyed the revolver to the jail, and hence there was nothing to rebut the presumption that the crime was committed at the husband's instigation, so as to relieve the wife from liability. The court said: "Marriage does not take from the wife her general capacity to commit crime, but, as it casts upon her the duty of obedience to and affection for her husband, the law indulges a presumption that, if she commits an offense in his presence, it is the result of his constraint or coercion, and, in the absence of proof to the contrary, excuses her. 1 Bish. New Cr. Law, § 357. This presumption is not a conclusive one, but is rebuttable. State v. Ma Foo, 110 Mo. 7, 19 S. W. Rep. 222. In this case the evidence showed that the wife, at the instigation of her husband, procured a revolver, and took it to him in the county jail. Here she was present while delivering the thing to him, but was absent while procuring and conveying it. We thought it must be held that the husband was present when the offense was committed, and, being so, the fact that

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he was at the time incarcerated in jail awaiting the result of his appeal will not rebut the presumption of coercion."

BILLS AND NOTES—PROOF OF OTHER FORGERIES TO ESTABLISH FORGERY OF NOTE SUED ON.—The general rule as to the admission of evidence in cases of forgery is that, where the question is whether a certain person forged a particular instrument, proof is inadmissible that on another occasion he forged another paper, wholly disconnected with the one in controversy. In a recent case, however,—that of the First National Bank v. Wisdom's Executors, 63 S. W. Rep. 461—the Supreme Court of Kentucky note an exception to this rule and the reason for it. In this case it was held that under a plea of *non est factum* to an action by a bank on a promissory note which was placed in the bank by its president, who soon thereafter absconded, being a confessed forger and defaulter, it was admissable for defendants, the executors of the person whose name was signed to the note, to prove that the president, after the note sued on was discounted, he had in his possession other notes purporting to have been signed by testator, and which were manifestly forgeries, as the transactions were logically connected, and when considered together authorize the conclusion that all the notes were prepared by the president to conceal his delinquency, with the intention to use them as it became necessary; and, besides, the fact that he forged the testator's name to the other notes would be admissible, at least, to show his capacity to imitate the signature. The reason for the general rule in such cases is that plaintiff would not be prepared to show the genuineness of other writings, and that such proof "introduces a foreign and irrelevant matter, destroying the unity of the issue." Dodge v. Haskell, 69 Me. 429; Dow v. Spenny, 29 Mo. 387. But as in this case, where there is a connection between the transactions, they may be given in evidence. Knight v. Heath, 23 N. H. 410; Lovell v. Briggs, 2 N. H. 218. So also, to prove fraud in a conveyance, evidence that the debtor, about the same time made other conveyances indicating fraudulent collusion, is admissible. Whitter v. Varney, 10 N. H. 291; Benham v. Cary, 11 Wend. 83; Blake v. White, 13 N. H. 267; Howe v. Reed, 12 Me. 515; Blalock v. Randall, 76 Ill. 224. The following authorities also hold proof of other forgeries to be admissible in evidence: Tyler v. Todd, 36 Conn. 218; Blalock v. Randall, 76 Ill. 224.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE TAX ON PEDDLERS AND DRUMMERS.—A keen intellect and a most wonderful sense of discrimination and distinction is required to follow the line of construction, limiting the powers of the states over interstate commerce, drawn by the Supreme Court of the United States under the influence of the commerce clause of the Constitution. It is notable because of the fact that the general rules are of less importance than the exceptions to them. For instance, the general rule is that no tax can be imposed by the state upon the sale and delivery of goods from a sister state. Then commence the exceptions. Can the "drummer" or "traveling salesman" who makes the sales and sends the contracts to the merchant he represents, be taxed for the privilege of doing business in the state. In Leisy v. Hardin, 135 U. U. S. 100, the supreme court held this to be an indirect interference with interstate commerce and unconstitutional. In Emert v. Missouri, 156 U. S. 296, however, the court modified this decision to the extent of holding that a tax on peddlers who delivered and sold their goods at the same time was not an interference with interstate commerce. Now comes an appeal from Texas desiring to know the line of distinction between peddlers and drummers. Saulsbury v. State, 63 S. W. Rep. 568. In this case a foreign manufacturer made buggies, and shipped them into the state in original packages, some of which contained buggies complete, others containing parts thereof. The buggies were then put together by the manufacturer's agent, and peddled by him throughout the state. When a buyer desired a vehicle not in stock, the agent sent the order to the manufacrurer, who shipped to the buyer. The court held that this did not constitute interstate commerce, and that the agent was properly convicted, under Pen. Code, art. 112, for peddling without first obtaining a license therefor. This statement of facts, presented a sort of cross between the high class drummer and the low grade peddler, which baffled classification. Relying strongly on the letter and spirit of the case of Emert v. Missouri, *supra*, the court justified the authority of the state in levying a peddlers license tax on the defendant in this case. We sympathize strongly with the court in this case and with Chief Justice Waite in his dissenting opinion in Robbins v. Taxing District, in being "unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler." The tendency as evidenced by the Emert case and the later cases of Preston v. Finley, 72 Fed. Rep. 850, and Hopkins v. United States, 171 U. S. 596, is in the direction of permitting a wider latitude of state control over interstate commerce where the effect of the state regulation is clearly for the benefit of the state and where the regulation is practically a regulation of internal commerce.

MOTIONS FOR CHANGE OF VENUE IN CRIMINAL CASES.

Motions for change of venue in criminal cases in the great majority of cases are overruled. One reason for this is, usually, that the greater the necessity there is that the venue should be changed the greater is the number of "respectable citizens" who will

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swear that the defendant can get a fair and impartial trial in the county where the indictment is found, and often the overwhelming evidence against a change is the strongest proof that such change should be made. This seems paradoxical, but is explained by the strong public prejudice. It is said to be a psychological fact that a prejudiced man cannot do justice towards the object of that prejudice. This prejudice may be just, it may be a righteous indignation, yet it completely disqualifies the possessor thereof as a juror or judge, because the law guaranties to each citizen a trial by a fair, impartial and unprejudiced judge and jury. This is the right of a citizen accused of crime, but that the citizen may enjoy this right the mind of each jury man must be like unto a white sheet of paper absolutely free of black, disfiguring marks of preconceived prejudice and opinions.[1]

But there is a difference between preconceived opinion and prejudice. A man may have a preconceived opinion without having any prejudice, because prejudice carries with it a kind of ill will, hostility to the object of such prejudice, whereas a preconceived opinion as to the defendant's guilt or innocence may be without the least ill will or hostility to the defendant. And here comes in another essential difference between prejudice and preconceived opinion, in this: a preconceived opinion may be changed by evidence, whereas evidence has no tendency or power to change prejudice. A prejudiced juror is a deadly viper in the jury box, and you need never deceive yourself by imagining that he is a man of too high character to be swayed by his prejudice, since this passion influences the high and low very much alike. As far back as our judical records extend we can trace a disposition in the courts and a leaning against the change of venue. And one of our state constitutions uses this language: "In criminal prosecutions the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty and property of the citizen."[2]

In the days of Kings, of governmental oppression of the common people, it was considered an inestimable advantage to the citizen accused of crime to be tried in the county of the crime, where he would be surrounded on the day of trial by his relatives and friends. Even now most of our state laws provide that "the local jurisdiction of all offenses shall be in the county where the offense was committed." The love of the *visne*, the *vicinia*, of the crime has exerted a strong influence on the courts. But these principles which were intended for the benefit of the citizen accused of crime should not be suffered to operate to his injury. The statutes providing for a change of venue, and the legislatures in enacting these statutes, did not intend that the venue in a criminal or other cause should he capriciously changed, or that it should be changed to suit the convenience of the defendants himself or his witnesses.[3] And on the hearing of witnesses for a change of venue, it should be remembered and borne in mind that if the public mind is excited over the crime, that such crime is the cause of such excitement, and the defendant at the bar is the author of, and responsible for, such crime. But I do not speak this by authority, it is merely my private opinion. Indeed, it is very difficult to distinguish between excitement in the public mind on account of the crime and prejudice against the defendant on account of the crime. The latter will authorize a change of venue, but the former not; because, if excitement in the public mind on account of the crime would authorize a change of venue, then no notorious crime could be punished in the county where committed, and so the law providing for the local jurisdiction of the graver felonies would be altogether defeated. Whereas, if prejudice against the defendant on account of the crime should not authorize and require a change of venue, then the defendant would be tried for his life by a jury of his enemies. Such a trial would violate all laws and shock the consciences of all just men, yet we find decisions in which this fundamental distinction is not suffered to have free course and do its legitimate work.[4] It cannot be truthfully

[1] Blackstone's Com., vol. 3, p. 358 (Shars. Ed.); State v. Van Wye, 37 S. W. Rep. 939; State v. Powell, 37 S. W. Rep. 936.

[2] Mass. Const., part 1, art. 13.

[3] People v. Harris, 4 Dev. 150; People v. Baker, 3 Parker, C. C., 181; Reg. v. Cavendish, 2 Cox, C. C. 175.

[4] People v. Graham, 21 Cal. 261; People v. Samonis.

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said that mere excitement in the public mind will justify a change of venue. But whenever that excitement centralizes and becomes ill-will directed towards a particular individual, then the line of demarcation is clearly drawn, and the venue should be changed. Thus, on an indictment for conspiracy to destroy foxes, it was held to be no reason for changing the venue that the gentry of the county were addicted to fox hunting. But in another case where, on the hearing of a motion to change the venue, it was shown in evidence that one hundred citizens of the county had united in employing counsel to prosecute the *prisoner*, this, it was held, entitled him to a change of venue.[6] These two cases well illustrate the subject. In the first case the gentry of the county were addicted to fox hunting, and might well be supposed to be moved by a crime which had for its object the destruction of foxes. But there was nothing to show that this excitement was directed towards the defendant at the bar, nor was there anything in the least going to show that they could not, or would not, give the defendant a fair and impartial trial. Whereas, in the latter case, the public mind was not only excited, but this excitement was specially directed towards the defendant, in that one hundred citizens had, of their own private means, employed counsel to prosecute the defendant.

This matter of obtaining a fair and impartial trial, by means of a fair and impartial jury, finds illustration in the case of the petit jury. The common law, like unto the old gothic constitution, originally provided that the jury for the trial of a cause should come from the immediate neighborhood where the facts were alleged to have occurred, and this was the original of venue, which venue was stated in the original writ, and also in the declaration and jury process, as a direction and indicator to the sheriff of living in the neighborhood, they were properly the very country or *pais* to which both parties had appealed, and were supposed to know beforehand the character of the parties and witnesses, and, therefore, they better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience, that jurors coming out of the immediate neighborhood would be apt to intermix their prejudices and partialities in the trial of right.[7]

So we see that in the case of the petit jury this inconvenience was felt. All these things go to establish the general law of jury trials, that in such trials care should always be taken that the actual trial should take place at such a distance from the home of the parties, as to forbid the possibility of the jury being influenced in their verdict by their personal feelings of like or dislike to the parties to the litigation.[8] On the hearing of a motion for a change of venue the evidence, as to the state of the public mind, must have reference to the condition of things at the time of the hearing of such motion.[9] And it seems that if the venue is changed it must be changed to the next or nearest county, free from such prejudice, and if possible to the county in which the court will next be held, when these two conditions exist at the same time, and of the two I suppose the latter would be given the preference, in furtherance of the constitutional requirement of a speedy trial. It is a further rule of law in the hearing of these motions for a change of venue, that the mere belief of witnesses that defendant cannot obtain a fair and impartial trial in the county of the finding of the indictment, will not, of itself, be received as evidence, but the witnesses must detail the facts and circumstances on which

[7] Blackstone's Com., vol. 3, p. 359 (Shars. Ed.).

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their belief is founded.[10] On the hearing of motions for change of venue, as said by the great Blackstone, the great object and purpose of the court should be to do right.[11] And judges should bear in mind that when the public mind is powerfully excited against some unfortunate and miserable defendant, when the public is clamorous for his trial and conviction, and in its mad thirst for blood would tear the unfortunate man limb from limb, at such times courts should remember that it is a very easy matter for the prosecution to place on the stand a "number of the most prominent men of the community" to swear that the defendant can get a fair trial in that county. Such witnesses can be obtained without effort; nay, more, they will voluntarily come forward, whilst the poor miserable wretch who sits trembling beneath the loud voices of these swift witnesses finds no one who will stand up and speak the truth for him. Because, when he or his lawyer asks a citizen to speak for him, the citizen looks at it in this way. "I can't take the stand for that man; if I should do so I have everything to lose and nothing to gain; the public mind is intensely excited against him, and if I get up there and swear that I do not believe he can get a fair trial in this county I will be insulted before I get out of the court yard. They will say, I am reflecting on the people of the county; to testify will injure my business; I can't do it; you will please excuse me." And so if the defendant in such case gets anybody to testify for him it will ordinarily be some relation or his attorney, or some one of those bold, honest, fearless men, who, sympathizing with the defendant's distress, will speak the truth, though at a personal sacrafice. The point in hand is well illustrated by the case of Hawes v. State, *supra*.

Hawes was accused of murder, and, thereof, indicted. The public mind was terribly excited against Hawes. For several nights after his arrest and incarceration, angry and excited crowds of men moved and swayed about the jail where Hawes was imprisoned. Finally, in a few nights, the crowd, angry and threatening, to the number of several thousand, began their march for the jail with axe and rope, calling and demanding Hawes that they might put him to death. The mob came on with shouts and curses; when it reached the outer jail yard fence it was met by the high sheriff of the county. The sheriff faced the mob and commanded them to halt. Knowing the fearless and resolute character of the sheriff the mob halted, but being told that the sheriff had only three or four men on guard the mob with a shout advanced. The sheriff retired, facing the mob until he approached within some three or four feet of the jail door, the mob still coming on. At a given signal from the sheriff twenty-five men armed appeared from the jail. The sheriff, then, for the last time, commanded the mob to halt; his command not being heeded he gave the order to fire, and continued firing; some ten or eleven men of the mob were killed. Circuit court coming on in a few weeks, and an indictment being found, and defendant arraigned and put on his trial, he moved for a change of venue, and in support of his motion offered seven witnesses, two of whom were his attorneys. The state met this evidence with the testimony of sixty-five witnesses, and could easily have produced thrice sixty-five more, that the public mind was entirely and perfectly free of any prejudice against the defendant, and that he could get a perfectly fair and impartial trial in that county. The circuit court with great promptness overruled defendant's motion for a change of venue, and the Supreme Court of Alabama sustained the action of the lower court.[12] The above case is given because it is a fair sample of how such matters are disposed of in times of great excitement by the average circuit judge. If the public mind was not unduly excited against the defendant in Hawes' case, then it would be hard to find a case where there was such undue excitement. Why did a mob of several thousand men assault the jail if there was no prejudice against the defendant? Was not each man of that angry mob a strong witness that there was undue excitement against Hawes? There having been in that mob, estimated nine thousand men, was not each one of these men a witness to the public prejudice?

[10] People v. Plunner, 9 Cal. 298; People v. Long Island R. R., Palker, C. C. 602; Reg. v. Palmer, 11, Ellis & B, 1024.

[11] Blackstone's Com. vol. 3, p. 391 (Shars. Ed.).

[12] Hawes v. State (Ala.), 7 South. Rep. 303.

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And there being nine thousand there was then nine thousand witnesses that the venue in that case should have been changed. This overrides the sixty-five respectable citizens. But these sixty-five witnesses for the state testified that there was some prejudice in the public mind after the riot, but that it was against the sheriff for the shooting. But how was it before the sheriff did any shooting? Did the mob go to the jail after the sheriff, or after Hawes? If we are to credit these sixty-five witnesses, this was a mob after Hawes, but the shooting changed the prejudice of the mob against Hawes into prejudice against the sheriff. Such reasoning is ridiculous. Too often, too often, and sad to say, circuit judges, instead of standing up against these times of public excitement, turn their backs to justice, right and the law, and go with the crowd, crying crucify him, crucify him. In this Hawes case, the very fact of a mob assaulting the jail should overthrow any number of witnesses testifying that there was no undue prejudice in the public mind. The witnesses themselves seem to feel the force and truth of this, and this accounts for their ridiculous statement that the assault on the jail and the shooting turned and changed the public prejudice from Hawes to the sheriff.

The truth of the matter is this, the higher the public prejudice and excitement the greater the probability that the motion for a change of venue will be overruled, and in the great majority of cases they are overruled, as the reported cases will show. But there are some cases where motions for change of venue are granted. This exception is explained by the fact that now and then a bold, resolute justice-loving judge will look under the skirts of these ready witnesses for the state, and will see that what they mean by a fair trial is a trial that will result in breaking the defendant's neck. The result of this is, that the excitement which is produced in the public mind as the result and consequence of the crime, and which is directed solely against the author of such crime, whoever he may be, and not against any particular individual, is in no sense undue excitement, and will by no means justify a change of venue.[13]

But this condition of things is as difficult of attainment as desirable of possession. It should be remembered that in these important criminal cases the jury never rises above the outside public sentiment, and they will be governed by it; so that, in a great criminal case, if you wish to know in general terms what the verdict of the jury will be, you have only to mix and talk with the people there assembled and find what is the public feeling on the matter. The jury, sitting in their box, watch the crowd assembled in the court room. They observe those unmistakable signs of approval or condemnation as some witnesses give material and pointed evidence. But, above all this, the jury know that they must live in this community after the trial is over, and they don't want the people, in case they should render a verdict contrary to public sentiment, pointing at them as they walk the street, or saying to them in person, "this is one of that jury who turned that murderer free." In all these cases public sentiment controls the jury. As has been heretofore said, the greater the necessity for a change of venue and the stronger the excitement and prejudice against the defendant, the more prominent citizens the state can and will produce to swear that the defendant can get a fair and impartial trial in that county.

And, generally, the necessity for a change of venue will be in exact ratio with the number of witnesses that the state produces to testify that a fair trial can be had in that county. When the state produces these numerous witnesses to swear to the absence of undue excitement in the public mind, it would subserve the ends of justice if the court would ask each of such witnesses this question: Have you formed or expressed any opinion as to the guilt or innocence of the prisoner at the bar? The witness' answer to this question will generally show, not only that there is undue excitement in the public mind, but that the witness himself is one of the chiefest of the excited and prejudiced persons. These times and cases of high public excitement when a mad and blood-thirsty populace is thirsting for the blood of the prisoner at the bar, and gnashing upon him with their teeth, these are the occasions that test a judge's mettle, and

[13] State v. Greer, 22 W. Va. 800; State v. Rhea, 25 Kan. 576; Scamo v. State, 84 Ala. 410; Poe v. State, 10 Lea, 673; People v. Goldenson, 76 Cal. 376; State v. Bohan, 15 Kan. 407.

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show what manner of man he is. If he be the political judge, the trimmer, the time server, he will deliver over the prisoner to the will of his enemies, and thereafter his henchman will stand in the streets and public places and speak of the fairness of the trial, and even of the favors shown by the court to the prisoner, and that the judge went to the limit of the law to make it as light on the prisoner as possible. But see yonder that infuriated crowd, but recently crying out crucify him, crucify him, satiated in the prisoner's blood returning from the place of execution, these are the witnesses of the favors shown by the court to the defendant at the bar. The execution of the laws will never rise above public sentiment, and the hope of justice is the spirit of the "bar." When the bar is filled with the lofty spirit of the common law, judges will be called to the bench before whom any mad mob will quail! A dauntless spirit, clothed with the power of the law, and standing for justice and right is irresistible. The human mind instinctively reverences truth and justice, and whenever a judge on the bench, in fact the representative of these principles wields the scepter of his authority, the people yield to him unquestioning obedience. What the country needs is men and judges who will do right because it is right. Principle is everything, and a man or a judge who has not in his make up the hard steel of principle is a mere bag of sand—he is nothing.

The law on this subject of the change of venue is all right, it is simply this, that wherever, through prejudice in the public mind, or otherwise, a prisoner cannot obtain a fair and impartial trial in the county of the finding of the indictment, then the trial of such prisoner shall be changed and removed to the next nearest county, free from such prejudice, and where the prisoner may obtain a fair and impartial trial.[14] The trouble is caused by a judicial yielding to popular prejudices, a giving away to public prejudice. If our citizens accused of crime are to be tried by an excited and angry multitude, if we are to have a reign of mob law instead of legal justice, then we had as well close our court houses, and say, "Rule thou, blind, bloody vengence." But every patriotic citizen shudders at the contemplation of such a condition of things. Then what is the remedy? It is this: Let our courts in each and every case do right and justice, though the heavens fall.

LINTON D. LANDRUM.

Columbus, Miss.

[14] Blackstone's Com. vol. 3, p. 383 (Shars. Ed.); Brennan v. People, 15 Ill. 511; Edwards v. State, 25 Ark. 444; Hubbard v. State, 7 Md. 160; People v. Perdue, 49 Cal. 425; Walker v. State, 42 Tex. 360; Mershon v. State, 44 Ind. 498; State v. O'Rourke, 55 Mo. 440; People v. Cogleton, 44 Cal. 92.

HOMESTEAD — VOLUNTARY CONVEYANCE — RIGHTS OF CREDITORS.

EAGLE v. SMYLIE.

Supreme Court of Michigan, May 7, 1901.

Where a tenant in common of lands having a homestead right therein, without intent to defraud his creditors, conveyed his interest to his adopted children, who had lived with him for a long time, and rendered him valuable service, and died shortly after, leaving neither wife nor children surviving, and without sufficient property to pay his debts, on partition of the common property his administrator is not entitled to the proceeds of his interest for the benefit of his creditors, under Const. art. 16. § 2, and Comp. Laws of 1897, § 10,362, providing that no homestead shall be subject to sale on execution for any debt arising on contract.

MOORE, J.: By this appeal the court is asked to decide the question whether the sum of $1,128.72, being a part of the proceeds of the sale of certain premises, should be paid to defendant George M. Savage or to the defendant Robert W. Smylie, administrator of the estate of James R. Elliott, deceased. The proceeding of the court below was a bill of partition filed in March, A. D. 1899, wherein the complainant Mrs. Elizabeth E. Eagle, sought to have partition of certain premises on Congress street east, in Detroit, which prior to 1841 belonged to her father, Robert Thomas Elliott, of Detroit. The bill of complaint sets up the many transfers in the title after that date, and shows that prior to August 3, A. D. 1896, James R. Elliott, an unmarried man, and brother of complainant, acquired substantially a six-sevenths interest in the property; that complainant had the largest remaining interest, and the other Elliott defendants held the small remaining undivided interests. In 1893, James R. Elliott, who alone of the owners in common of the premises had been in possession of the same for some years previous thereto, and who alone of said owners continued to occupy the same until his death, executed a mortgage upon his interests in the premises for the sum of $1,800, which mortgage defendant George M. Savage duly acquired after the death of said James R. Elliott, and shortly prior to the filing of the bill of partition. James R. Elliott died on August 31, A. D. 1896. During his last illness,

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and on or about August 3, A. D. 1896, Mr. Elliott, by quitclaim deed, conveyed an undivided one-half of his interest in the premises to Adelia M. Carey and to John C. Elliott, each. Miss Carey, shortly after the death of Mr. Elliott, married defendant George M. Savage, and she is a defendant in this proceeding as Adelia M. Savage. Defendant George M. Savage acquired by quitclaim deed the interest of his wife in said premises, and, subsequent to the filing of the bill of partition, also by quitclaim deeds, he acquired any interest that John C. Elliott had in the property. The bill of complaint further sets forth the appointment of defendant Robert W. Smylie as administrator of the estate of James R. Elliott, deceased; the appointment of commissioners on claims in due course of adminstration in the probate court for the county of Wayne; the insolvency of the estate; and the claim asserted by defendant Smylie, as adminstrator, that upon any sale of the premises under the partition proceedings he was entitled to the interest therein, over and above the mortgage above referred to, which James R. Elliott had prior to the 3d day of August, A. D. 1896, being the date of the quitclaim deeds to Miss Carey and to John C. Elliott, on the ground that the said conveyances were voluntary, and without consideration, as against claims of the creditors of deceased. The answer of defendant Smylie, as adminstrator aforesaid, states the claims allowed against the estate of James R. Elliott, deceased, as being $4,704.39, and that the assets of the estate amounted to $640; and he asserts his right, as adminstrator to the surplus, over the mortgage, which belonged to James R. Elliott before he gave the quitclaim deeds above referred to. The answers of defendant George M. Savage and his wife deny the claim of defendant Smylie to the fund in question, and assert that the quitclaim deeds were given upon sufficient consideration. This answer was afterwards amended, setting up that the land conveyed was a homestead when the quitclaim deed was made, in which the creditors had no interest. On February 26, 1900, a decree was entered in the circuit court, establishing the interest of the several owners in common to the premises, ordering a sale of the property, and reserving for the further order of the court the determination of several questions, among which was the controversy between defendant Savage and defendant Smylie, as administrator, as to their right to any amount arising from the sale which would represent the interest, over and above the mortgage, which James R. Elliott had in the premises on August 3, 1898. This amount was determined to be $1,128.72.

It is not claimed there was any intent on the part of Mr. Elliott to defraud his creditors in making this deed. The grantees in the deed were adopted children, who had lived with him a long time, and rendered him valuable service; and he without doubt thought he was leaving enough estate to pay his debts, but it is insisted that as he was in fact insolvent, that the conveyance was, in law, a fraud upon his creditors. In our view of the case we need consider but one question, and that is whether the creditors can complain of the conveyance by Mr. Elliott of his homestead. The position of counsel for the administrator is that the homestead is not an absolute estate, but at most is an artificial estate, which may be waived by the person to whose benefit it inures; citing Riggs v. Sterling, 60 Mich. 652, 27 N. W. Rep. 705; 15 Am. & Eng. Enc. Law, pp. 638, 639. Counsel says: We admit that James R. Elliott had a homestead interest in the premises at the time he executed the quitclaim deeds in question, while calling attention to the fact that he alone had any such interest in the property, and while emphasizing the fact that any homestead interest in the premises lapsed with his death. There being no widow or children surviving him, the provisions of sections 3 and 4 of article 16 of the constitution have no application to this case. We admit that the homestead law (Comp. Laws 1897, § 10,362), which is founded upon the constitutional provisions, has been and should be liberally construed, and that the real estate, while occupied as a homestead (that is, in this case, during the life of James R. Elliott), could not be levied upon or in any other way subjected to the claims of his creditors. Furthermore, we admit that James R. Elliott might have sold his property, and during his lifetime his creditors could not complain of the sale, even if it was voluntary. And, further, if Mr. Elliott had sold his interest in the property for, say, $1,500, this fund would likewise have been exempt from process during a reasonable time within which to invest the same in another homestead. Cullen v. Harris, 111 Mich. 20, 69 N. W. Rep. 78. But our contention is that appellant, as administrator, may, in behalf of such creditors, attack such voluntary conveyance after the death of James R. Elliott." They argue that the homestead is a privilege personal to the owner, and may be waived by him, and that a gift of the homestead is fraudulent as to the creditors; citing Fellows v. Lewis, 65 Ala. 343, 39 Am. Rep. 1; Kingsbury v. Wild, 3 N. H. 30; Currier v. Sutherland, 54 N. H. 486, 20 Am. Rep. 143; Ruohs v. Hook, 3 Lea, 306, 31 Am. Rep. 642; Schaffer v. Beldsmeier, 107 Mo. 314, 17 S. W. Rep. 797; Miller v. Leeper, 120 Mo. 466, 25 S. W. Rep. 378. An examination of the authorities will show a want of harmony in them. The following authorities are to the effect that a creditor has no interest in a homestead, and cannot complain of its conveyance by the debtor: Crummen v. Bennett, 68 N. C. 494; Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378; Wood v. Chambers, 20 Tex. 247; Hibben v. Sawyer, 33 Wis. 319; Dreutzer v. Bell, 11 Wis. 114; Conklin v. Foster, 57 Ill. 104; Hartwell v. McDonald, 69 Ill. 293; Smyth, Homest, § 234; Legro v. Lord, 10 Me. 165; Baker v. Kinnaird, 94 Ky. 5, 21 S. W. Rep. 237. In Marshall v. Strange (Ky.), 9 S. W. Rep. 250,

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it was held that, where a debtor conveys a portion of his homestead, the whole of which is worth less than the statutory limit, his creditors cannot, after his death, charge the land so conveyed with his debts. In Grimes v. Portman, 99 Mo. 229, 112 S. W. Rep. 792, it was held one may sell, mortgage, or give away his homestead, and his creditors cannot complain. The question in this state is not a new one. The constitutional provision is as follows: "Every homestead * * shall be exempt from forced sale on execution, or any other final process from a court, for any debt contracted after the adoption of this constitution." Article 16, § 2. The statutory provision reads: "A homestead * * * * owned and occupied by any resident of this state shall not be subject to forced sale on execution, or any other final process, for any debt or debts growing out of or founded on contract, either express or implied, made after the third day of July, 1848." Section 10,362, Comp. Laws 1897. In Riggs v. Sterling, 60 Mich. 643, 27 N. W. Rep. 705, it was argued, as it is was argued here, that the homestead is a privilege personal to the owner, and not an absolute right. The court said: "The homestead exemption, as it now exists, is not only a privilege conferred (Chamberlian v. Lyell, 3 Mich. 458), but, under the constitution, it is an absolute right. 'It was intended to secure against creditors a home, and, to a certain extent, the means of support, to every family in the state.' Dye v. Mann, 10 Mich. 297; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743." In Farrand v. Caton, 69 Mich., at page 242, 37 N. W. Rep. 203, it is said one may do what he pleases with his exempt property. In Anderson v. Odell, 51 Mich. 493, 16 N. W. Rep. 870, it is said creditors have no right to complain of dealings with property which the law does not allow them on their claims. In Rhead v. Hounson, 46 Mich. 243, 9 N. W. Rep. 267, in speaking of a voluntary conveyance of real estate from a father to his son, the court said: "It appears conclusively from the bill and evidence that when the execution debtor gave the deed in question he held and occupied a homestead on the premises. That part of the farm was therefore exempt. The holder was as free to dispose of it without interference as though he had not been indebted at all,"—citing Smith v. Rumsey, 33 Mich. 183. See also, Pulte v. Geller, 47 Mich. 560, 11 N. W. Rep. 385; Bank v. Elliott, 53 Mich. 256, 18 N. W. Rep. 805; Armitage v. Toll, 64 Mich. 412, 31 N. W. Rep. 408; Toll v. Davenport, 74 Mich. 386, 42 N. W. Rep. 63; Cullen v. Harris, 111 Mich. 20, 69 N. W. Rep. 78. We think the circuit judge made a decree in harmony with the uniform decisions of this court. The decree is affirmed.

NOTE—*Right of Alienation of Homestead.*—One of the most peculiar things about the law of homestead is its apparent difficulty of application. This is due, no doubt, very largely to the fact that the right of homestead is construed sometimes as an estate and sometimes as a mere exemption,—the tendency of the courts being more in the direction of giving effect to the purpose of the homestead exemption laws than in attempting to observe any consistent theory or rule. Technicalities of expression or theory have, therefore, little to do with the application of the law of homestead. This is especially the case when we consider the right to alienate or incumber the estate. The general rule is that the homestead law does not interfere with the rights of parties to voluntary sales or mortgages of the homestead lands. McGrath v. Berry, 76 Ky. 391; Smith v. Malone, 10 S. Car. 39. The owner may, therefore, alienate his homestead. Pendergast v. Heekin, 94 Ky. 384, 22 S. W. Rep. 605; Peterson v. Hornblower, 33 Cal. 266; Williams v. Watkins, 92 Va. 680; Green v. Root, 62 Fed Rep. 191; Ray v. Yarnell, 118 Ind. 112; Vanstory v. Thornton, 112 N. Car. 196, 34 Am. St. Rep. 483; Halliday v. Hess, 147 Ill. 588; Greer v. Major, 114 Mo. 145; Roane v. Hamilton, 101 Iowa, 687; Scalf v. Collin Co., 80 Tex. 514; Parker v. Dean, 45 Miss. 408; Gunn v. Wades, 65 Ga. 537; James v. Wilder, 25 Minn. 305; Wea Gas, etc. Co. v. Franklin Land Co., 54 Kan. 533, 45 Am. St. Rep. 533. In Tong v. Eifort, 80 Ky. 152, the court held that a husband and wife have the right, with or without consideration, to convey their homestead without regard to the claims of creditors. And in Pendergast v. Heekin, *supra*, it was held that a debtor may, by will as well as deed, invest his wife or child with title to the homestead, free from the claims of his creditors. The right of homestead, however, which has not been set out is not assignable. Gunnison v. Twitchel, 38 N. H. 62. A husband, without the concurrence of his wife, has power to dedicate a part of the community homestead to a city for the wife's use of homestead. Orrick v. City of Ft. Worth (Tex. 1895), 32 S. W. Rep. 443. See also City of Little Rock v. Wright, 58 Ark. 142, 23 S. W. Rep. 876. An interesting point arose under Virginia Code 1887, sec. 3649, providing that when the homestead right in property ceases it shall become subject to the debts of the owner. It was held that this did not prevent its incumbrance or alienation during the continuance of its homestead character; and that a creditor was not entitled to an injunction to preserve the *corpus* of homestead property, either real or personal, from alienation. Williams v. Watkins, 92 Va. 680, 24 S. E. Rep. 223. This power of alienation is not derived from the constitution or statute relating to alienation of homesteads. It is an incident of the ownership of property independent of the homestead law, and the directions and prohibitions of the constitution or statutes as to alienation are mere restrictions upon this antecedent power. Hinson v. Booth, 39 Fla. 333. The right to alienate or mortgage a homestead must be determined by the law in force when the mortgage was given. Watts v. Burnett, 56 Ala. 340. Thus, where one was married before the adoption of the constitution of 1868, and had acquired the property in question before that time, the restriction on his right to convey without the joinder of his wife contained in art. 10, sec. 8, does not apply. Shaffer v. Bledsoe, 117 N. Car. 144, 23 S. E. Rep. 169. The following authorities hold that a homestead may be incumbered in any manner the owner may desire, without any consideration of the rights of creditors: Dickerson v. Cuthburth, 56 Mo. App. 647; Blevins v. Rogers, 32 Ark. 258; Moran v. Clark, 30 W. Va. 359, 8 Am. St. Rep. 66; State Bank v. Ashmead, 23 Fla. 379; Danforth v. Beattie, 43 Vt. 138; Hill v. Alexander, 2 Kan. App. 251; Pioneer, etc. Co. v. Paschall, 12 Tex. Civ. App. 613; Bartholomae Brewing Co. v. Schroe-

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der, 67 Ill. App. 560; Hall v. Fulgham, 86 Tenn. 451; Low v. Anderson, 41 Iowa, 476. In fact, the homestead may even be given away without affecting the rights of creditors. Grimes v. Portman, 99 Mo. 229.

The homestead act has not created a new estate distinct from the fee, but simply an exemption; and when the holder conveys without releasing the right he transfers the fee, but the operation of the deed is suspended until he abandons the premises or surrenders possession. McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Rutledge v. McFarland, 75 Ga. 774; Hewitt v. Templeton, 48 Ill. 367. There seems to be some dispute over the question whether a conveyance or mortgage which is insufficient to convey the right of homestead is enforceable after abandonment or termination of the homestead. The following authorities deny that such conveyances can be enforced: Bruner v. Bateman, 66 Iowa, 488, 24 N. W. Rep. 9; Cummings v. Busby, 62 Miss. 195; Amphlett v. Hibbard, 29 Mich. 298; Alt v. Banholzer, 39 Minn. 511, 40 N. W. Rep. 830, 12 Am. St. Rep. 681. Thus, an assignment of a contract for a deed of the homestead, invalid because not joined in by the husband, is not made valid by a subsequent abandonment of the premises as a homestead. Belden v. Younger, 76 Iowa, 567, 41 N. W. Rep. 317. So, also, a conveyance of a homestead made by a married man alone, without the signature of the wife, does not become valid by reason of the property subsequently losing its character as a homestead. Barton v. Drake, 21 Minn. 299. The following authorities controvert the position assumed by the cases just cited: Himmelmann v. Schmidt, 23 Cal. 117; Lee v. Kingsbury, 13 Tex. 68; Vasey v. Trustees, 59 Ill. 188; Rutledge v. McFarland, 75 Ga. 774; Chaffe v. McGehee, 38 La. Ann. 278. Thus, where a mortgagor abandons his homestead, it is immaterial whether he knew or was ignorant of the fact that the mortgage on the homestead contained a clause releasing it at the time he executed it, or whether his wife signed or acknowledged it, the mortgage being, by the abandonment, rendered operative as to the homestead. Cobb v. Smith, 88 Ill. 199.

We now come to the consideration of the right of alienation as to outstanding judgments or claims. We note considerable confusion on this subject. In the first place, in regard to judgments, some authorities hold to the rule that a judgment creates a lien upon the homestead which may be enforced after abandonment or alienation, and others that there can be no lien upon a homestead. The former theory is supported by the following authorities: Brandon v. Moore, 50 Ark. 247, 7 S. W. Rep. 36, 7 Am. St. Rep. 96; Bills v. Mason, 42 Iowa, 329; Eaton v. Ryan, 5 Neb. 47; Vanstory v. Thornton, 112 N. Car. 196; Moore v. Smead, 89 Wis. 558, 62 N. W. Rep. 426. Thus, under constitution, Arkansas, 1868, providing for the exemption of a homestead, the lien of a judgment attaches to land occupied as a homestead, and can be enforced against one who purchases from the judgment debtor. Jackson v. Allen, 30 Ark. 110. So also under Code, N. Car. sec. 435, which makes a docketed judgment a lien on "all the land" of the debtor in the county where it is docketed, from the date of the docketing, the lien of a judgment properly docketed has priority over the liens of mortgages on the homestead executed subsequently to the docketing of such judgment. Vanstory v. Thornton, 112 N. Car. 196, 17 S. E. Rep. 566, 34 Am. St. Rep. 483. The following authorities hold that a judgment does not create a lien on a homestead which can be enforced after its termination: Mills v. McDaniels, 59 Mo. App. 331; Burwell v. Tullis, 12 Minn. 572; Morris v. Ward, 5 Kan. 239; Richart Utterback (Ky. 1888), 9 S. W. Rep. 825. Thus where one occupying land as a homestead conveyed it to his children, reserving a life estate, the land could not, at his death, be subjected to the payment of a judgment recovered against him prior to the conveyance, and subsequent to its acquisition as a homestead; the evidence being conflicting as to whether the value of the land was more than the statutory limit of a homestead exemption. Richart v. Utterback (Ky. 1888), 9 S. W. Rep. 825.

It is undoubtedly the general rule, however, supported by the great weight of authority, that, as far as alienation is concerned, lands owned and occupied as a homestead may be transferred without subjecting them to the liens of outstanding judgments against the owner. McDonald v. Crandall, 43 Ill. 231; Ketchin v. McCarley, 26 S. Car. 1, 11 S. E. Rep. 1099; Beckmann v. Meyer, 75 Mo. 333; Moore v. Granger, 30 Ark. 574; Gardner v. Batts, 114 N. Car. 496, 19 S. E. Rep. 794; Beyer v. Thoeming, 81 Iowa, 517, 46 N. W. Rep. 1074; Giles v. Miller, 36 Neb. 346, 54 N. W. Rep. 551, 38 Am. St. Rep. 730; James v. Wilder, 25 Minn. 305; Davis v. Prichard (Ky. 1888), 7 S. W. Rep. 549. Authorities holding *contra*: Whitworth v. Lyons, 59 Miss. 467; Allen v. Cook, 26 Barb. (N. Y.) 374; Grant v. Cosby, 51 Ga. 460; Hebert v. Mayer, 42 La. Ann. 839, 8 South. Rep. 590; Taul v. Epperson, 38 Tex. 492. Let us examine these cases more in detail. Thus a conveyance of a homestead though fraudulent as to creditors, does not render it, in the hands of the grantee, subject to the lien of a judgment previously obtained against the grantor. Delashmit v. Trau, 44 Iowa, 613. But in Louisana, where the owner of a homestead sells it, dormant judgments against him are revived, and will, if recorded, follow the land in the hands of the vendee, and, if the vendor repurchases, he will take subject to the judgments, and the homestead exemption will not revive. In Kansas, however, land owned by a husband and occupied as a homestead may be sold and conveyed by the husband and wife jointly, and the purchaser will take the title free from incumbrance notwithstanding a judgment against the husband. Morris v. Ward, 5 Kan. 239. In Texas, on the other hand, it was held that a judgment lienholder has priority over a purchaser of the homestead under a deed of trust signed and duly ackowledged by husband and wife. Taul v. Epperson, 38 Tex. 492. But in Missouri, where a debtor continued to occupy a homestead after the death of his wife, and, after several judgments had been obtained against him, conveyed it for a valuable consideration to his son, it was held that the property in the son's hands was not subject to sale under the judgments. Beckmann v. Meyer, 75 Mo. 333. It is thus seen to be impossible to reconcile the authorities. Each state has its own reason for extending or limiting the right of homestead, some favoring the creditor, others the debtor. This tendency will also necessarily decide its position on the right of alienation of the homestead.

JETSAM AND FLOTSAM.

EDIBLE EVIDENCE.

The jury ate up an important part of the evidence in a case they were trying in the superior court at Atlanta, Ga., in which one of the issues submitted

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was whether certain almonds, the price of which was sued for, were of the quality contracted for. The judge that presided at the trial has the humorous tendency that characterized the great judge whose names he bears and who was his grandfather,—Chief Justice Joseph Henry Lumpkin,—and in his judgment, refusing a new trial in this case, he has this to say:

"If a new trial should be granted in this case it can never be tried again exactly as it was before. Out of the almonds constituting the subject-matter of this litigation a small number were kept, and on the trial were submitted to the jury along with some almonds obtained from another shipment, for comparison. When the jury retired to their room for consultation the two small paper sacks containing these almonds were carried out with them. After some time they returned a verdict, but not the almonds. On inquiry the court was informed that as a part of their deliberation, and probably as a most conclusive mode of comparing the quality of the two samples, they had eaten both. In case of a new trial there are no more almonds for the next jury. It might be said that from an almond standpoint the case is exhausted. Perhaps it would be better for the jury not to eat up the evidence, at least not all the edible part of it. A due regard for the palates of a possible future jury, in case of a new trial, if nothing else, might suggest the advisibility of only a moderate degustation. It is quite possible that juries sometimes find a difficulty in swallowing all of the statements made before them, and that if on some occasion a toothsome or succulent bit of evidence is sent to the jury room with them, appealing at once to intellectual and gastronomic investigation, the desire for knowledge may be stimulated to a point beyond deliberative moderation."—*Green Bag.*

CORRESPONDENCE.

A PRETERMITTED STATUTE.

To the Editor of the Central Law Journal:

An interesting example of a pretermitted statute is section 735, Rev. Stat. Mo. 1879. In subsequent revisions this section disappears. The case of Manhattan Brass Co. v. Webster Glass Co., 37 App. p. 145 (1889), was decided upon this statute. It is probably declaratory, but so are many other sections under the chapters respecting corporations. The only authority in this state declaring the rule is Missouri Lead Co. v. Reinhard, 114 Mo. 218 (1893).

Yours,

CHARLES P. WILLIAMS.

BOOK REVIEWS.

EATON ON EQUITY.

There would appear to be hardly any necessity for a new work on this important subject, at least from the practitioner's standpoint. For the student of law, however, this subject has never been satisfactorily presented, so as to bring out clearly the great principles of this subject freed from its many difficult and confusing technicalities. This latter end, however, has been excellently attained in the treatise on Equity Jurisprudence just prepared by Mr. James W. Eaton for the Hornbook series of legal text books. The arrangement is clear, logical and concise, and is undoubtedly the best text book on the subject that has so far appeared. One volume of 734 pages, bound in law sheep. Published by the West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

The Law of Agency, including the Law of Principal and Agent and the Law of Master and Servant. By Ernest W. Huffcut, Professor of Law in the Cornell University College of Law. Second Edition, Revised and Enlarged. Boston: Little, Brown & Company, 1901. Sheep. Price, $3.50. pp. 406. Review will follow.

Federal Equity Procedure. A Treatise on the Procedure in Suits in Equity in the Circuit Courts of the United States. Including Appeals and Appellate Procedure with Appendixes containing the Constitution of the United States Annotated. Federal Judiciary Acts, Court Rules, Equity Forms, English Orders in Chancery. By C. L. Bates, of the Bar of San Antonio, Texas. In two volumes. Chicago: T. H. Flood & Company, 1901. Sheep, pp. 1407. Price $12.60 delivered. Review will follow.

Law Books by the Million. An Account of the Largest Law Book House in the World,—the Home Establishment of the National Reporter System and the American Digest System. St. Paul, Minn., West Publishing Co., 1901.

HUMORS OF THE LAW.

A judge once made an attempt to have a more ceremonious court, with the following result. He drilled the sheriff in the proper ceremony for opening the court, and the sheriff opened it in these words: "Oyez, Oyez—The honorable—Muhlenberg—Circuit Court—is now convened—Judge Caldwell presiding—God save the commonwealth! ! !"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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2. ADVERSE POSSESSION—Petition for Recovery of Logs Cut.—Where defendants are in possession of land, holding adversely to plaintiff, the latter cannot maintain an action against defendants for the recovery of logs cut by them while in possession.—CLARKE v. CLYDE, Wash., 66 Pac. Rep. 46.

3. ANIMALS—Health Officers — wrongful Killing.—In action against a health officer for killing a mule, evidence held to entitle plaintiff to affirmative charge.—BARRET v. CITY OF MOBILE, Ala., 30 South. Rep. 86.

4. APPEAL AND ERROR — Conflicting Evidence.—Where the weight of conflicting evidence is not clearly against the findings of the trial court, such findings will not be disturbed.—FURTH v. KRAFT, Wash., 66 Pac. Rep. 47.

5. APPEAL AND ERROR—Statement of Facts.—Where the appeal record contains no statement of facts, the supreme court cannot consider, on its merits, the denial of a new trial by the trial court.—NELSON v. SEATTLE TRACTION CO., Wash., 66 Pac. Rep. 61.

6. APPEAL AND ERROR—Withdrawing Case from Jury—Objections.—Where court's action in withdrawing the case from the jury is not objected to, on appeal case will be treated as one tried by the court.—NELSON v. JORDETH, S. Dak., 87 N. W. Rep. 140.

7. ASSIGNMENTS FOR BENEFIT OF CREDITORS—To Receiver of Bank—Security.—A transfer of property to the receiver of a bank as security is in legal effect one directly to the bank itself, and not an assignment in trust which must be recorded within 30 days.—EARLE v. MCCARTNEY, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 13.

8. ATTORNEY AND CLIENT — Lien — Enforcement.—Where an attorney was entitled to one-half of proceeds of litigation, and the case was settled without the attorney's knowledge, held that the attorney could open the settlement and enforce his lien, pursuant to Code Civ. Proc. § 66.—FISCHER-HANSEN v. BROOKLYN HEIGHTS R. CO., 71 N. Y. Supp. 513.

9. BANKRUPTCY—Bond for Annuity—Provable Claim.—A bond securing the payment of a life annuity to another is provable as a debt in bankruptcy for the amount of the penalty where value of annuity exceeds such amount.—COBB v. OVERMAN, U. S. C. C. of App., Fourth Circuit, 109 Fed. Rep. 65.

10. BANKRUPTCY—Claims of Partners to Partnership Assets.—A partner cannot claim in competition with firm creditors for advances for partnership purposes or for goods sold to his firm.—IN RE ERVIN, U. S. D. C., E. D. (Pa.), 109 Fed. Rep. 135.

1. BANKRUPTCY—Foreclosure in State Court—Injunction.—A court of bankruptcy will not enjoin foreclosure proceedings in a state court on a claim of the trustee that the amounts claimed by the mortgagees therein are excessive, but will direct the trustee to apply for leave to intervene and have the question determined by the state court.—IN RE PORTER, U. S. D. C., D. (Ky.), 109 Fed. Rep. 111.

12. BANKRUPTCY — Habeas Corpus—Right of Federal Court to Release Bankrupt.—A court of bankruptcy has no authority to discharge on *habeas corpus* a bankrupt who was imprisoned under a lawful civil process before the filing of the petition.—IN RE CLAIBORNE, U. S. D. C., S. D. (N. Y.), 109 Fed. Rep. 74.

13. BANKRUPTCY—Homestead Exemption—Adjudication by State Court.—An adjudication that a debtor is entitled to a homestead exemption, made by a state court after a contest by the creditors, cannot be reviewed or set aside in bankruptcy proceedings subsequently instituted.—IN RE RHODES, U. S. D. C., N. D. (Ohio), 109 Fed. Rep. 117.

14. BANKRUPTCY — Mortgage as a Preference.—A mortgage given within four months before bankruptcy, in part for a new consideration, and in part as security for old debt, is valid only to the extent of the new consideration, under Bankr. Act 1898, § 67d.—CITY NAT. BANK v. BRUCE, U. S. C. C. of App., Fourth Circuit, 109 Fed. Rep. 69.

15. BANKRUPTCY—Partnership—Claim by Partner.—A creditor of a firm which has dissolved, one partner assuming the firm debts, and subsequently becoming a bankrupt, cannot prove his claim without surrendering payments received from the firm within four months prior to the bankruptcy.—IN RE KELLER, U. S. D. C., N. D. (Iowa), 109 Fed. Rep. 118.

16. BANKRUPTCY — Preference—Recovery.—In an action by a trustee in bankruptcy, allegation held sufficient, without stating that such sum was paid out of the debtor's estate, to show a preference.—RICHTER v. NIMMO, 71 N. Y. Supp. 501.

17. BANKRUPTCY—Preference—Set-Off—New Credit.—Bankr. Act 1898, § 60c, does not entitle a creditor who has received a preference to set off against the same a new credit, and thereby qualify himself to prove the remainder of his claim.—IN RE KELLER, U. S. D. C., N. D. (Iowa), 109 Fed. Rep. 118.

18. BANKRUPTCY — Sale by Trustee — Warranty Against Taxes.—A trustee who sold property of a bankrupt "free and clear from all liens" held bound to protect the same from a lien for taxes to be subsequently levied, on an assessment made prior to the sale.—IN RE KELLER, U. S. D. C., N. D. (Iowa), 109 Fed. Rep. 131.

19. BANKRUPTCY—Ultra Vires Act of Corporation—Liability as Partner.—Where a corporation enters into partnership with a firm, it cannot on bankruptcy of the firm, by asserting that the partnership agreement was *ultra vires*, prove claim in competition with general creditors of firm.—IN RE ERVIN, U. S. D. C., E. D. (Pa.), 109 Fed. Rep. 135.

20. BANKS AND BANKING — Mortgage to Depositor—Consideration.—A mortgage given by the president of an insolvent bank to a depositor to secure him against loss by reason of false statements as to the bank's solvency, held based on a legal consideration, and valid.—KEMP v. NAT. BANK OF REPUBLIC OF NEW YORK, U. S. C. C. of App., Fourth Circuit, 109 Fed. Rep. 48.

21. BANKS AND BANKING—National Bank — Federal Courts.—A federal court has jurisdiction of a suit in equity by the receiver of a national bank without regard to the citizenship of the parties.—EARLE v. MCCARTNEY, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 13.

22. BANKS AND BANKING — National Banks—Individual Liability of Shareholders.—The only authorized procedure for enforcing the individual liability of the shareholders in a national bank is by a creditors' bill in a court of equity in the district where the bank is located.—WILLIAMSON v. AMERICAN BANK, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 86.

23. BILLS AND NOTES — Consideration — Gambling Debt.—Evidence held to show notice on the part of the holder of a check that it was given for gambling debt, precluding recovery.—MAINE MILE TRACK ASSN. v. HAMMOND, Mich., 87 N. W. Rep. 135.

24. BUILDING AND LOAN ASSOCIATION—Borrowing Members — Accounting.—Where association became insolvent, a borrowing member, whose loan was usurious, is liable for the amount received, and should be credited with interest and premiums paid, but not for dues paid on stock.—WILLIAMSON v. GLOBE BLDG. & LOAN CO., Tenn., 64 S. W. Rep. 298.

25. CARRIERS—Connecting Carriers—Liability.—Connecting railroad companies held liable as partners for injury to a shipment of goods.—ALABAMA & V. RY. CO. v. LAMKIN, Miss., 30 South. Rep. 47.

26. CARRIERS—Indemnity Policy—Recovery by Carrier.—Under Code 1892, § 4249, carrier cannot contest fact of delivery when bill of lading is in hands of *bona fide* holder, and can therefore recover on indemnity policy, whether goods have been actually delivered to it or not.—ILLINOIS CENT. R. CO. v. LANCASHIRE INS. CO., Miss., 30 South. Rep. 43.

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27. CARRIERS—Limitation of Liability.—Where there is but one contract and rate offered to shipper by common carrier, special provision limiting common-law liability is void.—ILLINOIS CENT. R. CO. v. LANCASHIRE INS. CO., Miss., 30 South. Rep. 48.

28. CERTIORARI — Necessary Allegation—Valid Defense.—Where a petition for a writ of *certiorari* to review a judgment alleged the nature of the action, but alleged no valid defense, it was error to grant such writ.—GATES v. HAYES, Ark., 64 S. W. Rep. 271.

29. CERTIORARI — Prerequisite—Invoking New Trial. —It was error for the circuit court to grant a writ of *certiorari* to review the judgment of the court of common pleas, rendered on constructive service, without invoking the remedy of a retrial.—GATES v. HAYES, Ark., 64 S. W. Rep. 271.

30. CHATTEL MORTGAGES — Selling Property — Criminal Liability.—On prosecution in P county for wrongfully selling personal property subject to lien, affidavit held sufficient, though not directly alleging that the property was in P county.—MCCALLUM v. STATE, Miss., 30 South. Rep. 47.

31. COLLEGES AND UNIVERSITIES — Agricultural Institutes and Stations—Act of Congress.—No part of the money appropriated by congress under Act March 2, 1887, to establish agricultural stations, can be used to defray the expenses of agricultural institutes.—VINCENHELLER v. REAGAN, Ark., 64 S. W. Rep. 278.

32. COLLEGES AND UNIVERSITIES — Officer or Employee—Distinction.—Where a state board by resolution created an office, fixing the duties, term, and salary thereof, and elected plaintiff thereto, he became an officer, and not an employee under contract. —VINCENHELLER v. REAGAN, Ark., 64 S. W. Rep. 278.

33. COLLISION — Contributory Negligence.—Where a fisherman anchored his boat in an improper place, and did nothing to prevent a collision, he was negligent, and could not recover for a collision.—CHESLEY v. NANTASKET BEACH STEAMBOAT CO., Mass., 61 N. E. Rep. 50.

34. CONFLICT OF LAWS—Contracts—Lex Loci.—Where an application for life insurance was made in Iowa by a resident, and the premium paid, and the policy delivered in Iowa, the policy is an Iowa contract.—KELLEY v. MUTUAL LIFE INS. CO., U. S. C. C., N. D. (Iowa), 109 Fed. Rep. 56.

35. CONSTITUTIONAL LAW—Abolishing Office—Impairing Contract.—Act May 23, 1901, which abolished the office of pomologist, is not unconstitutional as impairing the obligation of a contract.—VINCENHELLER v. REAGAN, Ark., 64 S. W. Rep. 278.

36. CONSTITUTIONAL LAW — Contempt — Illegal Imprisonment.—A person summarily adjudged guilty of contempt for an act not committed in the presence of the court, without a hearing, is deprived of his liberty without due process of law.—EX PARTE STRICKER, U. S. C. C., D. (Ky.), 109 Fed. Rep. 145.

37. CONSTITUTIONAL LAW—Ex Post Facto Laws.—The right of the widow to $1,000 from pension fund, was not affected by a change in the law after her husband's death.—KAVANAGH v. BOARD OF POLICE PENSION FUND COMRS., Cal., 66 Pac. Rep. 86.

38. CRIMINAL LAW—Unjust Discrimination — Public Contracts.—The provisions of County Government Act (St. 1897, p. 452), § 25, subd. 21, that printing cannot be let for publication in a paper which has not been established in the county for a year, is invalid, under Const. art. 1, §§ 11, 21.—VAN HARLINGEN v. DOYLE, Cal., 66 Pac. Rep. 44.

39. CONTEMPT—Unlawful Imprisonment—Discharge by Federal Court.—A person committed to jail for contempt by a state court without due process of law, and who has no right of appeal under the state laws, is entitled to be discharged by a federal court on *habeas corpus*.—EX PARTE STRICKER, U. S. C. C., D. (Ky.), 109 Fed. Rep. 145.

40. CONTRACTS— Conditions — Acceptance of Conditions.—A proposition to assume the debt of another on conditions which were never complied with creates no indebtedness on the part of the proposer.—WILLIAMS v. REYNOLDS, Tenn., 64 S. W. Rep. 290.

41. CONTRACTS — Consideration — Forbearance.— An agreement not to hold an indorser liable, to induce him to indorse a note given in renewal of another note which he had previously indorsed, is without consideration.—FAR ROCKAWAY BANK v. SMITH, 71 N. Y. Supp. 518.

42. CONTRACTS — Consideration — Forbearance.—An Agreement by a first mortgagee, having a present right to foreclose a mortgage, not to do so, is a sufficient consideration to support a contratwith the second mortgagee requiring the latter to pay taxes.—WILLIAMS v. BEDFORD BANK, 71 N. Y. Supp. 539.

43. CONTRACTS—Divisible Contracts—Right of Action. —Where a contract provided for the payment to the plaintiff of $600 per annum in monthly installments of $50 for the rest of his natural life, a new cause of action arises at the expiration of every month.—SEED v. JOHNSTON, 71 N. Y. Supp. 579.

44. CORPORATIONS—Minority Stockholder. — Allegations of a bill by a minority stockholder held insufficient to justify the appointment of a receiver for the property of a private corporation.—NORTH AMER. LAND & TIMBER CO. v. WATKINS, U. S. C. C. of App. Fifth Circuit, 109 Fed. Rep. 101.

45. CORPORATIONS—Receiver—Minority Stockholders. —A court of equity is not authorized to appoint a receiver for a solvent private corporation by an order made *ex parte* at the suit of a minority stockholder, where the management of the corporation by its officers and directors is not alleged to be fraudulent, dishonest or *ultra vires*.—NORTH AMER. LAND & TIMBER CO. v. WATKINS, U. S. C. C. of App., Fifth Circuit. 109 Fed. Rep. 101.

46. COUNTIES—Indebtedness—Vote.—Const. art. 8, § 6, requires only the consent of three-fifths of those voting on a question of incurring county indebtedness, and not three-fifths of the votes cast.—STRAIN v. YOUNG, Wash., 66 Pac. Rep. 64.

47. CRIMINAL EVIDENCE—"First Blow."—Where deceased was killed in a quarrel with defendant and his brother, it was error to exclude evidence that the first blow was struck by defendant's brother.—BYRD v. STATE, Ark., 64 S. W. Rep. 270.

48. CRIMINAL EVIDENCE—Threats.—On a prosecution for manslaughter, evidence that defendant made threats against decedent's brother seven or eight months before is inadmissible.—SHAW v. STATE, Miss., 30 South. Rep. 42.

49. CRIMINAL LAW—Indictment—Venue.—Where information does not show offense committed in the state, a motion in arrest of judgment will lie, under Pen. Code, § 1012.—PEOPLE v. WEBBER, Cal., 66 Pac. Rep. 88.

50. CRIMINAL LAW—Place of Crime—Allegation.—Information charging crime committed on train held not to sufficiently allege that it was committed in the county in which prosecution was brought, or in the state.—PEOPLE v. WEBBER, Cal., 66 Pac. Rep. 88.

51. CRIMINAL LAW—Reasonable Doubt.—Where the jury entertain a reasonable doubt whether a shot was fired accidentally during a scuffle and without intent to kill, defendant is entitled to acquittal.—JOHNSON v. STATE, Miss., 30 South. Rep. 39.

52. CRIMINAL LAW—Witnesses—Right of Defendant to Confer.—On a prosecution for manslaughter, defendant has a constitutional right to confer with his own witnesses, whether they are under the rule or not. —SHAW v. STATE, Miss., 39 South. Rep. 42.

53. CRIMINAL TRIAL—Continuance—Absence of Witness.—Continuance on account of the absence of a wit-

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ness held properly refused.—PARSLEY v. STATE, Tex., 64 S. W. Rep. 257.

54. CRIMINAL TRIAL—"Moral Certainty."—A charge that the jury may convict, if satisfied to a moral certainty of the truth of the charge, and that a moral certainty signifies only a very high degree of probability, held erroneous.—BYRD v. STATE, Ark., 64 S. W. Rep. 270.

55. CRIMINAL TRIAL—Newly-Discovered Evidence.—Where the defendant's conviction for rape rested almost entirely on the testimony of the prosecuting witness, it was error to refuse a new trial on grounds of newly-discovered evidence.—BUSSEY v. STATE, Ark., 64 S. W. Rep. 268.

56. CRIMINAL TRIAL—Objection to Evidence—No Ground Stated.—Where, in a criminal prosecution, evidence is objected to, but the ground of the objection is not stated, the objection will be considered as waived.—NEWMAN v. STATE, Tex., 64 S. W. Rep. 258.

57. DAMAGES—Death — Measure and Elements. — In action for death of plaintiffs intestate, evidence as to the amount of profits which had been derived from his business held inadmissible, as involving capital as a factor, as well as labor.—HEWLETT v. BROOKLYN HEIGHTS R. CO., 71 N. Y. Suppl. 581.

58. DAMAGES — Instruction — Assessment by Jury.—Where the court instructed the jury to return a verdict for the actual expenses incurred by plaintiff in being put off the train and for nominal damages, a verdict assessing the plaintiff's expenses at $40 and his damages at $250 will be set aside.—ST. LOUIS, I. M. & S. RY. CO. v. WOODWARD, Ark., 64 S. W. Rep. 263.

59. DEATH BY WRONGFUL ACT—Evidence—Speed of Electric Car.—In an action for death by collision with a street car, evidence of the speed of car at the place of accident, about six months after the same, held inadmissible.—HEWLETT v. BROOKLYN HEIGHTS R. CO., 71 N. Y. Supp. 581.

60. DEATH BY WRONGFUL ACT—Excessive Damages.—In an action for death, $25,000 damages held excessive.—CUMBERLAND TELEPHONE & TELEGRAPH CO. v. PITCHFORD, Miss., 30 South. Rep. 41.

61. DEBTOR AND CREDITOR—Preferred Creditors.—Under the laws of Virginia as they existed in 1896, a debtor, although insolvent, had the right to prefer certain creditors, if done in good faith and for a valid consideration.—KEMP v. NAT. BANK OF REPUBLIC OF NEW YORK, U. S. C. C. of App., 109 Fed. Rep. 48.

62. DESCENT AND DISTRIBTTION — Advancements—Interest.—Heir of decedent, to whom advancements have been made, cannot be charged with interest thereon.—COMER v. SHEHEE, Ala., 30 South. Rep. 95.

63. DESCENT AND DISTRIBUTION—Equity Jurisdiction—Partition.—Where equity has acquired jurisdiction to enforce rights of heirs at law in the portion of another heir in the lands of intestate, bill can be amended by asking sale of said lands for partition.—COMER v. SHEHEE, Ala., 30 South. Rep. 95.

64. DESCENT AND DISTRIBUTION—Mortgage Paid by Widow—Refunding by Heir.—Where widow paid mortgage on land to protect her dower, the heir, in refunding, was not chargeable with interest other than what was paid by her in redeeming.—SMITH v. STEPHENS, Mo., 64 S. W. Rep. 260.

65. DISORDERLY CONDUCT—Construction—"Riotous."—Word "riotous," as used in an ordinance, held to be employed in its popular meaning, as wanton and boisterous.—STATE v. KENNAN, Wash., 66 Pac. Rep. 62.

66. DIVORCE — Cross Complaint — Void Marriage.—Where a cross complaint in a suit for divorce seeks to adjudicate property rights, it is error to dismiss such complaint on finding that the marriage was void from its inception.—RAYL v. RAYL, Tenn., 64 S. W. Rep. 309.

67. DIVORCE — Grounds—Another Husband or Wife Living.—Evidence held sufficient to show a subsisting marriage with a husband whom defendant knew or believed to be living, warranting a divorce.—RAYL v. RAYL, Tenn., 64 S. W. Rep. 309.

68. DOWER—Mortgage—Liability of Widow.—Where widow pays mortgage on land to protect her dower and part of the mortgaged property is required to satisfy her dower, she should bear a similar proportion of the mortgage debt.—SMITH v. STEPHENS, Mo., 64 S. W. Rep. 260.

69. EJECTMENT — Pleading.— The pleading held to show that the action was ejectment and not to establish a boundary.—MCCRELLIS v. WELLS, Tenn., 64 S. W. Rep. 293.

70. ELECTIONS—Contest—Initials of Judges.—Under Sand. & H. Dig. §§ 2650, 2653, no ballots can be counted except those on which the initials of one of the judges of election are written by his own hand.—RHODES v. DRIVER, Ark., 64 S. W. Rep. 272.

71. ELECTIONS — Contest — Testimony of Voters.—Where there is proof that an indefinite number of illegal ballots was received, the voter must show how he voted, when his vote may be counted, under Const. art. 3, § 2.—RHODES v. DRIVER, Ark., 64 S. W. Rep. 272.

72. EQUITY—Jury Trial—Master's Findings.—A court of equity will not grant an issue to try before a jury questions of fact which have been fully heard before a master.—EARLE v. MCCARTNEY, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 18.

73. EQUITY — Setting Aside Decree — Leave to File Bill.—An original bill to set aside for fraud a decree entered on a mandate from the circuit court of appeals, may be filed without first obtaining leave of such court.—RITCHIE v. BURKE, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 16.

74. ESTOPPEL—Compromise—Acquiescence.—A compromise awarding lands in settlement of litigation, made by plaintiff's ancestor and acquiesced in for 23 years, held to estop assertion of title.—NIXON v. RUSSEL, Tenn., 64 S. W. Rep. 297.

75. ESTOPPEL — Contract to Redeem—Tax Title.—Where a person who has undertaken to redeem land from taxes takes a tax title instead, he cannot assert such title as against the owner.—MORROW v. JAMES, Ark., 64 S. W. Rep. 269.

76. ESTOPPEL—Parol Permission to Break Agreement.—Where a lessee has failed to perform certain conditions, relying on the lessor's verbal agreement that he need not perform, the lessor is estopped from claiming such failure as a breach.—CONLEY v. JOHNSON, Ark., 64 S. W. Rep. 277.

77. EVIDENCE—Expert Evidence.—Witness in an action for death from a defective highway held qualified to give opinions.—MILLER v. MEAD TP., Mich., 87 N. W. Rep. 131.

78. EVIDENCE—Lease—Parol Variation.—In an action on a lease, parol evidence of an oral agreement for repairs, held properly excluded.—VAN DERHOEF v. HARTMANN, 71 N. Y. Supp. 552.

79. EVIDENCE — United States Tide Tables.—The United States tide tables are admissible in evidence to determine the depth of the location of a pound net below low tide in such waters, in an action to restrain, its maintenance.—CHERRY POINT FISH CO. v. NELSON Wash., 66 Pac. Rep. 55.

80. EVIDENCE — Value of Services — Competent Witnesses.—Persons acquainted with the decedent are competent to testify as to the value of his services, in an action for his death.—MILLER v. MEADE TP., Mich., 87 N. W. Rep. 131.

81. EXECUTION — Against the Body.—Under Comp. Laws § 10,412, where execution against defendant's property was returnable in 1897, an execution against his body in 1899 was too late.—METCALF v. MOORE, Mich., 87 N. W. Rep. 129.

82. EXECUTORS AND ADMINISTRATORS — Widow's Right to Rents and Profits of Homestead.—Under Rev. St. 1879, the widow is entitled to the rents and profits of the plantation attached to her deceased husband's

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mansion, up to the time her dower is assigned, in her own right.—SMITH v. STEPHENS, Mo., 64 S. W. Rep. 260.

83. FALSE IMPRISONMENT—Issuing Warrant Without Jurisdiction.—A magistrate issuing a warrant for arrest without jurisdiction, held liable in damages for false imprisonment.—MCKELVEY v. MARSH, 71 N. Y. Supp. 541.

84. FEDERAL COURT—Circuit Court of Appeals—Jurisdiction.—A circuit court of appeals has no jurisdiction to set aside an order of a district court admitting defendants to bail pending proceedings for review.—UNITED STATES v. MOY WEE TAI, U. S. C. C. of App., Second Circuit, 109 Fed. Rep. 1.

85. FEDERAL COURTS — Court of Appeals—Revoking Mandate After Term.—A circuit court of appeals has no power to entertain a motion to revoke a mandate issued, where such motion is not filed until after the term at which such decree was entered.—REYNOLDS v. MANHATTAN TRUST CO., U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 97.

86. FEDERAL COURTS — Jurisdiction—Citizens of the Same State.—The discharge of a judgment pending a suit in a federal court based thereon, does not affect the court's jurisdiction to determine issues joined between co-defendants, although citizens of the same state.—RITCHIE v. BURKE, U. S. C. C., N. D. (Ohio), 109 Fed. Rep. 16.

87. FEDERAL COURTS — Prior Jurisdiction Over State Court.—A federal court held to have acquired prior jurisdiction over the subject-matter of an action brought in a state court, which it would protect by injunction.—MERCANTILE TRUST & DEPOSIT CO. v. ROANOKE & S. RY. CO., U. S. C. C., W. D. (Va.), 109 Fed. Rep. 3.

88. FISH—Pound Nets—Depth.—Under Laws 1899, p. 194, § 1, a pound net constructed in water of greater depth than 65 feet at low tide is illegal.—CHERRY POINT FISH CO. v. NELSON, Wash., 66 Pac. Rep. 55.

89. FRAUDS, STATUTE OF — Assumption that Contract is Legal.—Where there is nothing in a petition showing a contract absolutely void under the statute of frauds, it is assumed to be legal.—REED v. CRANE, Mo., K. C. Ct. of App., June 17, 1901.

90. FRAUDS, STATUTE OF—Creditors — Invoking Statute for Debtor.—Creditors cannot invoke the statute of frauds to defeat a liability of their debtor which he has himself recognized by giving his notes and security therefor.—KEMP v. NAT. BANK OF REPUBLIC OF NEW YORK, U. S. C. C., of App., Fourth Circuit, 109 Fed. Rep. 48.

91. FRAUDULENT CONVEYANCES — Admissions of Vendor.—Admissions of vendor in presence of vendee, before payment of consideration, as to fraudulent intent, held competent.—BENDER v. KINGMAN, Neb., 87 N. W. Rep. 142.

92. FRAUDULENT CONVEYANCES — Burden of Proof.—In a suit to set aside a conveyance made by a husband to his wife as in fraud of creditors, the burden is on complainant to show the fraud.—VIRDEN v. DWYER, Miss., 30 South. Rep. 45.

93. FRAUDULENT CONVEYANCES — Burden of Proof.—The burden is on one claiming that a sale was fraudulent as to creditors to show that the purchaser knew of the fraudulent intent or had notice which should have put him on inquiry.—MADDOX v. REYNOLDS, Ark., 64 S. W. Rep. 266.

94. FRAUDULENT CONVEYANCES—Father to Daughter—A conveyance from a father to a daughter held fraudulent as to his creditors.—STEUBEN CO. WINE CO. v. LEE, Mich., 87 N. W. Rep. 129.

95. FRAUDULENT CONVEYANCES—Purchases by One Creditor.—A creditor, to secure his own claim, cannot assist a debtor to defraud his other creditors by purchasing more goods than necessary to extinguish his claim.—MADDOX v. REYNOLDS, Ark., 64 S. W. Rep. 266.

96. GUARDIAN AND WARD—Sale—Approval of Deeds.—An *ex parte* order of probate court approving deeds of a guardian, where the sale was not reported or confirmed, does not validate the sale or start limitations running against the ward's claim to the land.—MORROW v. JAMES, Ark., 64 S. W. Rep. 269.

97. HIGHWAYS — Establishment — Viewers.—The county board cannot establish a road along a different route from that laid out by the reviewers.—FLINT v. HORSLEY, Wash., 66 Pac. Rep. 59.

98. HOMICIDE—"Malice Aforethought."—An instruction defining malice aforethought as "an unlawful act intentionally done," but omitting the essential of deliberation, is erroneous.—JOHNSON v. STATE, Miss., 30 South. Rep. 39.

99. HOMICIDE — Self-Defense — Imminent Danger.—Where a defendant believed, when he committed the homicide, that he was in imminent and immediate danger of being killed by decedent, he was entitled to acquittal, though there was no danger in fact.—JOHNSON v. STATE, Miss., 30 South. Rep. 39.

100. INDICTMENT AND INFORMATION — Resubmission to Grand Jury.—Resubmission to grand jury of charges dismissed by a prior grand jury denied.—PEOPLE v. NEIDHART, 71 N. Y. Supp. 591.

101. INJUNCTION—Action on Injunction Bond.—An action on an injunction bond is premature; if an appeal from the order dismissing injunction bill is undetermined.—YAZOO, ETC. R. CO. v. ADAMS, Miss., 30 South. Rep. 44.

102. INJUNCTION—Reinstatement.—Where a court by the same order both grants and dissolves an injunction to enable plaintiffs to apply to a judge of the court of appeals for a reinstatement, the application to reinstate will be denied.—ST. BERNARD COAL CO. v. PITTSBURG COAL CO., Ky., 64 S. W. Rep. 288.

103. INSURANCE — Discrimination.—Iowa statute to prevent discrimination in life insurance construed.—KELLEY v. MUTUAL LIFE INS. CO., U. S. C. C., S. D. (Iowa), 109 Fed. Rep. 56.

104. INSURANCE—Insanity — Covenant.—A covenant by an applicant for life insurance that he will not take his own life while insane does not create a binding contract, since it is impossible for him to observe it.—KELLEY v. MUTUAL LIFE INS. CO., U. S. C. C., S. D. (Iowa), 109 Fed. Rep. 56.

105. INSURANCE—Proof of Loss — Waiver of Limitation.—The acceptance and retention by the insurance company of proof of loss and the policy is sufficient to raise the question of fact as to the waiver of the limitation provision of the policy.—SULLIVAN v. PRUDENTIAL INS. CO., 71 N. Y. Supp. 525.

106. INTERNAL REVENUE—Sugar Tax an Excise.—The tax required to be paid by sugar refiners by War Revenue Act 1898, § 27, is not a direct tax but an excise laid upon the business of refining.—SPRECKELS SUGAR-REFINING CO. v. MCCLAIN, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 76.

107. INTERNAL REVENUE—War Revenue Act—Monthly Payments of Sugar Tax.—A collector is authorized to require monthly payments of tax by a sugar refiner under the war revenue act of 1898.—SPRECKELS SUGAR-REFINING CO. v. MCCLAIN, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 76.

108. INTEREST—When Payable.—Under Carroll's Ky. St. ch. 72, interest is recoverable on the price of property sold and delivered from the time such delivery is made and the price is payable.—YELLOW POPLAR LUMBER CO. v. DANIEL, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 39.

109. INTOXICATING LIQUOR—Judgment Against Owner—Not Conclusive on Lessee.—A judgment recovered against the owner and lessee of a building wherein intoxicating liquors are sold is not conclusive against the lessee selling the same, who was not made a party to the action nor served with notice.—BURKMAN v. JAMIESON, Wash., 66 Pac. Rep. 48.

110. INTOXICATING LIQUORS—License Fees—Recovery.—Debt is the appropriate form of common-law action

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for the recovery of license fees imposed by a municipal ordinance which provides no specific method for their collection.—CITY OF PHILADELPHIA V. ATLANTIC & P. TEL. CO., U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 55.

111. JUDGES—*Pro Tempore*.—Appointment and Powers.—A judge *pro tempore* may be appointed after verdict to hear and determine a motion for a new trial and settle a bill of exceptions.—NELSON V. SEATTLE TRACTION CO., Wash., 66 Pac. Rep. 61.

112. JUDICIAL SALES—Resale.—A resale of land by the purchaser at a judicial sale, who had the resale confirmed in the proceedings, held not a judicial sale, avoiding necessity of registering the transfer as to creditors.—AYMETT V. CITIZENS' NAT. BANK, Tenn., 64 S. W. Rep. 80.

113. JUDGMENT—Conclusiveness.—Judgment that advancement has been made to an heir and distributee held conclusive on such heir and those holding under him.—COMER V. SHEHEE, Ala., 30 South. Rep. 95.

114. JUDGMENT—Dismissal of First Action—Second Based on New Promises.—Though, at the time of bringing an action to foreclose a mortgage, certain new promises to pay, on which plaintiff relies in a subsequent action, had been made, an adjudication, dismissing the foreclosure is not conclusive on such subsequent action.—CONCANNON V. SMITH, Cal., 66 Pac. Rep. 40.

115. JUDGMENT—Nullification—Not Affecting Those Not Parties—A decree holding that a judgment had been discharged cannot be given effect as an adjudication by another court to affect the rights of parties before it who were not parties to such decree.—RITCHIE V. BURKE, U. S. C. C., N. D. (Ohio), 109 Fed. Rep. 16.

116. JUDGMENT—Res Adjudçata—Installments.—In an action to recover an installment on a continuing contract, held, that the recovery of one installment in an action therefor was not a bar to the recovery of another installment for a different period.—SEED V. JOHNSTON, 71 N. Y. Supp. 579.

117. JURY—Right to Trial by Jury.—A party charged with violating a city ordinance not entitled to a trial by jury.—STATE V. KENNAN, Wash., 66 Pac. Rep. 62.

118. LARCENY—Evidence—Conviction of Theft.—Facts held sufficient to support a conviction for theft.—PARSLEY V. STATE, Tex., 64 S. W. Rep. 257.

119. LIMITATIONS — Remainder-Man — Action After Death of Life-Tenant.—An action by a remainder-man to recover land, commenced within four years after the death of the life tenant, is not barred by limitations.—MORROW V. JAMES, Ark., 64 S. W. Rep. 269.

120. LIMITATION OF ACTIONS — Acknowledgment — Letters.—Certain letters written by defendant held to satisfy Code Civ. Proc. § 360, so as to be admissible in evidence to prove an acknowledgment of a debt barred by limitations.—CONCANNON V. SMITH, Cal., 66 Pac. Rep. 40.

121. LIMITATION OF ACTIONS—Legal Owners Against Equitable Owners.—Limitations begin to run in favor of the legal owners against the equitable owner at the time of the conveyance, in the absence of recognition of the equitable owner's rights.—HANBY V. LEGG, Ala., 30 South. Rep. 84.

122. LIMITATION OF ACTIONS—Resulting Trust.—A bill by a wife's heirs to establish a resulting trust in a lot, the title to which was in the name of the husband, held barred by the 10-year statute of limitations.—COX V. MENZING, Miss., 30 South. Rep. 34.

123. MANDAMUS—To Appoint to Office — Necessary Parties.—In *mandamus* to compel a village board to appoint relator to an office for which another had been chosen, the appointee should be made a party.—PEOPLE V. VILLAGE OF DOBBS FERRY, 71 N. Y. Supp. 578.

124. MARITIME LIENS—Personal Credit—Defense to Lien.—The owner of a vessel cannot avail himself of the fact that he had acquired a personal credit at the place where supplies were furnished, but to which he was not entitled, to defeat a claim to a lien for such supplies.—THE JOHN MCDERMOTT, U. S. D. C., D. (Conn.), 109 Fed. Rep. 90.

125. MASTER AND SERVANT — Fellow-Servants. — A servant cannot recover for injuries caused by negligence in the performance of the work of piling or removing bags of cement, whether such negligence was that of a superintendent, foreman, or a common workman.—PAGE V. NAUGHTON, 71 N. Y. Suppl. 508.

126. MASTER AND SERVANT—Unsafe Place—Negligence of Fellow Servant.—Negligence of a fellow-servant in the piling of bags of cement in a warehouse will not render the place an unsafe place to work in, in a legal sense.—PAGE V. NAUGHTON, 71 N. Y. Suppl. 508.

127. MORTGAGES — Appointment of Receiver. — Receiver on foreclosure will not be appointed unless necessary for preservation of mortgaged property and its appropriation to the debt.—MEYER V. THOMAS, Ala., 30 South. Rep. 89.

128. MORTGAGES—Foreclosure—Decree as to Adverse Claimant Not a Party.—Though a claimant to a paramount title to property was made a party, and personally served, and thereafter defaulted, in a suit to foreclose a mortgage, to which she was not a party, she will not be bound by a finding that she has no interest in the property.—OATES V. SHUEY, Wash., 66 Pac. Rep. 58.

129. MORTGAGES—Foreclosure—Deficiency.—Authority to sue for deficiency after foreclosure should be alleged, or at least proved, by plaintiff.—WAUGH V. NEWELL, Neb., 87 N. W. Rep. 143.

130. MORTGAGES— Foreclosure — Question of Paramount Title.—A question of prior and paramount adverse title to property will not be tried in a suit to foreclose a mortgage on such property, where the claimant was not a party to the mortgage.—OATES V. SHUEY, Wash., 66 Pac. Rep. 58.

131. MORTGAGES—Foreclosure—To Restrain for Alteration of Note.—Where a bill to restrain foreclosure because of a material alteration in the note contains no allegation of fraud, and fails to allege payment, it does not state a cause for relief.—JEFFREY V. ROSENFELD, Mass., 61 N. E. Rep. 49.

132. MORTGAGES.—Foreclosure Sale — Confirmation. —Where, after sale, the confirmation is stayed, and complainants, seeking to restrain the sale, are given time, to sustain their bill, but fail to produce proof subh confirmation will not be disturbed.—KEEBLE V MCLEMORE, Tenn., 64 S. W. Rep. 305.

133. NEGLIGENCE—Contributory Negligence — Question for Jury.—In an action for personal injuries, the question of plaintiff's contributory negligence held for the jury.—JARVIS V. FLINT & P. M. R. CO., Mich., 87 N. W. Rep. 136.

134. NEGLIGENCE — Death of Child — Contributory Negligence of Father.—A father held not guilty of contributory negligence, so as to prevent recovery in action by him for injuries causing the death of his son. —MILLER V. MEADE TP., Mich., 87 N. W. Rep. 131.

135. MUNICIPAL CORPORATIONS — Failure to Reappoint—Removal.—Under Laws 1897, ch. 414, failure to reappoint a village street commissioner and the selection of another was not a removal from office.—PEOPLE V. VILLAGE OF DOBBS FERRY, 71 N. Y. Supp. 578.

136. MUNICIPAL CORPORATIONS — Presenting Claim— Applies Only to Torts.—Requirement of city charter that no claim should be sued on until statement shall have been filed with city held to relate to a demand arising in tort.—BARRETT V. CITY OF MOBILE, Ala., 30 South. Rep. 86.

137. MUNCIPAL CORPORATIONS—Necessary Averment. —Under city charter, providing that no suit can be maintained without first presenting claim to city, it is necessary that complaint should aver compliance with such requirement.—BARRETT V. CITY OF MOBILE, Ala., 30 South. Rep. 86.

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138. MUNICIPAL CORPORATIONS—Public Contracts—How Made.—Under St. 1896, ch. 415, an ordinance directing with whom a contract for printing shall be made is invalid.—GODDARD v. CITY OF LOWELL, Mass., 61 N. E. Rep. 58.

139. NEGLIGENCE—Store—Injuries to Customer.—In an action by a customer for injuries sustained in falling down an open stairway in defendant's shop, evidence held to sustain a finding of negligence of defendant.—TOLAND v. PAINE FURNITURE CO., Mass., 61 N. E. Rep. 52.

140. SALES—Agreed Price—Recovery Not a Quantum Valebat.—Where a complaint alleges a sale of goods at an agreed price, and that the whole amount is due and unpaid, recovery must be had on the express contract alleged, and not on a *quantum valebat*.—TILDEN v. GORDON & CO., Wash., 66 Pac. Rep. 50.

141. NEW TRIAL—Specification of Error.—Under Comp. Laws, § 5090, where the statement of intention to move for new trial contains no specifications of error, it is unavailing on the motion for a new trial.—NELSON v. JORDETH, S. Dak., 87 N. W. Rep. 140.

142. NEW TRIAL—Statement.—Under Code Civ. Proc., § 1054, the judge can grant an extension of time to prepare a statement on motion for new trial only to one who is not in default.—FREESE v. FREESE, Cal., 66 Pac. Rep. 43.

143. PARTNERSHIP—Accounting—Limitations.—Bill to settle partnership accounts may be filed within six years after actual dissolution, or from a partnership transaction on account.—DUGGER v. TUTWILER, Ala., 30 South. Rep. 91.

144. PARTNERSHIP—Agreement to Divide Fee—Consideration.—Where partnership is formed to buy land, agreement of partners that fee to be paid one of the partners for effecting the sale should be divided among all the partners held supported by a sufficient consideration.—DUGGER v. TUTWILER, Ala., 30 South. Rep. 91.

145. PARTNERSHIP—Proof of—Relation—Testimony of Alleged Partners.—In an action against alleged copartners it was error to refuse to allow defendants to testify as to relations existing between them.—SCHOLTZ v. FREUD, Mich., 87 N. W. Rep. 130.

146. PLEADING—Amendment—Matter of Right.—Where a complaint is bad for not showing jurisdiction an amended complaint is a matter of right, is a new pleading, and becomes the complaint in the action.—JOHN W. SIMMONS v. CO. COSTELLO, 71 N. Y. Supp. 577.

147. PLEDGES—Bonds—Conversion.—A pledgee of railroad bonds payable to bearer does not convert such bonds by causing them to be registered in his own name.—RITCHIE v. BURKE, U. S. C. C., N. D. (Ohio), 108 Fed. Rep. 16.

148. PLEDGES—Note—Conversion.—Liability of Pledgee.—Pledgee of note held liable for its conversion, without payment or tender of the debt for which the note was pledged.—MEYER BROS. DRUG CO. v. MATTHEWS, Ark., 64 S. W. Rep. 264.

149. PLEDGES—Note—Pledgor's Liability for Debt.—Pledgor of a note, the possession of which the pledgee parted with without authority, held to be liable for the amount of the debt for which it was pledged.—MEYER BROS. DRUG CO. v. MATTHEWS, Ark., 64 Pac. Rep. 264.

150. POWER OF ATTORNEY—Stamp Requirements.—Note, with power of attorney authorizing confession of judgment attached thereto, held not within act June 13, 1898, requiring powers of attorney to be stamped.—TOLMAN v. TREAT, U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 90.

152. RECEIVERS—Adequate Remedy—Discretion of Court.—Appointment of receiver is in the discretion of the court, where there is a probability that person asking therefor will succeed, and there is no other adequate remedy or means of accomplishing the desired object.—MEYER v. THOMAS, Ala., 30 South. Rep. 89.

153. RECEIVERS.—Corporations—Right of Equity to Appoint.—Chancery has no jurisdiction to sequester the property of a corporation by means of a receiver outside of that specially conferred by statute.—DAVIDSON v. JOHN GOOD CORDAGE & MACHINE CO., 71 N. Y. Supp. 565.

154. REMOVAL OF CAUSES—Petition for Removal—Record.—Where a case removed from a state court is taken to a circuit court of appeals for review the petition for removal is an essential part of the record to enable the court to determine its jurisdiction.—LARNED v. JENKINS, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 100.

155. REPLEVIN—Ownership by Third Party—Dismissal.—Where, in a suit to recover chattels, the evidence showed that neither plaintiff nor defendant had title, and defendants were in possession for a third party, held error not to dismiss the complaint.—LEVY v. KELTER, 71 N. Y. Supp. 509.

156. SALVAGE—Towing—Disabled Bark.—The towing of a partially disabled bark into port by a steamer on request of the master of the bark held to be a towing, and not a salvage service.—THE J. C. PFLUGER, U. S. D. C., N. D. (Cal.), 109 Fed. Rep. 98.

157. SCHOOL AND SCHOOL DISTRICTS—School Funds—Apportionment.—The apportionment of school funds under Pol. Code, § 1858, subd. 4, must be based on the average daily attendance in the primary and grammar schools of the district, to the exclusion of the night and high schools.—STOCKTON SCHOOL DIST. OF SAN JOUQUIN COUNTY v. WRIGHT, Cal., 66 Pac. Rep. 84.

158. SEDUCTION—Conditional Promise to Marry.—There is no seduction if prosecutrix submitted in reliance of defense special promise of marriage in the event of pregnancy, though the parties were engaged to marry at the time of the special promise.—PEOPLE v. RYAN, 71 N. Y. Supp. 527.

159. SHIPPING—Barge—Lost Through Unseaworthiness.—A carrier by water held not liable for loss of cargo by the sinking of a barge through its unseaworthiness under the term of the bills of lading.—THE ARCTIC BIRD, U. S. D. C., N. D. (Cal.), 109 Fed. Rep. 167.

160. SHIPPING—Barge—Presumption of Unseaworthiness.—The sinking of a barge six hours after starting on a voyage and while being towed in smooth water held presumptively due to her unseaworthiness at the commencement of the voyage.—THE ARCTIC BIRD, U. S. D. C., N. D. (Cal.), 109 Fed. Rep. 167.

161. SHIPPING—Ten Days' Notice of Loss—Reasonable Regulation.—A provision of a bill of lading requiring notice of any claim for loss or injury to the goods to be given within 10 days after such loss or injury is known to the shipper is reasonable and valid.—THE ARCTIC BIRD, U. S. D. C., N. D. (Cal.), 109 Fed. Rep. 167.

162. SHIPS AND SHIPPING—Master—Wages.—The master of a dredge which was incapable of being navigated, held entitled to a lien on the vessel for his wages.—THE JOHN MCDERMOTT, U. S. D. C., D. (Conn.), 109 Fed. Rep. 90.

163. SHIPS AND SHIPPING—Voluntary Towage—Com-

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to tow a bark, which was partially disabled, into port, the service delaying her for eight hours, held entitled to an award.—THE J. C. PFLUGER, U. S. D. C., N. D. (Cal.), 109 Fed. Rep. 98.

165. SPECIFIC PERFORMANCE — Sale of Plantation.—A contract for the sale of a plantation as a going concern, including stock, implements, and supplies, for a fixed sum, may be specifically enforced in equity as an entirety.—BROWN v. SMITH, U. S. C. C., D. (S. Car.), 109 Fed. Rep. 26.

166. STATUTES — General Statute Repealing Special Act.—Laws 1899, p. 183, entitled "An act to provide for the confirmation of titles to real estate," being a general statute, does not repeal Sand. & H. Dig. ch. 26, relating solely to confirmation of tax titles.—EX PARTE MORRISON, Ark., 64 S. W. Rep. 270.

167. STATUTES — Interpretation—General Purpose.—Where a statute is not framed with regard to the language employed, the legislative will is to be ascertained from the text as a whole, interpreted in view of the general object and purpose of the act, and not from the literal meaning of the words of the statute alone.—CHERRY POINT FISH CO. v. NELSON, Wash., 66 Pac. Rep. 55.

168. STATUTES—Time of Taking Effect.—A legislative act, to take effect immediately, is of force from the beginning of the day on which it was enacted.—IN RE BOYCE, Wash., 66 Pac. Rep. 54.

169. STATUTES—Title — Two Objects Expressed.—Act No. 171 of 1893 held not unconstitutional, as having two objects expressed in its title.—JACKSON & S. TRACTION CO. v. COMR. OF RAILROADS, Mich., 87 N. W. Rep. 188.

170. STREET RAILROADS — Commissioners — Discretion.—Discretion of the railroad commissioners in compelling street railroad to elevate its tracks over those of a steam road, not reviewable.—JACKSON & S. TRACTION CO. v. COMR. OF RAILROADS, Mich., 87 N. W. Rep. 183.

171. STREET RAILROADS — Injuries — "Paramount Right of Way."—Where a street railroad has a "paramount right of way" in a street at a point where its rails pass *a cul de sac*, such right must be exercised with view to the surroundings.—HEWLETT v. BROOKLYN HEIGHTS R. CO., 71 N. Y. Supp. 581.

172. SUBROGATION—Right of Vendee of Land Taken by Grantor's Creditors.—Where one, purchasing land from a grantor who acquired his title by judicial sale, did not have the transfer registered, he was not entitled to subrogation, on seizure of the land by his grantor's creditors.—AYMETT v. CITIZENS' NAT. BANK, Tenn., 64 S. W. Rep. 302.

173. TAXATION — Assessment — Hearing.—The Massachusetts statute for the assessment and collection of taxes held not unconstitutional, because not giving taxpayer a chance to be heard.—HARRINGTON v. GLIDDEN, Mass., 64 N. E. Rep. 54.

174. TAXATION — Decree of Non-Liability — Res Adjudicata.—A decree enjoining the collection of taxes levied in one year cannot be given effect as an adjudication of complainant's non-liability for similar taxes levied on the same property for similar taxes levied on the same property for a subsequent year.—MERCANTILE NAT. BANK v. LANDER, U. S. C. C., N. D. (Ohio), 109 Fed. Rep. 21.

175. TRADE LABELS—Use by Others—Loss of Right.—The originator of a distinctive package or other dress for his goods, who has used the same generally and continuously for many years, does not lose his right to protection in its exclusive use because it has been used by others.—ACTIENGESELLSCHAFT-VEREINIGTE ULTRAMARIN-FABRIKEN v. AMBERG, U. S. C. C. of App., Third Circuit, 109 Fed. Rep. 151.

176. TRADE-MARKS—Exclusive Use—Injunction.—A preliminary injunction will not be granted against the infringement of an alleged trade-mark, unless complainant's right to its exclusive use is clearly established.—DIAMOND MATCH CO. v. SAFE HARBOR MATCH CO., U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 154.

177. TRADE-NAMES—Becoming a Descriptive Term.—The manufacturers of the original Singer sewing machines, by permitting the name to be applied to the machines themselves as a descriptive term, did not forfeit the right to prevent others from using it.—SINGER MFG. CO. v. HIPPLE, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 152.

178. TRESPASS—Justification — Specially Pleaded.—In an action of trespass a defense of justification must be specially pleaded.—BARRET v. CITY OF MOBILE, Ala., 30 South. Rep. 36.

179. TRIAL—Instruction—Embodied in Another.—It is proper to refuse an instruction, the same proposition having been embodied in another instruction.—WILLIS v. METROPOLITAN ST. RY. CO., 71 N. Y. Supp. 554.

180. TRIAL—Jury—Withdrawing Case.—In a cause involving the title to real estate it was error to take the case from the jury.—NELSON v. JORDETH, S. Dak., 87 N. W. Rep. 140.

181. TRIAL—Proper Instruction—Refusal.—The refusal of a proper instruction is not error, when the court fully explains the contention of the parties in an instruction given.—JARVIS v. FLINT & P. M. R. CO., Mich., 87 N. W. Rep. 186.

182. TROVER AND CONVERSION—Defense—Legal Authority.—In trover, a defense that the conversion of property was under legal authority may be proven under the general issue.—BARRET v. CITY OF MOBILE, Ala., 30 South. Rep. 36.

183. TROVER AND CONVERSION—Property Sales—Conversion.—Where a watch is stolen from one in possession thereof as a conditional purchaser, a subsequent demand by the seller for the return of the property on the failing due of an installment and the purchaser's failure to deliver do not show a conversion.—STERNBERG v. SCHIEB, 71 N. Y. Suppl. 511.

184. TRUSTS—Land Purchased With Wife's Money.—Husband taking title to land purchased with his wife's money, a trust results to the wife, which may be proved by parol.—HANBY v. LEGG, Ala., 30 South. Rep. 84.

185. TRUSTEES—Trustees Appointed by Court—Powers.—Trustees appointed by the court held to be invested with all the powers of those named in a will.—MYERS v. MCCULLAGH, 71 N. Y. Supp. 520.

186. VENDOR AND PURCHASER — False Representations.—One who contracts for the purchase of real estate in reliance on the representations of the vendor, but after he has had the means of verifying such statements, cannot avoid the contract on the ground that they were false.—BROWN v. SMITH, U. S. C. C., D. (S. Car.), 109 Fed. Rep. 26.

187. WILLS — Bequest — Insurance Policy—Right of Executrix.—Where testator bequeaths to his wife an insurance policy payable to his legal representatives or assigns, the proceeds of the policy go to the wife, instead of the executrix.—LEONARD v. HARNEY, 71 N. Y. Supp. 546.

188. WILLS—Devise to Husband and Wife in Trust for Children.—Devise of real estate to testatrix's son and his wife in trust for the support of themselves and children, children arriving at a certain age being entitled to their share, does not create a valid trust.—TREAT v. VOSE, 71 N. Y. Supp. 507.

189. WITNESSES — Cross-Examination — Disparaging Questions.—Disparaging questions to defendant on cross examination held within discretion of trial court.—MARKGRAF v. KLINGE, 71 N. Y. Supp. 590.

190. WITNESSES—Husband as Witness Against Wife.—In a suit to set aside a conveyance by a husband to his wife as in fraud of creditors, the husband is not competent as a witness against the wife.—VIRDEN v. DWYER, Miss., 30 South. Rep. 45.

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Central Law Journal.

ST. LOUIS, MO., NOVEMBER 1, 1901

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ever invented. Its classification of the law has received the official indorsement of the American Bar Association, which, in 1900, recommended its universal adoption for all legal indexes and local digests. The inestimable advantages of such a system of digesting can hardly be fully appreciated by any but the busy practitioner. With the wide differences and increasing changes, together with the delicate modifications and constructions by judicial opinion, of the laws of the several states, the average lawyer is buried and bewildered under the very mass of it. To put into his hands such an index to all the law of his own state, or better still, of all the law of all the states, is like throwing a rope to a drowning man. He clutches at it with a sense of infinite relief and sees the expected labor of weeks melt away into the delightful labor of a few hours, and he plunges into his adversary with the feeling of confidence of a general who knows the strength of the enemy's position as well as he does his own.

We congratulate the West Publishing Company on its well merited success, and very cordially wish them a continuance of favor in the appreciation and patronage of the American bar.

NOTES OF IMPORTANT DECISIONS.

FACTORS AND BROKERS—RIGHTS OF REAL ESTATE BROKER TO COMMISSION.—The difference between ordinary brokers and real estate brokers or agents as they are more often called, is that the power of a real estate broker does not generally extend to execute a sale, but merely to bring the parties together or to negotiate for the contract. Morris v. Ruddy, 20 N. J. Eq. 236; Reitenberg v. Main, 47 Cal. 213. In the matter of compensation, therefore, a real estate broker has earned his commission, if he is the means of procuring a purchaser ready and willing to buy upon terms acceptable to the owner. Such was the decision in the recent case of Hubachek v. Hazzard, 86 N. W. Rep. 426, where the Supreme Court of Minnesota further held that if the agent is the procuring cause, the owner cannot sell at a less figure than that named to the agent, thereby escaping liability for the commission. The court said: "The point which appellants seem to insist upon is that, because Clark refused to pay $8,250, the agent's figures, the owner was at liberty to sell for $8,000, without liability for his agent's commission. But the various decisions of this court have established the rule that, if an agent is instrumental in bringing together a proposed purchaser and seller, the fact that the owner himself made the sale would not release him from his responsibility to the agent for his commission as the procuring cause. While the identical question presented here is not raised in those cases, yet there can be no distinction for the underlying principle is the same. It is immaterial whether the owner sold at the same price or at a lower figure than given to the agent, for the agent might still remain the efficient cause of bringing the parties together. The case would present an entirely different aspect if the owner had refused to deal with the purchaser at the time in question, had dropped all proceedings connected with it, and afterwards, through some other source or from some other cause, negotiations were opened anew. In such case, the agent would not be the procuring cause or instrumental in bringing the parties together. Upon this question may be cited Wilkinson v. Martin, 8 Car. & P. 1; Murray v. Currie, 7 Car. & P. 584; Earp v. Cummins, 54 Pa. 394, 93 Am. Dec. 718; Martin v. Silliman, 53 N. Y. 615."

INJUNCTIONS—RIGHT TO INJUNCTION WHERE THERE IS A REMEDY AT LAW.—It is not a sufficient defense to an application for injunction that the injury threatened is not irreparable or that there is a remedy at law. The remedy at law must be adequate. In the recent case of Staples v. Rossi, 65 Pac. Rep. 67, the Supreme Court of Idaho held that an injunction will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff. This case was an appeal from an order granting the plaintiffs a temporary injunction restraining the defendants from removing from the Golden Group placer-mining claim logs cut by the defendants from trees growing thereon, which logs are now banked upon the Middle Boise river, upon said mining claim. It is contended by the appellants that the order granting said injunction was unauthorized, for the reason that the appellants were solvent, and that a plain and adequate remedy exists in behalf of the respondents, either by action of replevin, or by action to recover damages for said timber, in the event of plaintiffs establishing title to said mining claim. The court, however, did not consider these remedies adequate and granted the injunction. The court said: "We are not in sympathy with the idea that a trespasser, notwithstanding that he may be solvent, may go upon the lands of another and cut timber thereon, and that the owner of such lands is not, under our statute, entitled to a temporary injunction to restrain the removal of said timber until the owner can establish his title to said land in an action commenced for that purpose. The inconvenience to the defendant from a temporary injunction will be less than would be the injury to plaintiff should plaintiff succeed

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in establishing his right." The trend of modern decisions and authorities upholds the court in its decision of this case. Davis v. Reed, 14 Md. 152; Fulton v. Harman, 44 Md. 253; Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371; Smith v. Rock, 59 Vt. 232, 9 Atl. Rep. 551; De La Croix v. Villere, 11 La. Ann. 39; Lanier v. Alison (C. C.), 31 Fed. Rep. 100; U. S. v. Guglard (C. C.), 79 Fed. Rep. 23; Smith's Appeal, 69 Pa. 474; King v. Campbell (C. C.), 85 Fed. Rep. 814; Disbrow v. Harwood Co. (Sup.), 59 N. Y. Supp. 378; King v. Stuart (C. C.), 84 Fed. Rep. 546; Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580; Irwin v. Lewis, 50 Miss. 368; U. S. v. Parrott, Morr. Min. Rep. 335; Boyce's Exrs. v. Grundy, 3 Pet. 210, 7 L. Ed. 655. In Watson v. Sutherland, *supra*, the court said: "If the remedy at law is sufficient, equity will not relieve, but it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

MINING CORPORATIONS—VALUE OF PROPERTY TAKEN IN PAYMENT OF CAPITAL STOCK.—In the formation of mining corporations one of the most difficult questions is the value to be attached to the property which is turned over to the company by the promoters in payment of stock. The value is entirely problematical. It may be worth millions or it may be worth nothing. In the recent case of Richardson v. Mining Company, 65 Pac. Rep. 74, the Supreme Court of Utah held that where property is taken in payment of capital stock at the inception of a corporation, the question is, what was the fair estimated cash market value of the property at the date of incorporation, and not at the time when, through the expenditure of large sums of money, the property has been demonstrated to possess no value. Honesty and good faith are the tests, and when it appears that the value of mining property taken for capital stock was fixed honestly and in good faith, that the owner had title thereto, and that the property conveyed to the corporation and accepted by it in full payment of the capital stock, the courts will not disturb the transaction, and parties dealing with the corporation are bound to take notice of what lawfully appears in the articles of incorporation and in the statutes under which it was created. See, also, Transit Co. v. Lynch, 55 Pac. Rep. 639; Henderson v. Turngren, 35 Pac. Rep. 495; Coit v. Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. Rep. 231; Young v. Iron Co., 65 Mich. 111, 31 N. W. Rep. 814. The court in the principal case said:

"In the organization of a mining corporation where the capital stock is to be paid for in property, the statute does not require the property to be accepted at its actual cash value, but at its fair estimated cash market value. The fact that the property may have been deemed worthless when the corporation ceased to operate it is wholly immaterial. The question in such a case always is, what was the fair estimated cash market value at the time of the incorporation and not at some future time, when, through large expenditures of money or capital, the property has been demonstrated to possess no value. If this were otherwise,—if stockholders in such a corporation, the moment the property, which had, in good faith, been deemed of ample value, and taken in full payment of their stock, was, by development thereof, shown to be worthless, were to be held liable to creditors for the value of the stock,—it is apprehended that few person, especially those of limited means, would be willing to assume the risk of developing mines. Fortunately for the mining industry such is not the law. The statute contemplates no such results. Under its provisions, as we have seen, incorporators of mining corporations are permitted, in the absence of fraud, to pay for their stock in property at its estimated fair, cash market value, whatever its actual cash value may be; and this is so even where the property has no ascertainable market value. The fixing of such value is a matter of opinion. It requires the exercise of judgment; and the exercise of judgment for such purposes it is clear the legislature left to the incorporators where the corporation is organized for mining purposes. An opinion thus formed must be one honestly entertained, but it is subject to no other qualification."

CONTRACTS IN RESTRAINT OF TRADE.

The term public policy received a judicial definition in Egerton v. Brownlow,[1] where the following language was used: "By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in the administration of the law."

The administration of justice being maintained at the expense of the public, no court will render its assistance either directly, by compelling specific performance, or indirectly, by awarding damages or compensation for the breach of a transaction or contract which, in its object, operation or tendency is calculated to be prejudicial or which might have been injurious to the public welfare.

Illegality when applied to contracts is an element which wholly vitiates the contract between the immediate parties, as well as in

[1] 4 H. L. Cases, 1235.

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respect to third persons, and still it is an element with which society and the State as represented by the courts are more immediately concerned than the parties themselves. In the case of fraud the wrong is personal and may be waived by the injured party; in case of illegality the wrong is done to the public in general and the State through its judicial officers must control the penalty. In certain instances the illegality is created by statute, in all other instances by the common law independent of statute. Contracts in restraint of trade are pronounced illegal by the law, because they conflict with public policy.

The subject of this article is one involved in much doubt, which is by no means removed by the apparent conflicting decisions of eminent jurists.

Among the most ancient rules of the common law, we find it laid down that contracts which in any degree tended to restrain trade are void. In the reign of Henry V., 1415, a suit was brought on a bond given by the defendant, a dyer, not to use the art of a dyer's craft within the town where the plaintiff resided, for the space of half a year. The judge before whom the case was tried indignantly denounced the plaintiff for procuring such a contract and declared, "if the plaintiff were here he should go to prison till he paid a fine to the king."[2]

Again, in Colgate v. Bachelor, decided in the reign of Queen Elizabeth, 1601, where a bond had been given not to exercise the trade of a haberdasher within the cities of Canterbury and Rochester for the space of four years, the court said: "That the condition was against law to prohibit or restrain any to use a lawful trade at any time or any place."[3] Such contracts were held void for the reasons: First, that it was an injury to the public by being deprived of the restricted party's industry. Second, that it was an injury to the party himself by being trine and constructions on the subject has from time to time been much modified, as it was discovered that a doctrine so rigid must be injurious to the State itself; not, however, that such contracts are any more legal now than at a former poriod, but that the courts, taking into consideration the increase of population and trade, the customs and opportunities of the people, construe the term differently. During the reign of James I., in 1621, the principle was recognized that for a time certain, and place certain, and if reasonable a person might bind himself not to use his trade. This principle was sustained in the leading case of Mitchell v. Reynolds,[4] decided in 1711.

In the case of Pierce v. Fuller,[5] decided in 1811, an agreement not to run a stage between Boston nnd Providence, in opposition to plaintiff's stage, was held to be reasonable and valid. In the case of Horner v. Graves,[6] decided in 1831, the agreement was that the defendant, a dentist, would abstain from practicing within a radius of one hundred miles from York, and the court held the agreement void on account of its not being a reasonable restraint. In Hitchcock v. Coker,[7] decided in 1837, the plaintiff was a druggist, and had taken the defendant into his employ as an assistant, at an annual salary, on condition that the defendant would not at any time thenceforth exercise the trade or business of a chemist or druggist in the town of T, or within three miles thereof, and if he did so exercise such business he would pay the plaintiff five hundred dollars as liquidated damages. The defendant broke the contract by exercising the business within T, and the plaintiff brought action for *non assumpsit* and recovered. In Whitaker v. Howe,[8] decided in 1840, an agreement by a solicitor not to practice as a solicitor for the period of twenty years within the territory of Great Britain was held to be a reasonable restriction and valid. The

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therefore the restraint was no larger than was necessary for the plaintiff's protection, regard being had for the public; while it is improbable that a dentist would have patients at so great a distance as one hundred miles. By using the same line of reasoning, the decision in Whitaker v. Howe can hardly be reconciled with that of Horner v. Graves.

It will be seen that from the beginning of the eighteenth century the question depended on reasonableness[9] of the restraint, which is a question of law for the court, and the difficulty lies in determining what are and what are not reasonable restrictions in respect to the area within which the restrictions is to be confined,[10] it being frequently held that if the contract be founded upon a good consideration and otherwise reasonable, the mere fact that the restraint is indefinite in point of time does not invalidate it.[11] The question being whether or not the restraint is greater, having regard for the subject-matter of the contract, than was necessary for the protection of the legitimate interests of the party in whose favor the contract was made; if the question be decided in the affirmative the contract is of no benefit to either party, but as to the one party becomes oppressive, and, being oppressive, the law regards the restriction as unreasonable and injurious to the interests of the public.[12]

It was at one time considered that contracts that totally prohibited the pursuit of an occupation, or the carrying on of a particular business, at any place within the State were void.[13] The first case supporting this doctrine was that of Chappel v. Brockway, cited above and decided in 1839, in which the court said: "Such contracts must be injurious to the public, and no good reason can be shown why one individual should thus fetter himself or another individual should contract for the restraint The obligation is injurious to one party without being beneficial to the other." The doctrine of this case was substantially followed by that of Lawrence v. Kidder, cited above, in which Judge Selden, who wrote the opinion, says: "That contracts in restraint of trade, which embrace the entire kingdom or state, are void, is a doctrine coeval with the common law." In other words, it was deemed to be impossible for a restraint extending throughout the whole state, to be necessary for the protection of the coventor and without being of an injurious nature to the pubiic. The States of Ohio and Illinois[14] quite recently adhered to this rule. The Supreme Court of Ohio stated such to be the settled law in that state. In Lufkin Rule Co. v. Tringeli, above cited, the defendants were engaged in the city of Cleveland, in the business of manufacturing and dealing in wood, iron, steel and copper rules, gauges for measuring timber, etc., and they sold said business with the good will thereof to the plaintiff, and bound themselves not to engage in the manufacture and sale of said articles within the State of Ohio or elsewhere in the United States for the period of twenty-five years. The defendant violated the agreement and an action was brought for an injunction and damages for a breach of the contract. It was admitted that the demand for said goods was restricted chiefly to the sections of the United States where lumber is manufactured and handled, yet the plaintiff failed to recover. In the opinion the court says: "And it will be observed that the restraint at the least is to the State of Ohio, and hence the agreement is not capable of such a division as under any circumstances would make it a valid one."

This mode of applying the rule must be received with some caution as cases may and

[9] Nobles v. Bates, 7 Cowen (N. Y.), 306; Duffy v. Shockey, 11 Ind. 78; Hubbard v. Miller, 27 Mich. 15; Whitney v. Slayton, 40 Me. 224; Holmes v. Martin, 10 Ga. 503; Gill v. Ferris, 82 Mo. 156; Arnold v. Kreutzer, 67 Iowa, 214; Washburn v. Dosch, 68 Wis. 436; Herreshoff v. Boutineau, 17 R. I. 3; Long v. Towl, 42 Mo. 545.

[10] Warfield v. Booth, 33 Md. 63; Linn v. Sigsbee, 67 Ill. 75; Smith's Appeal, 113 Pa. St. 579; Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50.

[11] Kelso v. Reid, 145 Pa. St. 606; Bowser v. Bliss, 7 Blackf. (Ind.) 344; Guerand v. Dandelet, 32 Md. 561; Cook v. Johnson, 47 Conn. 175; Handforth v. Jackson, 150 Mass. 149; Martin v. Murphy, 120 Ind. 464. *Contra:* Mandeville v. Harman, 42 N. J. Eq. 185. *Contra:* Rakestraw v. Lanier, 104 Ga. 188. See Carll v. Snyder (N. J. Ch.), 26 Atl. Rep. 977.

[12] Horner v. Graves, 7 Bing. 735; Herreshoff v. Boutineau, 17 R. I. 3; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560; The Berlin Machine Co. v. Perry, 71 Wis. 495.

[13] Chappel v. Brockway, 21 Wend. (N. Y.) 157; Lawrence v. Kidder, 10 Barb. (N. Y.) 641; Taylor v. Blanchard, 13 Allen (Mass.), 370; Wright v. Ryder, 36 Cal. 342.

[14] Lufkin Rule Co. v. Tringeli, 57 Ohio St. 596; Lanzit v. Sefton Mfg. Co., 184 Ill. 326. See Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50.

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do arise, in which it may cause injustice rather than justice to condemn as invalid a contract not to carry on a particular business within a particular state. The modern agencies of commerce, coupled with the art of invention, have enlarged the field for the manufacture and sale of articles, not only in different states, but to and even beyond the limits of the United States. Business and commercial transactions have been widely extended of recent years, due largely to the modern use of the railway, steam navigation, etc., so that the nature and character of the business may be such that its supporters and patrons may be limited in number or may extend over a broad territory, and enlarged restrictions may become necessary for the reasonable protection of the contractee and even without interfering with the interests of the public.

The doctrine that a restraint co-extensive with the state is void was repudiated in the year 1873, when the Supreme Court of the United States decided that a restraint not to carry on a particular trade within a certain state was not necessarily void.[15]

The doctrine holding contracts of this character unlimited as to space unreasonaand void[16] as against the policy of the law has been repudiated in England and several of the American States,[17] which on the contrary hold that when the restraint is partial, that is, subject to some qualification, either as to the time[18] or space,[19] and if deemed necessarily reasonable for the protection of the parties the contract is valid.

The case of the Diamond Match Co. v. Roeber, *supra*, is considered one of the leading American cases on this point. The defendant was engaged in the manufacture in New York State, and sale throughout the states and territories of friction matches, and sold his manufactory trade, good will, etc.,of the business to the plaintiff, and covenanted that he would not at any time within ninety-nine years engage in such manufacture or sale, except in the service of the purchaser, within any of the states and territories, except Montana and Nevada, and the contract was held valid. Judge Andrews delivered the opinion of the court, and in the course thereof says: "The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties and even as to third persons, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. In this case the business in question extended over the entire territory of the United States. The covenant of the contract prevented the covenantor from engaging in the business which he sells so as to protect the purchaser in the fruits and benefits to be derived from the purchase. This seems to be an encouragement to productive activity and an inducement whereby a man uses his money, talents and labors in building up an enterprise.

In the case of Leslie v. Lorillard, *supra*, Judge Gray, in writing the opinion says: "Under the authority of that case (referring to Diamond Match Co. v. Roeber, *supra*,) it may be said that no contracts are void as being in general restraint of trade, when they operate simply to prevent a party from engaging or competing in the same

[15] Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64; Herreshoff v. Boutineau, 17 R. I. 3; Beal v. Chase, 31 Mich. 490; Diamond Match Co. v. Roeber, 106 N. Y. 473.

[16] Lufkin Rule Co. v. Tringell, 57 Ohio St. 596; Smith's Appeal, 113 Pa. St. 579; Sutton v. Head, 86 Ky. 156; Bishop v. Palmer, 146 Mass. 469; Wiley v. Baumgardner, 97 Ind. 66; Lanzit v. Sefton Mfg. Co., 184 Ill. 326; Trenton Potteries Co. v. Olyphant, 58 N. J. Eq. 507.

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was not unreasonable for the protection of the interested parties?

The general rule that contracts in restraint of trade are void does not in any manner apply to the sale of a patent right,[20] as this is a monopoly authorized by the government itself for the encouragement of science and ingenuity, and therefore a covenant by the vendor on the sale of a patent right, that he will not at any time aid or assist in any manner any competition against the vendor is undoubtedly valid. A secret process or art is a legal subject of property, and as the public is not in any way prejudiced by the transfer of such a process, one may sell the same and restrain himself generally from using or divulging it.[21]

As to the divisibility of contracts, the general rule is, that when you cannot sever the illegal from the legal part, the contract is altogether void,[22] but when you can sever them, whether the illegality is created by statute or the common law, you may reject the bad and retain the good.[23] The rule seems to have extended to its farthest limit in respect to contracts in restraint of trade. Whenever the covenant in restraint of trade, taken as a whole, is greater than the law will permit, yet if the covenant is worded in such a manner that that part which is a valid restraint can be separated from the whole which would render it illegal and void, the court will separate the part which imposes a valid restraint from the whole, and enforce such contracts as far as it is good.[24] This principle is well illustrated in the case of Lange v. Werke, *supra*, where L for a valuable consideration covenanted with W that he would not, for a specified time, engage in the business of manufacturing stearin or star candles in the county of Hamilton, or at any other place in the United States. He subsequently went into the business within said county of Hamilton. The court held that it was divisible as to place, that while it was void outside of Hamilton county, it was good within the county. Again, in the case of Trenton Potteries Co. v. Olyphant, *supra*, the principle is further extended, where upon the sale of a business the vendors bound themselves not to engage in the same business "within any State in the United States of America, or within the District of Columbia, except in the State of Nevada and the Territory of Arizona for the period of fifty years." The court held that the description of the places within which the contract restrained the vendor is a divisible description embracing not one whole area but several are as disjunctively described and that the contract to the extent of New Jersey was valid and enforceable. It has even been decided in Kentucky that a contract by a vendor not to re-engage in said business for the term of ten years was valid, upon the ground that the words were implied to mean in the same city, taken in connection with the subject-matter.[25]

The above article points out the meaning and application of the phrase, "contracts in restraint of trade," as ordinarily used in American jurisprudence, and is not intended to touch upon the subject of trusts.

ERNEST T. DIXON.

Indianapolis, Ind.

[20] Good v. Tucker & Carter Cordage Co., 121 N. Y. 1; Morse Twist Drill & Machine Co. v. Morse, 103 Mass. 173.

[21] Tode v. Gross, 127 N. Y. 480. See Fowle v. Park, 131 U. S. 88.

[22] Leavitt v. Palmer, 3 N. Y. 19; Hynds v. Hays, 25 Ind. 31; United States v. Bradley, 10 Pet. 343.

[23] Pickering v. Railway Co., L. R. 3 C. P. 250; Ohio v. Board of Education, 35 Ohio St. 519.

[24] Lange v. Werke, 2 Ohio St. 519; Hubbard v. Miller, 27 Mich. 15; Smith's Appeal, 113 Pa. St. 579; Peltz v. Eichele, 62 Mo. 171; Wiley v. Baumgardner, 97 Ind. 66; Dean v. Emmerson, 102 Mass. 480; Trenton Potteries Co. v. Olyphant, 58 N. J. Eq. 507. *Contra:* Moore v. Bonnet, 40 Cal. 251.

[25] Western District Warehouse Co. v. Hobson, 96 Ky. 550.

WATER AND WATER COURSES—UNLAWFUL OBSTRUCTION—NAVIGABLE STREAM.

STATE v. BAUM.

Supreme Court of North Carolina, May 23, 1901.

1 A branch of a sound, which was from 2 to 4 fee deep and from 140 to 300 yards wide, and was used by the public for passing in boats from one part of the sound to the other, which shortened the distance, and was safer in rough weather, constituted a navigable stream.

2 Where defendant drove piles 18 inches apart across the branch of a sound which was from 2 to 4 feet deep and from 140 to 300 yards wide, and was used by the public in passing in boats from one part of the sound to another, it was proper to charge that if the jury believed beyond a reasonable doubt, that the branch was a navigable stream, and that defendant willfully placed posts in it, he should be found guilty of unlawfully obstructing it.

This is a criminal action on indictment charging the defendant with unlawfully obstructing the

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navigation of a part of Currituck Sound known as "North Sand Cove." One Hampton, a witness for the state, testified as follows: "I know North Sand Cove, which begins on the eastern side of Currituck Sound, and runs through the marsh for about one-half to one mile, and runs into the sound again. It has four mouths or openings into said sound. I have measured the water at the western mouth, and at high tide it is two to two and a half feet, and at low tide about one and a half feet in depth. I measured it at middle tide, and it was two feet, and about the same at its other openings into said sound. The mouths are from 140 to 230 feet wide, but it is wider after you get in, and in some places 200 to 300 yards, and about the same depth all through as at the mouths. North Sand Cove, before it was stopped up, was used by citizens of Currituck county for passing and repassing in their boats, when boating, fishing, and hunting, from one part of the sound to the other. The distance was shortened, and in rough weather was easier to navigate. Boats from 18 to 20 feet long passed through this cove frequently, and I have carried myself on one of them, my nets, and 700 to 800 pounds of fish. It was used by all the people. The mouths were stopped by posts put across them, driven securely down, 18 inches apart, and measuring from 4 to 5 inches in diameter,—97 of these in one place and 152 in another,—and stopped all use of this water course by boats. I have heard defendant say he put them there." Another witness for the state testified to the same effect. The defendant introduced no testimony. The defendant asked the court to direct a verdict of not guilty. This the court refused and charged as follows: "That if they believed all evidence in this case, and find rom the evidence, beyond a reasonable doubt, hat the North Sand Cove is a navigable stream, and further find that the defendant obstructed the stream by willfully placing posts in same as testified, then the defendant is guilty, and you should so find." There was a verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

DOUGLAS, J. (after stating the facts): We find no error in his honor's refusal to charge, or in his charge, though the latter is somewhat meager. But, as there are no requests for special instructions, we presume that it was intended to present to us the simple question whether such a water course as is described in the uncontradicted testimony is a navigable stream. We are of opinion that it is, and that the defendant was properly convicted, if the jury believed the evidence, the credibility of which was left to them. This case is very similar to that of State v. Narrows Island Club, 100 N. Car. 477, 5 S. E. Rep. 411, except that the defendant does not claim any individual ownership in the bed of the cove. For the reasons stated in that opinion, we do not think that this action can be maintained under section 1123 of a common-law offense. That case comes nearer settling the case at the bar than any other we can find in the books, and we think is controlling. There is a vast amount of learning upon the subject of navigable waters, much of which is inconsistent, and the greater part of which is totally inapplicable to the physical conditions of our country. Under the common law of England, whence came the doctrine, the ebb and flow of the tide was the test of a navigable stream. Such streams were said to be *publici juris*, but the right of navigation might be acquired above tide water. This rule operated very well in England, whose small size and low elevation confined actual navigation, practically, to the theoretical limits fixed by law. Few, if any, of its streams are actually navigable for any practical purpose beyond the flow of the tide. For a time our courts adhered to the definition of the common law, and found little difficulty in doing so, as this country was then thinly settled, with no towns of any importance above tide water. At that time the navigability of a stream depended more upon the temper of the Indians living along its banks than upon its natural features. As, however, the settlements went inland, and important towns were built where tides were unknown, the courts soon found that it was impossible to measure rivers like the Hudson and the Mississippi by the rule of the Thames. The rule was then modified so as to include among navigable streams all rivers as far up as they afforded a free passage for seagoing vessels, and about the same time its practical application was greatly extended by the development of steam power, which enabled vessels to ascend rivers the swiftness of whose currents had hitherto been a practical bar to navigation. This rule seems to have been followed for many years in determining the limits of federal jurisdiction, but it, in turn, was found insufficient to meet the demands of industrial and commerical growth. In fact, it did not reach to the Great Lakes, which have but recently become to be regarded in their true light as inland seas having a law unto themselves. In contemplation of law they are, for all practical purposes, regarded as the "high seas." An interesting discussion of this subject is given by Chief Justice Taney in the case of The Genesee Chief, 12 How. 443, 13 L. Ed. 1058, and by Justice Bradley in Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224. See, also, U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. Rep. 109, 37 L. Ed. 1071. The admiralty rule, as now generally recognized, is thus stated in Gould, Waters (3d Ed.), § 67: "The ebb and flow of the tide does not constitute the test of the navigability of American waters, and those rivers are public and navigable in law which are navigable in fact. If, in their ordinary condition, by themselves or by uniting with other waters, they form a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water, they are 'navigable waters within the United States,' within the meaning of the acts of congress,

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in which that phrase is employed." 5 Stat. 726. The different states were, of necessity, compelled to extend this rule, to a greater or less extent, to their inland streams, and to such coastal waters as are not within federal jurisdiction. The rule now most generally adopted, and that which seems best fitted to our own domestic conditions, is that all water courses are regarded as navigable in law that are navigable in fact. That is, that the public have a right to the unobstructed navigation as a public highway, for all purposes of pleasure or profit, of all water courses, whether tidal or inland, that are in their natural condition capable of such use. The navigability of a water course is therefore largely a question of fact for the jury, and its best test is the extent to which it has been so used by the public when unrestrained. And yet it would seem that there must be some element of a public highway, and its navigation must be in some degree required by the necessity or convenience of the public. It should not depend entirely upon the personal whim of an individual. We are not prepared to say that a landowner would be liable to criminal prosecution because he happened to put a water gate across a creek up which otherwise an idle hunter might be able to pole a canoe, nor are we now dealing with any right except that of simple navigation. It appears from the evidence that the public were in the habit of passing through North Sand Cove before it was stopped up, and that by its use and distance from one part of the sound to another was shortened, and navigation rendered safer in rough weather. These conditions constitute ample evidence of a navigable stream. Gould, Waters, §§ 42, 43, 54, 57, 60, 86; Ang. Water Courses, §§ 537, 541, 550; Wood, Nuis. §§ 451-456; Wilson v. Forbes, 13 N. Car. 30; Collins v. Benbury, 25 N. Car. 277; *Id.*, 27 N. Car. 118; Fagan v. Armistead, 23 N. Car. 433; Lewis v. Keeling, 46 N. Car. 299; State v. Glen, 52 N. Car. 321; State v. Parrott, 71 N. Car. 311; Broadnax v. Baker, 94 N. Car. 675; State v. Narrows Island Club, *supra;* Hodges v. Williams, 95 N. Car. 331; McLaughin v. Manufacturing Co., 103 N. Car. 100, 9 S. E. Rep. 307; State v. Eason, 114 N. Car. 787, 19 S. E. Rep. 88, 23 L. R. A. 520; Burke Co. Com'rs v. Catawba Lumber Co., 116 N. Car. 731, 21 S. E. Rep. 941; Farmers' Co-operative Mfg. Co. v. Albemarle & R. R. Co., 117 N. Car. 579, 23 S. E. Rep. 43, 29 L. R. A. 700; Stanton v. Wimberly, 122 N. Car. 107, 29 S. E. Rep. 63. Many of these cases do not involve directly the right of navigation, as they relate principally to other matters, such as the right of entry or fishing, but they all tend more or less accurately to show the distinction in this state between navigable and non-navigable water courses. That the obstruction of a navigable stream is a public nuisance is well settled by reason and authority. State v. Dibble, 49 N. Car. 107; State v. Parrott, 71 N. Car. 311; State v. Narrows Island Club, *supra;* Wood, Nuis. §§ 478, 483, 484; Gould, Waters, §§ 91, 94, 140; Ang. Water Courses, § 554. As no error appears in the trial of the action, the judgment of the court below is affirmed. Affirmed.

NOTE.—*What are Navigable Waters.*—The subject of this annotation has been the bone of one of the most celebrated controversies that has arisen out of our English common law. The general rule of law is that navigable waters belong to the crown or state while non-navigable waters are the property of adjoining owners. But what is the test of navigability? In England only such streams were considered navigable in which the tide ebbed and flowed. Over such waters the king or the state had absolute sovereignty and the title to the bed and shores up to the high-water mark was in the king. Later a distinction began to be recognized between waters navigable in law, which referred only to tidal waters and waters navigable in fact, which referred to bodies or streams of fresh water which were actually capable of navigation, whether the tide ebbed or flowed in them or not. Over such waters the state or public were said to have on casement or right of highway by prescription. Williams v. Wilcox, 8 Ad. & El. 314, 333; Woolrych on Waters, 31. The latter authority says: "Waters flowing inland, where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers." Navigability in this last sense had reference only to the use of the stream as a public highway,—the ownership of the bed and all other proprietary rights were resident in the adjoining owners. Lord Denman expressed in this rule succinctly in Williams v. Wilcox, *supra:* "It is clear that the channels of public navigable rivers were always highways: up to the point reached by the flow of the tide the soil was in the crown, and, above that point, in the owners of the adjacent lands. In either case, the right of the subject to pass up and down was complete." This is the state of the law on this subject as it exists to-day in England. It is also the rule adopted by many of the states of the American Union, especially the smaller states of the east. Mill River Co. v. Smith, 34 Conn. 463; Norway Plains Co. v. Bradley, 52 N. H. 86; Fletcher v. Phelps, 28 Vt. 257, 262; Holden v. Manufacturing Co., 65 Me. 215; Carter v. Thurston, 58 N. H. 104; Commonwealth v. Vincent, 108 Mass. 441, 447; Welles v. Bailey, 55 Conn. 292; Veazie v. Dwinel, 50 Me. 479; Wyandauch Club v. Davis, 53 N. Y. S. 993; Cobb v. Davenport, 32 N. J. L. 369; Bickel v. Polk, 5 Harr. (Del.) 325; Goodsell v. Lawson, 42 Md. 348; Chenango Bridge Co. v. Paige, 83 N. Y. 178; Houck v. Yates, 82 Ill. 179; Kaskaskia Commons v. McClure, 167 Ill. 23; Williamson v. Haskell, 50 Mich. 364; Lake Shore R. R. Co. v. Platt, 53 Ohio St. 254; Allen v. Weber, 80 Wis. 531. It might be stated, however, that one requirement of the common-law right of navigation over inland waters, *i. e.*, that it must be required by long user or prescription, has, for obvious reasons, been disregarded in applying the same rule in this country. In all these states the owners of lands situated on the banks of navigable streams owns the river-beds, subject to the public right of navigation. In nearly all the other states of the union, where this question has been decided, the common-law rule has been rejected, and all navigable waters, *i. e.*, those waters which are navigable in fact or which do or which may afford a channel for commerce,—belong to the state in fee, the rights of riparian owners extending only to the low water

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mark. Allegheny City v. Moorehead, 80 Pa. St. 118; State v. Tomlinson, 77 N. Car. 58; *In re* Garnett, 141 U. S. 1; McMannsiv. Carmichael, 88 Iowa, 1; Benson v. Morrow, 61 Mo. 345; Webb v. Demopolis, 95 Ala. 116; Renwick v. Railroad, 49 Iowa, 664, 669; Hahn v. Dawson, 134 Mo. 581; Gilbert v. Emerson, 55 Minn. 254; St. Louis Ry. Co. v. Ramsey, 53 Ark. 314; Weise v. Iron Co., 13 Oreg. 496; Shoemaker v. Hatch, 13 Nev. 261; Wood v. Fowler, 26 Kan. 682; Buckl v. Cone, 25 Fla. 1; Lux v. Haggin, 69 Cal. 255; Heckman v. Smett, 99 Cal. 303, 32 Cent. L. J. 284, 297.

But whether we enbrace within the legal meaning of the term "navigability" the proprietary right of the government in the bed of the streams as well as the right of easement to the use of the stream as a public highway, or only the latter signification, the test of the navigability is the same in one case as in the other. The ebb and flow of the tide is absolutely no test at all of the navigability of waters in this country under any phase of the question,—the final and conclusive test in all such cases is whether the stream is navigable in fact. This last question is sometimes one of great difficulty and can most satisfactorily be answered by a review of the decided cases. The general rule on this subject was very accurately laid down by Justice Field in the case of The Daniel Ball, 10 Wall. (U. S.) 557, 563, where he states: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. Ard they are navigable in fact when they are used, cr are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584, it was held that any stream capable of being generally and commonly useful for some purpose of trade, and the transportation of property, whether by steamers, or sailing vessels, or oarboats, or rafts, is a public stream. But is also necessary that, to constitute a stream as navigable, the commerce passing over it, or capable of being transported over it, must be of an essentially valuable character. Woodman v. Pittman, 79 Me. 456; Burrows v. Gallup, 32 Conn. 493; Rowe v. Granite Bridge, 21 Pick. (Mass.) 344. Thus a pass or crevasse caused by the overflow of the Mississippi river, through which a few fishermen have occasionally gone with small vessels and through which one or two cargoes of timbers may have passed, but which has not been used for any purpose of interstate commerce, does not constitute a navigable water in the sense that a dam erected therein for the purpose of reclaiming overflow lands will constitute an obstruction in navigable waters, within the prohibition of act of congress of 1890. Leavy v. United States, 177 U. S. 621, 20 Sup. Ct. Rep. 797, reversing 92 Fed. Rep. 344. But in order to be a navigable stream it is not necessary that the waters shall be deep enough to admit the passage of boats at all portions of the stream. St. Anthony Falls Water Power Co. v. St. Paul, 168 U. S. 349, 18 Sup. Ct. Rep. 157; Walker v. Allen, 72 Ala. 456; Broadnax v. Baker, 94 N. Car. 675, 55 Am. Rep. 633; Brown v. Chadbourne, 31 Me. 925, 50 Am. Dec. 641. Thus in the first case cited it was held that the Mississippi, in the region of the falls of St. Anthony, Minn., is to be classed as a navigable river, being navigable in its natural state both above and below the falls and the adjacent rapids. So, also, waters which are capable only of floating rafts and logs are public highways, at least for that purpose. Thompson v. Androscoggin Co., 54 N. H. 545; Lewis v. Coffee Co., 77 Ala. 190, 54 Am. Rep. 55; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Town of Pierrepont v. Loveless, 72 N. Y. 211; Shaw v. Iron Co., 10 Oreg. 371, 45 Am. Rep. 146; Gatson v. Mace, 33 W. Va. 14; Weatherby v. Meiklejohn, 56 Wis. 73. In American River Water Co. v. Amsden, 6 Cal. 443, however, it was held that while a stream is navigable which can float rafts of lumber, it is not so if it only have capacity for floating logs and planks. But see *contra:* Deddrick v. Wood, 15 Pa. St. 9.

On the question whether streams periodically navigable are navigable in law is a question on which the authorities are not harmonious. The great lumber states are inclined to take the position that a stream is navigable if it is valuable as a highway of commerce at any period of the year. Holden v. Manufacturing Co., 65 Me. 216; Walker v. Allen, 72 Ala. 456; Felger v. Veazie, 3 Oreg. 457; Little Rock v. Brooks, 39 Ark. 403; Olson v. Merrill, 42 Wis. 203; Shaw v. Oswego Iron Co., 10 Oreg. 371; Thunder River Booming Co. v. Speechly, 31 Mich. 336, 18 Am Rep. 184; Brown v. Chadbourne, 31 Me. 9; Smith v. Fonda, 64 Miss. 551. The rule announced in these states is well stated by Danforth J., in Holden v. Manufacturing Co., *supra*, as follows: "In order to make a stream floatable, it is not necessary that it should be so at all seasons of the year. It is sufficient if it have that character at different periods with reasonable certainty and for such length of time as to make it profitable for that purpose." In other states in which the lumber interests are not important this rule is denied. Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Cardwell v. Sacramento Co., 79 Cal. 347. See case of Hanies v. Hall, 17 Oreg. 165, for a full and interesting discussion of the question of streams periodically floatable. In that case the court limits the doctrine of the earlier cases decided in that state.

An interesting case, very similar in its facts to the principal case, is that of Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed. Rep. 680, where it was held that a bay on an area of one of the Great Lakes, some 4,000 acres in extent, which was patented to the state as swamp land, and which, though of sufficient depth for navigation where it open into the lake, is throughout the remainder of its extent of an average depth of not more than two feet, and rarely more than three feet, and is covered through the summer with grass and rushes, is not navigable water, but merely a marsh, and subject to private ownership. So also in the very similar case of Niles v. Cedar Point Club, 85 Fed. Rep. 45.

JETSAM AND FLOTSAM.

CROSS-EXAMINATION.

There is an old saying that advice is cheap and therefore easily given. In the practice of the law this is not so, as many will testify to. In this short talk on the subject of cross examination, I will note that the little advice I propose to set out in this article was not cheap to me. On the other hand it came from years of work. It came also from blunders and disappointments. While it will not be my purpose to speak of these blunders and disappointments, I do trust what little I have to say will save some young attorney from similar troubles and annoyances. But after all, the young attorney can learn to cross examine his witnesses in one way only, and that is by practice. Yet he must be familiar with certain prin-

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ciples. He must know something of the law. Hard work and close observation will make him in the course of time proficient.

I will say at the outset that while the examination in chief of a witness is a very important matter, yet in many cases the cross-examination of that same witness by the lawyer on the other side is equally as important and sometimes much more difficult to conduct with the proper degree of skill and safety. And it is reasonable and proper to ask, why should great importance be attached to the cross-examination of witnesses in a trial, whether the case be a civil or criminal one? It is very evident from the manner in which we often see this kind of examination carried on, that the examiner himself does not realize its importance.

The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclinations and prejudices, his manner of obtaining certain knowledge of the facts to which he bears testimony, the manner in which he used those means, his powers of discernment, memory and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observiug his demeanor and of determining the just weight and value of his testimony. It is not easy for a witness who is subjected to this test to impose on a court or jury, for however artful the fabrication of falsehood may be it cannot embrace all the circumstances to which a cross-examination may be extended.

Therefore, in the object of the cross-examination, which is to break the force or destroy the effect of the testimony given by the witness upon his direct examination, or to lay the foundation for testimony of other witnesses, is readily seen its great importance.

Now, conceding the fact that cross-examination is a very important matter, it should not be forgotten that there lurks around it more or less danger, and blunders made there ofttimes are costly and well nigh irremediable. While examining a witness in chief the fewer the questions, generally speaking, put by the lawyer, the better for him and his client, with the cross-examination it is different. The examiner is obliged to ask questions and questions, and keep moving all the time. He can not hold one position long at a time. He lurks around the witness, as it were, firing a shot here and there, and then falling back as if in retreat, and when he sees the advantage takes it and that quickly. It is possible to make mistakes that may ruin the case. Sometimes a question may bring out matter overlooked by the other side, and as I have seen it often, with young inexperienced men, that instead of weakening the case of their opponent they succeed by blunders in giving to it strength, to the injury of themselves and their clients. Sometimes, for example, a witness is called upon, on his cross-examination, to explain this or that. If the matter without explanation does not injure you, it is best to pass it by unnoticed. Explanations, when you do not know your ground are dangerous, particularly, when they rebound and injure you. "It is a good rule," says a writer "never to put a question in cross-examination without giving a reason for it." "Cross-examination," said a learned judge to a junior, "does not consist in repeating in a louder tone the examination in chief."

However annoying the cross-examination of a witness may be, or however difficult it may be to get the questions answered properly, it is a safe rule to keep a good temper. When a man gets mad, he is apt to be insulting. When a lawyer loses his temper, he not only injures himself with the jury and witness, too, but he is the laughing stock of the profession, for he then places himself at the mercy of all. I am sorry to say it, but I know a certain lawyer who is so "high-strung" and easily provoked that the very first thing his brother attorneys on the other side of the case do is to get him mad, and then they usually have things all their own way.

When one begins to think of the many things of many kinds connected with the cross-examination of witnesses, he finds special rules for special cases to be rare occurrences. While the general law is ever the same, we find no two witnesses alike. Next to a sound knowledge of the law, we would say that good common sense and a knowledge of human nature are absolutely essential. I could say more along this line, for surely more can be said, and then the subject show little signs of exhaustion.—*North Carolina Law Journal.*

LUNATIC BANKRUPTS.

In spite of the fact that the law of lunacy was the subject of a consolidated enactment so recently as the year 1890, followed by an important amending statute in the year 1891, there is still no branch of the law of greater intricacy or more beset with pitfalls at every turn than that relating to lunatics. But when the element of insolvency is also introduced, the combination gives rise to complex problems both of law and practice of quite exceptional difficulty. Most of these arise out of the contest which generally ensues between the creditors of the lunatic and his committee, the former struggling to secure the lunatic's property before it gets beyond reach of their attack, the latter striving to save the lunatic's estate from his creditors in order to provide for the lunatic's maintenance.

It does not make the solution of these problems any easier when one reflects that the main question which really lies at the root of most of them, namely, whether a lunatic can commit an act of bankruptcy and be adjudicated bankrupt thereon, has been, since it was first raised a hundred years ago, and still is, an open one. Moreover, the courts do not seem particularly inclined to face it, since, though it was clearly raised in *Re* Farnham (No. 1) (1895), 2 Ch. 799, the court of appeal said it might as well remain open a little longer, and decided the case on a different ground.

There is nothing either in the lunacy or in the bankruptcy acts which gives any guidance in these matters. The only reference to lunacy in the bankruptcy acts is in section 148 of the Act of 1883, which provides that for all the purposes of that act a lunatic may act by his committee or *curator bonis*, and in section 2 (2) of the Act of 1890, which enables the court to make a special order as to public examination of a lunatic. This latter provision certainly appears to assume the possibility of a lunatic being made a bankrupt, but it is doubtful whether it does not merely refer to the particular case in which a lunatic may be made bankrupt at the instance of his committee, a point which will be noticed later on.

Viewing the matter from the practical standpoint of the creditor whose only anxiety is to get his money,

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not much light will be thrown upon the subject by discussing the abstract question of whether a lunatic can be made bankrupt. It is very rare to find a creditor who wishes to indulge in litigation which can only end in the house of lords. The practical question of creditors is how far the lunacy overrides their common-law rights and the right which the bankruptcy law gives them to get control of the debtor's property and have it applied in discharge of the debtor's obligations. In considering this question, it is very material to remember that there is a well-established principle upon which the court of lunacy always deals with the claims of the lunatic's creditors, in cases where the estate is insolvent. The moment the lunatic's property becomes subject to the jurisdiction of the lunacy court, the primary consideration is, what is for the benefit of the lunatic? The lunatic's benefit comes first, the creditor's interest second, and unless there is sufficient to provide ample maintenance for the lunatic, the creditor's claims will not be paid. This principle has been established by a long series of decisions, and was clearly enunciated in *Re* Plenderleith, 42 W. R. 224, and more recently still by Rigby, L. J., in *Re* R. S. A. (1901), 1 Q. B. 35. But the lunacy only affects the creditor through its control over the debtor's property. The creditor may still pursue all his ordinary remedies against the lunatic, if he pleases, suing him to judgment, issuing execution and getting charging orders; but if he has to have recourse in pursuing his remedies to the lunacy jurisdiction, his claim will be controlled by the principle before stated.

This, then, is how the matter stands when there is insolvency but no bankruptcy. In such cases the position of the creditor is a difficult one. There are three courses open to him. He can come in under the lunacy and carry in and prove his claim on the inquiry as to debts of the lunatic which is generally instituted by the master. Rules in Lunacy, 1892, r. 33. If he has reason to think that the whole of the debtor's property is in the control of the lunacy court, this is probably his best and cheapest course. On the other hand, he may pursue his ordinary remedy, sue the debtor to judgment, and obtain charging orders on his property. It is possible that such a charging order may be made effectual, in spite of the lunacy, if the creditor can put it in force against the property of the debtor not yet reduced into the control of the lunacy court; for the only limitation to a judgment creditor's right to reach the property of the lunatic by ordinary writs of the execution is the condition that in doing so he must not interfere with the possession of an officer of the court of lunacy. So in *Re* Brown, 48 W. R. 461, a creditor successfully enforced a charging order against a fund paid into court in an administration action, and the balance only of the fund was transferred to the lunacy. Moreover, charging orders upon the lunatic's property, even if it be under the control of the lunacy, may eventually become effectual if the lunatic dies or recovers. *Re* Plenderleith, *supra*.

When lunacy is complicated not merely by insolvency but by bankruptcy, it is important to consider separately the cases in which bankruptcy precedes lunacy, and those in which, assuming for the moment these can arise, lunacy precedes bankruptcy. When a man is make a bankrupt, and lunacy supervenes, the position of the creditor is a much stronger one than in the converse one; for upon bankruptcy his estate vests in his trustee, and if the trustee is diligent, and gets it into his control before the lunacy, there will be nothing left for the lunatic, since the court in lunacy has no jurisdiction to interfere with the bankruptcy court, and will not attempt to take the property out of the hands of the creditors for the benefit of the lunatic. *Re* Farnham (No. 2), 44 W. R. 836.

Now, as regards the cases in which bankruptcy follows lunacy, there is at least one case in which this may, without doubt, occur, and that is where the committee of a lunatic proceeds, with the leave of the court, to wind up the lunatic's affairs in bankruptcy. This he has undoubtedly power to do, if it is for the benefit of the lunatic. *Re* James, 12 Q. B. D. 332; *Re* Aytoun, 36 L. J. Newspaper, 407. But this is a power specially conferred under the lunacy jurisdiction, and every step in the proceedings must be controlled by the lunacy court. If, for instance, after filing, with leave a declaration of inability to pay debts, the committee desires to consent to an adjudication upon a petition presented by a creditor, he ought not to do so without the leave of the court. *Re* Aytoun.

Now it is possible that the interests of the lunatic and of the creditors may coincide, and that bankruptcy may be desirable, as in *Re* Aytoun, where it was judged for the benefit of the lunatic to be made a bankrupt in order that his property might be realized, when it was anticipated that all his creditors would be paid and a surplus provided for his maintenance. If the creditor is lucky enough to find a committee willing to take this view, he may safely proceed by way or bankruptcy. This was done in *Re* Lee, 23 Ch. D. 326, where the committee had unsuccessfully carried on the lunatic's business, and a creditor put in an execution and then filed a bankruptcy petition, whereupon the committee applied to the court in lunacy for leave to consent to adjudication. This was granted.

But it is difficult to see, even assuming that a lunatic can commit an act of bankruptcy and be adjudicated bankrupt, what a creditor can gain by a bankruptcy where there is already a lunacy under the lunacy jurisdiction. If the committee has done his duty he will have reduced all the lunatic's property into his own control, and there will be nothing for administration by the trustee in bankruptcy, unless he can manage to grasp something which falls in afterwards. In fact, except in those cases in which a lunatic is made bankrupt at the instance of his committee, bankruptcy is adverse to, and inconsistent with, the administration of the estate in lunacy, and this is really the strongest argument against the possibility of making a lunatic bankrupt. Of course, different considerations arise where there is no official lunacy, and neither the lunatic nor his property are under control of the lunacy jurisdiction. Such cases will not very likely often occur, but in a case of this kind, it certainly seems that a creditor might successfully and profitably proceed in bankruptcy. There might be some difficulty about proving an act of bankruptcy; but an act of bankruptcy committed in a lucid interval, even if involving intention, would certainly be available, and it is difficult to see why an act of bankruptcy *in invitum*, such an execution, should not be equally so, even if there is no lucid interval.

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BOOK REVIEWS.

BATES ON FEDERAL EQUITY PROCEDURE.

This work is one of the most important additions to legal literature that has yet been published. It will be hailed with delight by the active practitioner who has anything to do with the federal courts. Its scope is wide and exhaustive. It is a complete treatise on the procedure in suits in equity in the circuit courts of the United States including appeals and appellate procedure, with appendixes containing the constitution of the United States annotated, federal judiciary acts, court rules, equity forms and English orders in chancery, by C. L. Bates of the San Antonio bar. There has certainly been a demand for such a treatise. During the last twenty-five years, the really great and important property litigation in this country has been chiefly in suits in equity in the federal courts, and such litigation is likely to increase with the progress of the country. The procedure in such suits is the same, in all the states of the union; and the busy practitioner has often felt the need of a work furnishing readily a complete and comprehensive statement of the rules of procedure in suits in federal equity. The aim of the author has been, as he states in his preface, "to state fully the procedure in the prosecution and defense of a suit in federal equity, with all its incidents and minor details from the preparation and filing of the bill to and including the final decree, and appeal and appellate procedure." That the author has most satisfactorily carried out his aim and purpose in writing the book a glance through its pages will be most convincing. The style is clear and the statements of the law are made with the positiveness of one who knows what he is talking about, and the citation of authorities evidences the greatest accuracy and the most careful discrimination. It is a book that can be relied upon. We are, therefore, very strong in our opinions that this treatise will ultimately become the highest authority on federal equity procedure. Printed in two volumes of 1,402 pages and bound in extra quality of law sheep. Published by T. H. Flood & Co., Chicago, Ill.

HUFFCUTT ON AGENCY.

A second edition, revised and enlarged, of this splendid little work on Agency has just issued from the press. Its purpose, as the author succinctly observes, "is to set forth the manner in which obligations are incurred or rights acquired through the acts of agents and servants." Book I. deals with the law of principal and agent; Book II. with the law of master and servant. Book II. appears for the first time in this edition and Book I. has been largely rewritten: the whole, therefore, constituting practically a new work. One volume, 456 pages, bound in the best quality of law sheep. Published by Little, Brown & Co., Boston, Mass.

HUMORS OF THE LAW.

"THAT NICE OLD JUDGE."

You may sing of the judge, common pleas judge,
Or any judge that you please;
I go for the judge, the nice old judge,
That knowingly takes his ease,
And looking wise from behind the bench,
At the rate of six thousand a year,
Cares not a hair in his sound old head
Who goes to the front or rear.

Not his is the bone they are fighting for,
And why should the judge sail in,
With nothing to gain, but a chance, perhaps,
To lose in strife and chagrin.
There may be a few, perhaps, who fail
To see it quite in this light;
But when the fur flies, I'd rather be
The outside judge in the fight.
I know there are some—of judges I speak—
That think it is quiet the thing
To take the part of one in the fight,
And hop right into the ring;
But I care not a hair what any may say,
In regard to the wrong or the right,
My judgment goes, as well as my rhyme,
For the judge that keeps out of the fight.

—*Legal Intelligencer.*

"Your letters to me," said his affianced bride one day, "are so cold and formal."

"Surely, my dear," exclaimed the lawyer, stung by her reproach, "when they are published after my death they will be found to be models of composition, breathing the most exalted sentiments and couched in absolutely correct English."

In a little western town, the other day, says the *Argonaut*, the most popular citizen soundly whipped a tough character, and to vindicate the majesty of the law the offender was brought up for trial. The jury was out about two minutes. "Well," said the judge, "what have the jury to say?" "May it please the court," responded the foreman, "we the jury find that the prisoner is not guilty of hittin' with intent to kill, but simply to paralyze; and he done it." The verdict was received with applause, and the prisoner received an ovation.

In a suit recently brought in the Kansas district court at Marion for the recovery of the price of a cork leg, the defendant was released from payment on showing that the leg was a misfit. On the testimony of the defendant that the leg made him walk like a "step-and-go-fetch it," the jury also awarded him $5 damages.

FEMININE BARRISTERS.

"That's very well done," he said when the sweet young thing who had interested herself in the law submitted the paper to him, "but you have overlooked one thing."

"What's that?" she asked.

"You do not say at the conclusion, 'And further affiant saith not.'"

"But I stop, don't I?" she demanded.

"Oh, yes."

"And I put the signature in?"

"Yes."

"Well, I should think any one of sense could see that when affiant quits talking he has stopped."

"Yes, but—"

"If a person said 'That's the end' every time he finished a statement in conversation people would think he was a fool, wouldn't they?"

"Of course, but you see—"

"When you close a letter you don't have to say 'Here's the finish,' do you?"

"No; but in law it's different."

"Well, if the judges are so stupid they've got to be told when the end is reached, I'll just write 'Finis.' That's prettier, anyway."

"But it won't do."

"Then you can keep your old law books," she exclaimed petulantly. "And you can keep your old

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judges. Any one who can't see when the writing stops and draw his own conclusions from that hasn't sense enough to do business with a reasoning being and I won't waste any time over him. So there, now!"

A solicitor's clerk appeared before a judge at chambers upon a simple motion. He was told that he would have no difficulty. The judge asked to see the papers, and, while looking through them, suddenly and to the consternation of the clerk, said, "Where's the venue?" "I forgot it my lord; it's at the office." "Are you sure?" (There was a twinkle in the judge's eye.) "Oh! yes, my lord, I remember seeing it on the table just before I left!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ABATEMENT AND REVIVAL — Action to Use of Another.—An action brought in the name of another held not to be defeated by the action pending for another use plaintiff.—FOREMAN SHOE CO. v. F. M. LEWIS & CO., Ill., 60 N. E. Rep. 971.

2. ABATEMENT AND REVIVAL — Amendable Defects.—Where errors and defects are amendable, the process will not be abated, but the case will be remanded for proper amendment.—FLEMING v. COURTENAY, Me., 49 Atl. Rep. 611.

3. ABATEMENT AND REVIVAL — Procedure.—Where *scire facias* to revive cause is returnable to one term, revival may be entered at a subsequent term.—LAIDLEY v. JASPER, W. Va., 39 S. E. Rep. 169.

4. ADVERSE POSSESSION—Computing Period—War.—In computing statutory period necessary to hold adverse possession, the period of war between the states must be excluded.—ANNISTON CITY LAND CO. v. EDMONDSON, Ala., 31 South. Rep. 61.

5. ADVERSE POSSESSION—Copy of Deed—Evidence.—A copy of the record of a deed containing the name of no grantee is not admissible in evidence to establish color of title.—NELSON v. COOPER, U. S. C. C. of App., Second Circuit, 108 Fed. Rep. 919.

6. ADVERSE POSSESSION—Evidence of Ownership.—Witness cannot state that plaintiff exercised such acts of ownership over the land as the nature of the land admitted.—ANNISTON CITY LAND CO. v. EDMONDSON, Ala., 30 South. Rep. 61.

7. ADVERSE POSSESSION — Evidence of Value.—In ejectment, where both parties rely on adverse possession, evidence of value held immaterial.—ANNISTON CITY LAND CO. v. EDMONDSON, Ala., 30 South. Rep. 61.

8. ADVERSE POSSESSION — Homestead Occupation.—One entering land under homestead laws across which a railroad company had built its right of way under a land grant may acquire title to part of such a way by adverse possession.—NORTHERN PAC. RY. CO. v. TOWNSEND, Minn., 96 N. W. Rep. 1007.

9. ADVERSE POSSESSION — Part of Land Occupied.—If defendant has adverse possession of any portion of the lands during the whole statutory period, he has adverse possession of all.—ANNISTON CITY LAND CO. v. EDMONDSON, Ala., 30 South. Rep. 61.

10. ALIENS — Immigration Officers—Courts.—Courts have jurisdiction to determine citizenship of alleged alien, notwithstanding its adverse determination by the immigration officers.—IN RE DI SIMONE, U. S. D. C., E. D. (La.), 108 Fed. Rep. 942.

11. ALTERATION OF INSTRUMENTS — Discharge of Maker.—Maker of a note held discharged by a material alteration avoiding the note.—HOFFMAN v. PLANTERS' NAT. BANK, Va., 39 S. E. Rep. 184.

12. APPEAL AND ERROR — Admissibility of Evidence.—The admissibility of evidence cannot be determined, where the record contains merely the questions asked, but not the answers.—BRASHEARS v. ORME, Md., 40 Atl. Rep. 620.

13. APPEAL AND ERROR—Bill of Exceptions.—Where evidence on application for the appointment of a receiver is not a part of the record by a bill of exceptions, no question is presented for review.—EUREKA LUMBER CO. v. BUFF & BLUE OOLITIC STONE CO., Ind., 60 N. E. Rep. 1067.

14. APPEAL AND ERROR — Competency of Witness.—Where no exception was made to competency of witness before he was examined, the question cannot be raised on appeal.—BAKER v. SAFE-DEPOSIT & TRUST CO., Md., 49 Atl. Rep. 628.

15. APPEAL AND ERROR—Death of Defendant.—Death of sole defendant in error after filing in office of clerk of supreme court does not cause writ to abate.—MCGOWAN v. BROOKS, Ga., 39 S. E. Rep. 112.

16. APPEAL AND ERROR — Denial of Mandamus—Not Reviewable.—Order of appellate division, affirming order denying *mandamus*, held not reviewable by court of appeals.—PEOPLE v. COLER, N. Y., 60 N. E. Rep. 1046.

17. APPEAL AND ERROR—Dissolution of Injunction.—A recital in the record of an appeal from an order partially dissolving an injunction held conclusive that the proceeding for dissolution was in the proper manner.—WENZEL v. MILBURY, Md., 49 Atl. Rep. 618.

18. APPEAL AND ERROR—Evidence—Objection.—No advantage can be taken of a ruling on the sustaining objection to evidence on the ground that objection was not sufficiently specific.—AMERICAN MORTG. CO. v. MOUSE RIVER LIVE-STOCK CO., N. Dak., 96 N. W. Rep. 965.

19. APPEAL AND ERROR — Excluding Evidence.—Where evidence is excluded, it must appear that it would have been relevant to make its rejection a ground of error.—MAXWELL v. KENT, W. Va., 39 S. E. Rep. 174.

20. APPEAL AND ERROR—Final Order.—Order denying application of attorneys to determine amount of their lien, held a final order in the special proceeding, and appealable to the court of appeals.—IN RE KING, N. Y., 60 N. E. Rep. 1054.

21. APPEAL AND ERROR — Incomplete Record.—Where record on appeal is incomplete, a statement in the transcript, explaining the condition of the record,

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is no part thereof.—HORNBROOK v. HETZEL, Ind., 60 N. E. Rep. 965.

22. APPEAL AND ERROR—Instruction—Non-Prejudicial.—Instruction in ejectment, though objectionable, not ground for reversal, where plaintiff could not have been prejudiced.—MAXWELL v. KENT, W. Va., 39 S. E. Rep. 174.

23. APPEAL AND ERROR — Justice—Jurisdiction.—An appeal does not lie from justice where amount was $1, though the constitutionality of a statute was involved.—COLLIERY ENGINEER CO. v. AMERICAN CAR & FOUNDRY CO., Ind., 60 N. E. Rep. 941.

24. APPEAL AND ERROR—Parties — Deceased Defendant.—Supreme court, having acquired jurisdiction of writ of error, may compel legal representative of deceased defendant to be made a party.—MCGOWAN v. BROOKS, Ga., 39 S. E. Rep. 112.

25. APPEAL AND ERROR—Question of Costs.—A decree will not be reversed on a question of costs, where it is affirmed in respect to the merits.—SPROULL v. PRATT & WHITNEY CO., U. S. C. C. of App., Second Circuit, 108 Fed. Rep. 968.

26. APPEAL AND ERROR — Reason of Decision.—A decree need not contain any reason for the decision, and will be affirmed, though a wrong reason be given therein.—BALLARD v. CHEWNING, W. Va., 39 S. E. Rep. 170.

27. APPEAL AND ERROR—Record — Motions.—Order separating the trial of an action will not be reviewed, where the motion for the separation was not brought into the record.—SKELLEY v. VAIL, Ind., 60 N. E. Rep. 961.

28. APPEAL AND ERROR — Record — Presumption.—Where clerk certifies that the paper copied as the amended complaint is such, the court will so presume.—INDIANAPOLIS UNION RY. CO. v. HOULIHAN, Ind., 60 N. E. Rep. 943.

29. APPEAL AND ERROR—Rejection of Plea.—Error in rejecting a plea tendered by defendant is harmless, where the evidence in support thereof is admitted under the general issue.—SOUTHERN RY. CO. v. WILCOX, Va., 39 S. E. Rep. 144.

30. APPEAL AND ERROR — Res Judicata.—Where the parties and subject-matter are the same, and supreme court on prior appeal disposed of the whole matter, it is *res judicata*.—MCALLISTER v. HAMILTON, S. Car., 39 S. E. Rep. 182.

31. APPEALS—Part of Order Appealed From.—Unless there are special reasons therefor, a part of an order appealed from will not be taken up for consideration on a motion in advance of the regular hearing.—UNITED STATES v. LEE TEN TAI, U. S. C. C. of App., Second Circuit, 108 Fed. Rep. 960.

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33. BANKRUPTCY — Judgment—Prior to Bankruptcy.—Sale of property set apart as exempt on judgment on debt created after bankruptcy, held not to devest the lien of a judgment prior to bankruptcy, not proven.—DOZIER v. MCWHORTER, Ga., 39 S. E. Rep. 106.

34. BANKRUPTCY—Petition to Recover Preferences.—Where a petition in involuntary bankruptcy alleges a transfer of property with intent to hinder and delay creditors, the solvency of the alleged bankrupt is a matter of defense, and the petitioners need not prove insolvency.—IN RE WEST, U. S. C. C. of App., Second Circuit, 108 Fed. Rep. 940.

35. BANKRUPTCY — Preferences — Judgment.—Judgment obtained against insolvent within four months of bankruptcy is void.—SEVERIN v. ROBINSON, Ind., 60 N. E. Rep. 966.

36. BILLS AND NOTES—Proceeds—Fraudulent Application.—In an action against indorsers on a note, held proper to instruct that, if note had been fraudulently applied with plaintiff's knowledge, it could not recover.—GREEVER v. BANK OF GRAHAM, Va., 39 S. E. Rep. 159.

37. BLACKMAIL—Indictment.—Indictment for blackmailing must allege the ownership of the property attempted to be extorted.—GREEN v. STATE, Ind., 60 N. E. Rep. 941.

38. BONDS—Misrepresentations.—Obligor of bonds, having pleaded that he gave them for land by misrepresentations as to value must prove value at time of purchase.—SOUTH ROANOKE LAND CO. v. ROBERTS, Va., 39 S. E. Rep. 133.

39. BUILDING AND LOAN ASSOCIATIONS—Usury.—A contract requiring the borrower to pay a monthly premium and monthly dues, the sum of which exceeded the legal rate of interest, is usurious.—SHANNON v. GEORGIA STATE BUILDING & LOAN ASSN., Miss., 30 South. Rep. 51.

40. CARRIERS—Goods—Delivery.—Where a contract of shipment between a carrier and shipper does not specify the time the goods are to be delivered to the carrier, the shipper has a reasonable time for their delivery.—SOUTHERN RY. CO. v. WILCOX, Va., 39 S. E. Rep. 144.

41. CARRIERS — Interstate Shipment — Illegal.— The illegality of a contract for the interstate shipment of freight held to prevent the recovery by the shipper for a breach thereof.—SOUTHERN RY. CO. v. WILCOX, Va., 39 S. E. Rep. 144.

42. CHARITIES—Discretion of Trustees.—Trustees of a devise to charitable uses held not vested by testator's will with a discretion as to expending the income of the fund.—HAYNES v. CARR, N. H., 49 Atl. Rep. 688.

43. CHARITIES—Jurisdiction of Equity.—Courts of equity held to have original and inherent jurisdiction over charities, independent of St. 43 Eliz. ch. 4, respecting charitable uses.—HAYNES v. CARR, N. H., 49 Atl. Rep. 688.

44. CHARITIES — Trust — Indefiniteness.—A trust for charitable uses held not invalid because the trustees were given powers to devote the income to educational purposes.—HAYNES v. CARR, N. H., 49 Atl. Rep. 688.

45. CHATTEL MORTGAGES—Filing—Time.—A chattel mortgage filed on the day of delivery was filed within 10 days after execution, as required by statute.—HORNBROOK v. HETZEL, Ind., 60 N. E. Rep. 965.

46. CLERKS OF COURTS—Duties—Census.—The rights and duties of a clerk of the circuit court are not affected for the balance of his term by reason of a census being taken, whereby the population of the county is raised above 15,000.—WATKINS v. VENABLE, Va., 39 S. E. Rep. 147.

47. COLLISIONS—Anchorage Ground.—A steamship, anchoring in a harbor outside the anchoring ground, held liable for a collision in a fog in the nighttime.—THE A. P. SKIDMORE, U. S. D. C., S. D. (N. Y.), 108 Fed. Rep. 972.

48. COLLISION—Lookouts.—A tug entering a harbor in a thick fog in the nighttime held negligent for failure to have lookouts on the bows of its bow.—THE A. P. SKIDMORE, U. S. D. C., S. D. (N. Y.), 108 Fed. Rep. 972.

49. CONSTITUTIONAL LAW—Employer's Liability Act.—Employer's liability act, making railroad companies responsible for injuries to employees, the same as to strangers, is constitutional.—INDIANAPOLIS UNION RY. CO. v. HOULIHAN, Ind., 60 N. E. Rep. 943.

50. CORPORATION — Foreign — Service of Process.—Jurisdiction is not acquired over a corporation, organized under the laws of another state, by service of process in the third state upon an officer of the corporation there found.—ELLSWORTH TRUST CO. v. PARRAMORE, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 906.

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51. CORPORATIONS—Minority Stockholders.—A bill by a minority stockholder, to set aside a conveyance made in pursuance of an unlawful conspiracy in restraint of trade, and also praying damages under the anti-trust act, held multifarious.—METCALF v. AMERICAN SCHOOL-FURNITURE CO., U. S. C. C., W. D. (N. Y.), 106 Fed. Rep. 909.

52. COSTS—Printing—Briefs.—Unless provided for by special rule, the cost of printing briefs on appeal will not be allowed.—KURSHEEDT MFG. CO. v. NADAY, U. S. C. C. of App., Second Circuit, 106 Fed. Rep. 918.

53. COSTS—Retaxing Costs.—Where cause in city court, taken to supreme court is afterwards reversed by the court of errorrs, the application for the retaxing of the costs in the supreme court must be made in the latter court.—STOKES v. SCHLACTER, N. J., 49 Atl. Rep. 588.

54. COUNTIES — County Clerk—Compensation.—The county clerk is entitled to such compensation for incidental duties required in the sale of land for delinquent taxes as is allowed by Code, ch. 172.—STONE v. CALDWELL, Va., 39 S. E. Rep. 121.

55. COUNTIES—Expert Accountants.—When necessity exists, county commissioners may employ expert accountants to examine the county's book and collect sums found due.—GARRIGUS v. BOARD OF COM'RS OF HOWARD COUNTY, Ind., 60 N. E. Rep. 948.

56. COURTS—City Courts.—The general assembly, without regard to population of a city, may establish a city court therein, and prescribe for writs of error to the supreme court.—HEARD v. STATE, Ga., 39 S. E. Rep. 118.

57. CRIMINAL EVIDENCE—"Reasonable Doubt."—An instruction defining reasonable doubt in a homicide case as only requiring the jury to believe conscientiously, that this testimony, establishes the guilt of defendant, is erroneous.—ELLERBEE v. STATE, Miss. 30 South. Rep. 57.

58. CRIMINAL LAW—Bills of Exception—Time of Filing.—Time beyond the term to file bills of exception cannot be granted in criminal cases, except at or before the rendition of judgment.—STATE v. KIRK, Ind., 60 N. E. Rep. 989.

59. CRIMINAL LAW—Self-Defense.—An instruction on self-defense in a homicide case, which is based on an erroneous assumption that the killing was on sight, is erroneous.—ELBERLEE v. STATE, Miss., 30 South. Rep. 57.

60. CRIMINAL LAW—Trial—Sentence.—Where defendant pleads guilty, he cannot, on appeal, first object that his sentence was beyond the limits of the law.—TOWN COUNCIL OF CROSSHILL v. OWENS, S. Car., 39 S. E. Rep. 184.

61. DAMAGES—Evidence to Reduce Damages.—Where the sole defense tendered by a plea in abatement was not sustained, defendant held entitled to participate only to reduce the recovery.—FOREMAN SHOE CO. v. F. M. LEWIS, Ill., 60 N. E. Rep. 971.

62. DAMAGES—No Pecuniary Damages.—Where there was no evidence of pecuniary loss, it was proper to direct a verdict for defendant.—PAULTON v. KEITH, R. I., Atl. Rep. 635.

63. DAMAGES—Telephone Service.—Where plaintiffs were to have telephone service for organizing the company, held proper for them to show on breach what the value of the service would have been to them.—ZABEL v. NEW STATE TEL. CO., Mich., 86 N. W. Rep. 948.

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66. DIVORCE—Adulters—Connivance.—Evidence held insufficient to show connivance or acquiescence of the husband, precluding divorce for wife's adultery.—BROWN v. BROWN, N. J. 49, Atl. Rep. 589.

67. DRAINS—Mandamus.—*Mandamus* will not lie to compel township trustees to remove bridges obstructing the drainage of a water course.—STATE v. BOARD OF COM'RS OF HENRY COUNTY, Ind., 60 N. E. Rep. 989.

68. EJECTMENT—Deed—Evidence.—A deed conveying certain described land is not evidence that grantor had any title.—ANNISON CITY LAND CO. v. EDMONDSON, Ala., 30 South. Rep. 61.

69. ELECTIONS—Contest—Allegation of Fraud.—An allegation that certain votes were cast by persons not qualified voters not demurrable, because not alleging fraud on the part of the election officers.—KELLY v. STATE, Miss. 49 South. Rep. 49.

70. ELECTIONS—Contest—Marking Ballot.—The use of two crosses, instead of one, to designate the name of the person voted for, does not invalidate the ballot.—KELLY v. STATE, Miss., 30 South. Rep. 49.

71. ELECTION OF REMEDIES—Law or Equity.—Where plaintiff is prosecuting an action at law and a suit in equity, he may be compelled to elect between the two.—FLEMING v. COURTENAY, Me., 49 Atl. Rep. 614.

72. EMINENT DOMAIN—Right to Trial by Jury.—Const. art. 6, § 27, guarantying the right to jury trial, has no application to condemnation proceeding.—WIXOM v. BIXBY, Mich., 86 N. W. Rep. 1001.

73. EMINENT DOMAIN—Telegraph Poles—Damages.—A landowner may recover damages for the additional burden upon the fee caused by the erection of telegraph poles upon a public highway, notwithstanding it is a post road of the United States.—KESTER v. WESTERN UNION TEL. CO., U. S. C. C., W. D. (N. Y.), 106 Fed. Rep. 926.

74. EMINENT DOMAIN—Verdict—Impeachment.—Evidence of a member of a jury to determine damages for land taken for public purposes, is not admissible to impeach the verdict.—WIXOM v. BIXBY, Mich., 86 N. W. Rep. 1001.

75. EQUITY—Action—Dismissal.—Equity can dismiss an action without prejudice, so that the judgment will not operate as a bar.—PRONDZINSKI v. GARBUT, N. D., 86 M. W. Rep. 969.

76. EQUITY—Answer.—Under Code, § 5275, an answer may be filed at any time before final decree.—SHARITZ v. MOYERS, Va., 39 S. E. Rep. 166.

77. EQUITY—Conjectural Relief.—Equitable relief will not be granted where any conclusion in favor thereof must be conjectural.—DOYLE'S ADMR. v. BEASLEY, Va., 39 S. E. Rep. 152.

78. EQUITY—Insurance—Life Tenant.—Equity has jurisdiction to determine rights of the parties under a policy of insurance taken out by the life tenant.—CONVIS v. CITIZENS' MUT. FIRE INS. CO., Mich., 86 N. W. Rep. 994.

79. EQUITY — Jurisdiction — Adequates Remedy.—Equity will not exercise its jurisdiction, where the remedy at law is adequate, unless justice will thereby be facilitated.—ANDERSON v. EGGERS, N. J., 49 Atl. Rep. 578.

80. EQUITY—Submission to Jury.—A court of equity can submit matters of fact to jury or not, in its discretion.—BAKER v. SAFE-DEPOSIT & TRUST CO., Md., 49 Atl. Rep. 623.

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question of the validity thereof, held not to estop them from pleading *non est factum* to defeat liability.—REPASS v. RICHMOND, Va., 39 S. E. Rep. 160.

88. EVIDENCE.—For breach of warranty against breaking, it was error to admit evidence that machine did not work properly.—DOWAGIAC MFG. CO. v. CORBIT, Mich., 86 N. W. Rep. 954.

84. EVIDENCE—Bonds—Other Deputies.—Evidence is not admissible, in an action on a bond of a deputy treasurer, as to bonds given by other deputies.—REPASS v. RICHMOND, Va., 39 S. E. Rep. 160.

85. EVIDENCE—Burden of Proof—Interveners.—Filing plea by interveners denying plaintiff's allegations held not to relieve plaintiff of the burden of establishing his right to recover.—EASTMORE v. BUNKLEY, Ga., 39 S. E. Rep. 105.

86. EVIDENCE—Corroboration—Witnesses.—Evidence of statements made by a surety on a bond prior to the institution of suit thereon held not admissible to corroborate his testimony.—REPASS v. RICHMOND, Va., 39 S. E. Rep. 160.

87. EVIDENCE—Fragments of Deeds.—Fragments of a deed held admissible, in connection with parol proof that missing portion could not be found.—ANNISTON CITY LAND CO. v. EDMONDSON, Ala., 30 South. Rep. 61.

88. EVIDENCE — Interrogatories — Former Trial.—Where plaintiff dismisses action and brings another, answers to the interrogatories returned while first action is pending held admissible on trial of second action.—RADFORD v. GEORGIA & A. R. Co., Ga., 39 S. E. Rep. 108.

89. EVIDENCE—Lost Deed.—Record of a deed held inadmissible until proof that the original is not in possession or under control.—AMERICAN MORTG. CO. v. MOUSE RIVER LIVE-STOCK CO., N. D., 86 N. W. Rep. 965.

90. EVIDENCE—Res Gestæ—Correspondence.—Correspondence between the parties to a contract after its execution is not admissible in an action thereon as a part of the *res gestæ*.—SOUTHERN RY. CO. v. WILCOX, Va., 39 S. E. Rep. 144.

91. EVIDENCE—Stipulation in Court.—A stipulation of counsel, made in open court and taken down by the stenographer at a former trial, is admissible in evidence on a new trial of the same cause.—GALLAGHER v. MCBRIDE, N. J., Atl. Rep. 582.

92. EXECUTION—Enjoining—Sale by Vendee.—A bill by vendee to enjoin a sale of goods under execution against the seller, which does not show sale was prior to defendant's judgment is not sufficient.—WENZEL v. MILBURY, Md., 49 Atl. Rep. 618

93. EXECUTION—Payment to Sheriff.—Payment to sheriff on levy on account after fraudulent assignment of the account, held a discharge of the debt.—FABER v. WAGNER, N. Dak., 86 N. W. Rep. 968.

94. EXECUTORS AND ADMINISTRATORS—Care of Testatrix—Recompense.—Where complainants supported testatrix for years on her fraudulent pretense of destitution, they were entitled to be recompensed.—ANDERSON v. EGGERS, N. J., 49 Atl. Rep. 578.

95. EXECUTORS AND ADMINISTRATORS—Distribution—Enforcement.—Where title to devises did not pass to beneficiaries until executor had assented thereto, they should not recover property from him without alleging assent or refusal to assent.—LESTER v. STEPHENS, Ga., 39 S. E. Rep. 109.

96. EXECUTORS AND ADMINISTRATORS — Sale — Purchase by Administrator.—Statute declaring a purchase of land by an administrator at his own sale to be void should be construed to mean voidable only.—VEEDER v. MCKINLEY-LANNING LOAN & TRUST CO., Neb., 86 N. W. Rep. 962.

97. EXECUTORS AND ADMINISTRATORS — Sale — Purchase by Administrator.—An administrator, authorized to sell land belonging to the estate, cannot become a purchaser in his own right.—VEEDER v. MCKINNEY LANNING LOAN & TRUST CO., Neb., 86 N. W. Rep. 962.

98. FACTORS—Lien—Possession.—Factor's lien, given by Rev. Codes, § 4886, held dependent on possession of the property.—ROSENBAUM v. HAYES, N. Dak., 86 N. W. Rep. 978.

99. FACTORS—Receipt of Good—Sunday.—The fact that a factor acquired possession of sheep on Sunday will not defeat his possession or lien.—ROSENBAUM v. HAYES, N. Dak., 86 N. W. Rep. 978.

100. FEDERAL COURTS — Jurisdiction — Objection.—A federal court cannot entertain a purely equitable defense in an action in ejectment, and the matter being jurisdictional, the court is bound to take notice of it.—MULQUEEN v. SCHLICHTER JUTE CORDAGE CO., U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 961.

101. FEDERAL COURTS — Pleading — Amendment.—A federal court will permit an amendment of a complainant in an action at law before answer, introducing an additional cause of action.—OLIVER v. RAYMOND, U. S. C. C., E. D. (Wis.), 108 Fed Rep. 927.

102. FIRE INSURANCE—Forfeiture—Misstatements.—Where owner of life estate insured the premises and stated that she was the owner thereof, held not to render the policy void.—CONVIS v. CITIZENS' MUT. FIRE INS. CO., Mich., 86 N. W. Rep. 994.

103. FIRE INSURANCE—Waiver.—Written assent to a sale of the property is waived by company subsequently recognizing the policy in force.—STUART v. RELIANCE INS. CO., Mass., 60 N. E. Rep. 929.

104. FRAUDS, STATUTE OF—Agreement to Reconvey.—A parol agreement to reconvey real estate held within the statute of frauds, and not to create an express trust in favor of the grantor.—VEEDER v. MCKINLEY-LANNING LOAN & TRUST CO., Neb., 86 N. W. Rep. 962.

105. FRAUDULENT CONVEYANCE—Account—Tranfer.—Transfer of threshing account and statutory lien, while good between the parties, held void as to execution creditors of assignor.—FABER v. WAGNER, N. Dak., 86 N. W. Rep. 968.

106. FRAUDULENT CONVEYANCE — Declarations of Grantor.—Declarations of the grantor after the conveyance, in the absence of the grantee, held properly excluded.—SKELLEY v. VAIL, Ind., 60 N. E. Rep. 961.

107. FRAUDULENT CONVEYANCES—Intent.—Intent to defraud creditors must appear on face of deed, that court may declare it fraudulent *per se*.—BALLARD v. CHEWNING, W. Va., 39 S. E. Rep. 170.

108. GIFTS—Declaration of Husband.—Declarations of husband while free from debt held admissible to prove gift to the wife.—FIRST NAT. BANK v. HOLLAND, Va., 39 S. E. Rep. 126.

109. GIFTS—Husband to Wife — Dividend.—Gift by husband to wife of stock held not affected by the fact that he continued to draw the dividends.—FIRST NAT. BANK v. HOLLAND, Va., 39 S. E. Rep. 126.

110. GUARDIAN AND WARD — Personal Liability.—Where a guardian gave a personal order for goods expecting to pay for them as guardian, such fact did not relieve him of personal liability.—GALLAGHER v. MCBRIDE, N. J., 49 Atl. Rep. 582.

111. HEALTH.—Although abatement of nuisance by board of health may affect a suit pending, no ground for interference with the board of health.—STONE v. HEATH, Mass., 60 N. E. Rep. 975.

112. HIGHWAYS—Open to travel—Evidence.—Wagons passing over a highway insufficient to show that it was open to public travel.—COMPTON v. INHABITANTS OF TOWN OF REVERE, Mass., 60 N. E. Rep. 931.

113. HOMICIDE — Self-Defense. — An instruction on self-defense, that the danger must have been so urgent that there was no reasonable mode of escape, except to take the life of deceased, held erroneous.—ELLERBEE v. STATE, Miss., 30 South. Rep. 57.

114. HUSBAND AND WIFE — Conveyance to Wife.—Where real estate is conveyed by a husband to wife

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without consideration, the presumption is that the parties intended the conveyance as a gift.—VEEDER v. MCKINLEY-LANNING LOAN & TRUST CO., Neb., 86 N. W. Rep. 962.

115. HUSBAND AND WIFE—Deed to Husband.—Where a deed to a married woman and her husband recited that she was a tenant in common with the grantors, no title vested in the husband.—SHARITZ v. MOYERS, Va., 39 S. E. Rep. 166.

116. INJUNCTION — Interlocutory Decree — Appeal.—Under section 7 of Act March 3, 1891, an appeal does not lie from an interlocutory decree denying an injunction. — WESTERN ELECTRIC CO. v. WILLIAMS-ABBOTT ELECTRIC CO., U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 952.

117. INJUNCTION — Nuisance — Removal.—Failure to object to the construction of a nuisance held not to estop a party injured thereby from maintaining injunction to compel its removal.—TOWNSEND v. EPSTEIN., Md., 49 Atl. Rep. 629.

118. INJUNCTION—Motion to Dissolve.—Where a motion to dissolve an injunction is heard on a bill and answer, and the latter denies all the facts stated in the bill, the injunction will be dissolved.—WENZEL v. MILBURY, Md., 49 Atl. Rep. 618.

119. INSURANCE — Change of Beneficiary.—Assignment of a life policy by insured with consent of insurer held a sufficient change of beneficiary.—ATLANTIC MUT. LIFE INS. CO. v. GANNON, Mass., 60 N. E. Rep. 933.

120. INTOXICATING LIQUORS—Hotel—Keeping Bar.—A hotel keeper who keeps a bar in a room which cannot be seen from the street, is guilty of a misdemeanor.—PEOPLE v. WHITE, Mich., 86 N. W. Rep. 902.

121. JUDGES — Disqualification — Relationship. — A judge held not disqualified because related within the sixth degree.—EX PARTE KREBS, S. Car., 39 S. E. Rep. 161.

122. JUDGES—Special—Quo Warranto.—Under Ann. Code 1892, § 922, a special judge has no jurisdiction of a *quo warranto* proceeding in vacation.—KELLY v. STATE, Miss., 30 South. Rep. 49.

123. JUDGMENT—Limitations.—Four years' possession of land, which will devest lien of judgment under Civ. Code, § 5855, must be during a time when judgment could be lawfully enforced.—DOZIER v. MCWHORTER, Ga., 39 S. E. Rep. 106.

124. JUDGMENT—Parties not of Record—Conclusiveness. — One who promotes and controls an action through counsel is concluded by the judgment although not a party to the record.—HAUKE v. COOPER, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 922.

125. JUDGMENT—Res Judicata. — Judgment of supreme court affirming, because of equal division, judgment below, held *res judicata*. — MCALISTER v. HAMILTON, S. Car., 39 S. E. Rep. 182.

126. JURY.—Taking Case from Jury.—A defendant, who, by conceding a prayer, admits that the case was for the jury, cannot ask to withdraw the case from the jury.—PHILADELPHIA & B. C. R. CO. v. HOLDEN, Md., 49 Atl. Rep. 625.

127. LIS PENDENS—Substitution.—Purchaser *pendente lite* is entitled, on becoming a party to the action, to be substituted to his grantor's position.—SHARITZ v. MOYERS, Va., 39 S. E. Rep. 166.

128. MANDAMUS—Connecting Error of Trial Court.—*Mandamus* will not lie to compel the correction of an error made by a court in construing the opinion of an appellate court.—JAMES v. CENTRAL TRUST CO., U. S. C. C. of App., Fourth Circuit, 108 Fed. Rep. 929.

129. MASTER AND SERVANT — Employer's Liability Act.—Railroad corporation held responsible for injuries to employees through negligence of locomotive engineers the same as to strangers.—INDIANAPOLIS UNION RY. CO. v. HOULIHAN, Ind., 60 N. E. Rep. 948.

130. MASTER AND SERVANT — Fellow-Servants. — A foreman of water supply running free on an engine, between stations, is a fellow-servant of the engineer, and cannot recover from the railroad company for an injury caused by the negligence of such engineer.—LOUISVILLE & N. R. CO. v. STUBER, U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 984.

131. MECHANICS' LIENS — Other Realty — Enforcing Lien.—In order that a contractor may enforce lien on other reality of the same owner which may be benefited, he must clearly identify it by evidence.—EASTMORE v. BUNKLEY, Ga., 39 S. E. Rep. 105.

132. MILITIA — Mandamus — Military Board. — *Mandamus* will not lie to compel military board to pay for services at militia courts-martial.—SIMON v. MILITARY BOARD, OF VIRGINIA, Va., 39 S. E. Rep. 125.

133. MUNICIPAL CORPORATIONS — Advertising City—Cost.—Charter of city held not to authorize appointment of an officer to represent the city in a general way as a resort before the people at large.—POTTS v. CITY OF CAPE MAY, N. J., 49 Atl. Rep. 584.

134. MUNICIPAL CORPORATIONS—City Councilman—Recovery from City.—Laws prohibiting councilman from contracting with city do not prevent him from recovering for injuries from defective highway.—CITY OF DANVILLE v. ROBINSON, Va., 39 S. E. Rep. 122.

135. MUNICIPAL CORPORATIONS — Contracts—Awarding.—In reviewing award of city contract, the court will only inquire into the good faith of the city.—RYAN v. CITY OF PATERSON, N. J., 49 Atl. Rep. 587.

136. MUNICIPAL CORPORATIONS — Debt-Incurring Power.—The purchase by a municipal corporation of land subject to mortgages in excess of its debt-incurring power will be enjoined.—BROWNE v. CITY OF BOSTON, Mass., 60 N. E. Rep. 934.

137. MUNICIPAL CORPORATIONS—Defective Sidewalk.—One injured by defect in sidewalk held not chargeable with notice thereof because he is a councilman.—CITY OF DANVILLE v. ROBINSON, Va., 39 S. E. Rep. 122.

138. MUNICIPAL CORPORATIONS—Extension of City.—A notice for the proposed extension of a city held to have been sufficiently published under Burns, Rev. St. 1894, § 3659.—CITY OF BLOOMINGTON v. DUNN, Ind., 60 N. E. Rep. 958.

139. MUNICIPAL CORPORATIONS—Franchise—Forfeiture.—Where money is forfeited to a city for a failure to comply with a franchise, a donation thereof to another company, completing the work of the first company, was unconstitutional.—ADAMS v. JACKSON ELEC. RY., LIGHT & POWER CO., Miss., 30 South. Rep. 58.

140. MUNICIPAL CORPORATION—Obstruction in Street.—Facts held to show that an ordinance authorizing the construction of a passageway over a street was void, because permitting the obstruction of the street for private use.—TOWNSEND v. EPSTEIN, Md., 49 Atl. Rep. 629.

141. MUNICIPAL CORPORATIONS—Paving Material.—A city may select such quality of material for its pavements as, in the honest exercise of discretion, it may require.—RYAN v. CITY OF PATERSON, N. J., 49 Atl. Rep. 587.

142. MUTUAL BENEFIT SOCIETIES—Expense Fund—Diversion.—Appointment of a member, with right to participate in a special dividend, held not void as diverting the expense fund for private gain.—MULLER v. STATE LIFE INS. CO., Ind., 60 N. E. Rep. 985.

143. NATURAL GAS—Turning off Gas.—Act of turning off a valve belonging to a person furnishing gas to consumers without consent of the owner is unlawful.—STATE v. MOORE, Ind., 60 N. E. Rep. 955.

144. NEGLIGENCE — Children—Dangerous Condition of Premises.—Acquiescence in permitting children upon premises held not to render proprietor liable for injuries caused by dangerous condition thereof.—FORMALL v. STANDARD OIL CO., Mich., 86 N. W. Rep. 946.

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145. NEGLIGENCE—Look and Listen.—Where the view of a traveler on approaching a crossing is obstructed, he is negligent in going on the track without stopping looking, and listening.—PHILADELPHIA & B. C. R. CO. v. HOLDEN, Md., 49 Atl. Rep. 625.

146. NEGLIGENCE—Look and Listen.—Failure of one riding in a closed carriage on a dark night to look and listen for an approaching electric car at a crossing held negligence.—WARREN v. BANGOR, O. & O. T. RY. CO., Me., 49 Atl. Rep. 609.

147. NEGLIGENCE—Proximate Cause.—Negligence in making an opening in the inclosure of a race track, held the proximate cause of an injury received from a runaway horse escaping through such opening.—WINDELER v. RUSH CO. FAIR ASSN., Ind., 60 N. E. Rep. 954.

148. NEW TRIAL—Remarks of Counsel.—Where remarks of counsel were harmless, the verdict will not be set aside therefor, though they were improper.—CHRISTENSEN v. LAMBERT, N. J., 49 Atl. Rep. 577.

149. NOVATION—Acceptance of Collateral.—Where a bank, having discounted notes for a receiver, accepted his certificates as collateral, held, that the acceptance by the bank of such certificates was not a novation.—STATE BANK v. DOMESTIC SEWING MACH. CO., Va., 39 S. E. Rep. 141.

150. NUISANCE — Obstructing Light.—Passageway connecting buildings on opposite sides of the street, so as to shut out the light from adjacent premises, held a nuisance.—TOWNSEND v. EPSTEIN, Md., 49 Atl. Rep. 629.

151. OFFICERS—Compensation — Enlargement.—Act of legislature, extending territory from which swamp lands might be s lected for services rendered, held not invalid, as an enlargement of compensation, under Const. § 21, art. 4.—OLDS v. COMR. OF STATE LAND OFFICE, Mich., 86 N. W. Rep. 956.

152. PARTITION—Distribution.—In partition of land conveyed to a father for his wife's benefit, held, that the lands belonged to the father and should be partitioned among all his children.—KEISTER v. KEISTER, Va., 39 S. E. Rep. 164.

153. PATENTS — Injunction—Dealing in Article.—A licensee under a patent cannot enjoin another, who is not a party to the contract, from dealing in the patented article, where the suit is not one for infringement.—JOHNSON v. SEAMAN, U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 951.

154. PATENTS—Rehearing — New Evidence.—Rehearing granted, after interlocutory decree sustaining patent, to admit newly-discovered evidence.—JOHN R. WILLIAMS CO. v. MILLER, DURRUL & PETERS MFG. CO., U. S. C. C., S. D. (N. J.), 108 Fed. Rep. 967.

155. PAUPERS—Evidence — Voting and Taxation.—Voting and taxation held of much stronger proof to prevent gaining of pauper settlement than when offered to establish one.—INHABITANTS OF MONROE v. INHABITANTS OF HAMPDEN, Me., 49 Atl. Rep. 604.

156. PUBLIC LANDS—Survey — Conclusiveness.—The survey fixing line of Lake Erie between a tract of swampy land and the lake is conclusive that such land is not a part of the lake bed.—BROWN v. PARKER, Mich., 86 N. W. Rep. 869.

157. QUIETING TITLE — Peaceable Possession.—To maintain bill to quiet title, complainant's possession must be peaceable and under claim of ownership.—BRAND v. UNITED STATES CAR CO., Ala., 30 South. Rep. 60.

158. QUIETING TITLE—Sufficient Possession.—Possession, to authorize bill to quiet title, is sufficient when the land is put to such use as it is reasonably adapted to.—BRAND v. UNITED STATES CAR CO., Ala., 30 South. Rep. 60.

159. QUIETING TITLE — Undue Influence.—Cross-bill alleging undue influence in obtaining deed to plaintiff, in an action to quiet title, held to state a cause of action.—CURTIS v. BURNS, Ind., 60 N. E. Rep. 963.

160. QUO WARRANTO — "Public Office."—The office of assessor of the city of Vicksburg is a "public office," so that a *quo warranto* proceeding to try the right to such office may be tried in vacation.—KELLY v. STATE, Miss., 30 South. Rep. 49.

161. QUO WARRANTO — Title to Office.—*Quo warranto* granted where relator claims title to office, which will not expire for more than four years, and no inconvenience to the public can result.—WATKINS v. VENABLE, Va., 39 S. E. Rep. 147.

162. QUO WARRANTO—Usurper in Office.—Code, ch. 145, does not make a writ of *quo warranto* applicable only where the incumbent is a mere usurper without color of title.—WATKINS v. VENABLE, Va., 39 S. E. Rep. 147.

163. RAILROADS—Equipment Notes—Sale.—A seller of equipment taking notes and retaining title, till full payment on the foreclosure of mortgage is entitled to retake the property, or to a first lien thereon, where mortgagee elects to retain it.—METROPOLITAN TRUST CO. v. RAILROAD EQUIPMENT CO., U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 918.

164. RAILROADS—Failure to Give Signal.—In an action for injuries received at a private crossing, failure to signal at a public crossing held not admissible as reflecting on plaintiff's contributory negligence.—PHILADELPHIA, ETC. R. CO. v. HOLDEN, Md., 49 Atl. Rep. 625.

165. REMOVAL OF CAUSES — Defendant's Privilege—Waiver.—The right of defendant to be sued only in the district where either he or the plaintiff resides is a personal privilege, which he alone can assert, and which he waives by removal.—EMPIRE MIN. CO. v. PROPELLER TOW BOAT CO. OF SAVANNAH, U. S. C. C., D. (S. Car.), 108 Fed. Rep. 900.

166. REMOVAL OF CAUSES — Federal Question—Pleading.—To authorize the removal of a cause, on the ground that it involves a federal question, such fact must appear from the plaintiff's pleading; the want cannot be supplied by a statement in the petition for removal.—MAYO v. DOCKERY, U. S. C. C., E. D. (N. Car.), 108 Fed. Rep. 897.

167. REMOVAL OF CAUSES—Suit Against United States Marshal.—A United States marshal, sued for trover in a state court by a citizen of the same state, for the seizure of property under process issued by a district court in a private suit, cannot have the cause removed into the circuit court by *certiorari*.—MAYO v. DOCKERY, U. S. C. C., E. D. (N. Car.), 108 Fed. Rep. 897.

168. SALES — Breach of Contract — Evidence.—In an action for breach of contract to purchase plaintiff's machines to supply trade, evidence as to number of another make sold by defendants held properly excluded.—DOWAGIAC MFG. CO. v. CORBIT, Mich., 86 N. W. Rep. 954.

169. SALES — Equipment Notes.—A contract under which equipment is delivered to a railroad company, which is to become the owner on payment of the last of a series of notes given the seller, although denominated a "lease," is in legal effect a sale.—METROPOLITAN TRUST CO. v. RAILROAD EQUIPMENT CO., U. S. C. C. of App., Sixth Circuit, 108 Fed. Rep. 918.

170. SALVAGE — Fraud of Master — Wrecker.—The fraudulent conduct of a master wrecker will not work a forfeiture of all right to compensation on the part of other employees.—THE GOV. AMES, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 969.

171. SCHOOLS AND SCHOOL DISTRICTS—Teacher—Contract.—A contract to teach, entered into between a school trustee and a teacher in good faith, held valid and binding.—RUMBLE v. BARKER, Ind., 60 N. E. Rep. 956.

172. SHIPPING — Breach of Charter Party.—Where breach of charter party of vessel did not take place in the state of Washington, and defending vessel was never within the jurisdiction of that state, no lien is

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created by its laws.—THE UNIVERSE, U. S. D. C., D. (Oreg.), 108 Fed. Rep. 968.

173. SHIPPING—Maritime Liens - State Authority.—A state legislature has no authority to create maritime liens.—THE UNIVERSE, U. S. D. C., D. (Oreg), 108 Fed. Rep. 968.

174. SHIPPING—Ten Days' Notice of Loss—Reasonable Regulation.—A provision of a bill of lading requiring notice of any claim for loss or injury to the goods to be given within 10 days after such loss or injury is known to the shipper is reasonable and valid.—THE ARCTIC BIRD, U. S. D. C., N. D. (Cal.), 109 Fed. Rep. 167.

175. STATES - Governor — Employment of Counsel.—The governor has no authority to employ counsel at the expense of the state to assist in drafting laws.—CAHILL V. BOARD OF STATE AUDITORS, Mich., 86 N. W. Rep. 950.

176. STATUTES—Joint Resolution.—A joint resolution held not invalid as attempting what could be accomplished only by a bill.—OLDS V. COMRS. OF STATE LAND OFFICE, Mich., 86 N. W. Rep. 956.

177. SUBROGATION—Paying Off Incumbrance.—Understanding that one paying off incumbrances shall hold the land as collateral does not subrogate such person to the lien of the incumbrancers.—MCGOWAN V. BROOKS, Ga., 39 S. E. Rep. 115.

178. TAXATION—Misdescription—Collector's Return.—Entire omission to describe land in collector's return held fatal to the validity of a tax sale.—BURGESS V. ROBINSON, Me., 49 Atl. Rep. 606.

179. TAXATION — Receipt — Misdescription.—Where plaintiff paid her taxes, and the tax collector gave her a receipt misdescribing the property, which was afterwards sold for the taxes, the tax title will be set aside.—PERRET V. BORRIES, Miss., 30 South. Rep. 60.

180. TAXATION — Tax Deed.—A judgment debtor, whose land has been sold on execution, cannot make a valid title to his wife under a tax deed, paid for with his own money.—BURGESS V. ROBINSON, Me., 49 Atl. Rep. 606.

181. TAXATION - Tax Sale—Notice.—Applicant to purchase land bought in by commonwealth for taxes held not freed from duty to give notice to trustee and beneficiary, though deed of trust is not properly indexed.—VIRGINIA BLDG. & LOAN CO. V. GLENN, Va., 39 S. E. Rep. 186.

182. TORTS—Right of Arrest.—Where an officer had entered the outer door of a theater, held proper to direct a verdict for defendant in an action for the manager's refusal to permit him to serve a writ on an actor therein.—PAULTON V. KEITH, R. I., 49 Atl. Rep. 685.

183. TRIAL—Answers—Not Responsive.—Answers of a witness not responsive to the question may be stricken out.—SKELLEY V. VAIL, Ind., 60 N. E. Rep. 961.

184. TRIAL—Directing Verdict.—Where facts, as well as their bearing upon the injury of an employee, were in issue, and the evidence was conflicting, the court properly declined to direct a verdict.—MEXICAN CENT. RY. CO. V. CONWAY, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 932.

185. TRIAL—Instructions.- Failure to instruct as to matters already covered held not error.—GREEVER V. BANK OF GRAHAM, Va., 39 S. E. Rep. 150.

186. TRIAL—Instructions—General Exceptions.—General exceptions to an instruction held insufficient to raise the question of its inconsistency with other instructions given.—MATTHEWS V. CLOUGH, N. H., 49 Atl. Rep. 637.

187. TRIAL—Objection to Evidence.—Where evidence was objected to, objection need not be repeated, where other evidence of the same kind is offered.—AMERICAN MORTG. CO. V. MOUSE RIVER LIVE-STOCK CO., N. Dak., 86 N. W. Rep. 965.

188. TRUSTS—Resulting Trust—Burden of Proof.—The burden is on one claiming a resulting trust to establish the facts.—VREDER V. MCKINLEY-LANNING LOAN & TRUST CO., Neb., 86 N. W. Rep. 982.

189. TURNPIKES AND TOLL ROADS—Contract to Make Bridge.—A railroad company, required to construct a turnpike bridge over its right of way, held not required to reconstruct bridge to enable the operation of an electric railway thereon.—WEST SHORE R. CO. V. BERGEN TURNPIKE CO., N. J., 49 Atl. Rep. 578.

190. USURY — Payment in Foreign State.—A stipulation in a loan contract that payment was to be made in a foreign state will not take the contract out of the operation of the laws of the state.—SHANNON V. GEORGIA STATE BLDG. & LOAN ASSN., Miss., 30 South. Rep. 51.

191. USURY—Renewal Note Excluding Usury.—The renewal by a new note of a usurious note, but excluding all the usury, renders the contract binding on the maker.—VERMEULE V. VERMEULE, Me., 49 Atl. Rep. 608.

192. WILLS—Advancements.—The sum shown by a testator's account with each one of his children held to be the amount to be charged against them as advancement.—BAKER V. SAFE-DEPOSIT & TRUST CO., Md., 49 Atl. Rep. 623.

193. WILLS—Bequest by Interest in Estate.—A will bequeathing testatrix's interest in the estate of her mother will not include property inherited by testatrix from her sister.—IN RE TILLINGHAST, R. I., 49 Atl. Rep. 634.

194. WILLS — Capacity — Religious Belief.—Evidence of religious belief held admissible as tending to show testator's mental incapacity to make a will.—BRASHEARS V. ORME, Md., 49 Atl. Rep. 620.

195. WILLS—Construction.—A writing, executed as required of a will, providing for payment for care during deceased's last sickness, to be collected out of his estate, held to be a will.—FERRIS V. NEVILLE, Mich., 86 N. W. Rep. 960.

196. WILLS—Construction — Intent.—Intent of testator in construing will must prevail, if consistent with rules of law.—IN RE WOODWARD'S ESTATE, Minn., 86 N. W. Rep. 1004.

197. WILLS—Contest—Charging Jury.—Arraying contestant's witnesses against those of proponent, in charging the jury as to the capacity of testatrix, held erroneous.—SPENCER V. TERRY'S ESTATE, Mich., 86 N. W. Rep. 998.

198. WILLS — Devise to Mother and Children.—Will providing that niece hold land independently of her future husband and transmit it to her children, vests a life estate in niece, with remainder in children.—SHANNON V. BONHAM, Ind., 60 N. E. Rep. 951.

199. WILLS—Power to Convey Fee.—Devise construed to give widow of testator power to convey a fee.—SAWIN V. CORMIER, Mass., 60 N. E. Rep. 986.

200. WILLS—Revocation in Void Will.—Where an instrument purporting to be a last will is adjudged void, a clause therein revoking all former wills is ineffectual.—LYON V. DADA, Mich., 86 N. W. Rep. 946.

201. WILLS—Specific Devise.—Provision in will, reciting that the testatrix may be entitled to a certain interest in the estate of a deceased person, and devising the entire interest, constitutes a specific devise.—IN RE TILLINGHAST, R. I., 49 Atl. Rep. 634.

202. WILLS—Time from which Will Speaks.—Words in will descriptive of objects of a gift refer to the death of testator, and not to date of will.—IN RE WOODWARD'S ESTATE, Minn., 86 N. W. Rep. 1004.

203. WILLS—Trustee—Beneficiary.—It is no objection to a trust created by will that the trustee is also a beneficiary thereunder.—SUMMERS V. HIGLEY, Ill., 60 N. E. Rep. 969.

204. WITNESSES — Defendant—Testimony in Own Behalf.—A conviction of defendant, compelled to testify, on his own testimony, will be set aside.—TOWN COUNCIL OF CROSSHILL V. OWENS, S. Car., 39 S. E. Rep. 184.

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Central Law Journal.

ST. LOUIS, MO., NOVEMBER 8, 1901

No tendency is more to be deprecated and condemned than that of thrusting the law into the private affairs of the citizen under the guise of the police power. In a free country nothing can be more destructive of private rights. Under the exercise of such a power the majority may crush and burden a minority as arbitrarily as any despot in Europe. The recent case of People v. Reetz, 86 N. W. Rep. 396, brings up for our purpose the constitutionality of such legislation in that phase of it relating to the examining and licensing of physicians. In that case the supreme court held, generally, that under the police power inherent in the state, the legislature may enact reasonable regulations for the examination and registration of physicians, and the practice of medicine and surgery. Counsel argued that such legislation was an interference with the inalienable right of a citizen when ill to employ anybody he chooses as his physician. The contention of counsel, as a general proposition, cannot be successfully contradicted, the statement of the court in this case to the contrary notwithstanding. For the law to tell a man what he shall eat or what he shall drink or wherewithal he shall be clothed is paternalism with a vengeance, and is often practically accomplished under many laws regulating the adulteration of food products, the sale of liquor, and tariffs on foreign goods, etc. But to compel a man lying on a bed of sickness to call in a physician of a certain school or schools recognized by the state, but in whom the sufferer has no confidence, or else to languish without treatment, is as cruel and as unwarrantable an interference with private right as to require him under more serious conditions of health to accept the comforts of religion from a minister having the state indorsement.

Medicine is not an exact science. Some people believe in allopathy, others say that nature cures when it does cure in spite of its volcanic purges; some believe in homeopathy, others call it the greatest humbug of the age; some believe in Christian Science, others condemn it as criminal and suggest that those who practice it be prosecuted for manslaughter or assault to kill as the case may be; some believe in osteopathy, others will point suggestively to their foreheads as a votary of the new school passes by. And so we might go on with all the other opathies and treatments, dry air, cold water, magnetism, etc., etc. In many of these a knowledge of even the rudiments of *materia medica* is not essential, so that no general examination could possibly let them all in. The state therefore by requiring such an examination must necessarily shut out all schools of medicine not represented in the board of examiners or covered by the examination. Nothing but the most absurd sophistry could conceal the fact that this is a most gross violation of individual liberty, smothering all investigation of disease and its remedy or alleviation, except in certain directions, and compelling a man in sickness or pain to do without treatment unless he is willing to accept that prescribed by the state. This is not the police power, it is tyranny, and the tyranny of a majority is as bad as any other tyranny.

It is a pleasure, however, to observe a tendency of late on the part of the courts to recognize the invasion of private right inherent in such legislation and, while not declaring it unconstitutional, to meet its most serious defects by constructional limitation. Thus in Evans v. State, 9 Ohio, S. & C. P., Dec. (Ohio, 1899) 222, it was held that a statute prohibiting any person not having a certificate from the board of medical registration from prescribing, directing or recommending any drug, medicine or other agency for the treatment, cure or relief of any bodily imfirmities did not include the system known as "Christian Science." So also in Kentucky it was held that a similar statute did not prevent an osteopath from practicing his profession without a license. Nelson v. State Board of Health (Ky. 1900), 57 S. W. Rep. 501, 50 L. R. A. 383. See also State v. Liffring, 61 Ohio St. 39, 46 L. R. A. 334. *Contra*, Jones v. People, 84 Ill. App. 453. In the case of Nelson v. Board of Health, the court said: "[This statute] allows only reputable physicians holding a diploma from a regular or reputable school to practice medicine. If the act applies to appellant, he can

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in no case practice his system in this state; for, however well qualified he may be, he cannot be examined as a physician, and he could not, without abandoning his practice as an osteopath, obtain a diploma from a medical college. If the statute applies to him, it also applies to trained nurses, and all others of that class, who for compensation administer to the wants of the sick. The result of such a construction of the statute would be to compel every one, whether willing or unwilling, to employ a registered physician to care for him when he is sick, or to trust himself entirely to gratuitous services, however much he might prefer skillful nursing to medical treatment. It is doubtful if the legislature has the right under the constitution thus to restrict the free choice of the citizen in a matter concerning only himself, and not the people at large."

NOTES OF IMPORTANT DECISIONS.

MINES AND MINING—JUDGMENT LIENS—UNPATENTED CLAIMS.—The effect of a judgment lien upon an unpatented mining claim came up recently in the case of Butte Hardware Co. v. Frank, 65 Pac. Rep. 1, where the Supreme Court of Montana held that a judgment lien on an unpatented mining claim is not lost by the transfer of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer of an unpatented claim does not amount to an abandonment. The court said: "The point is raised by respondents that a judgment, if a lien, would not be such after sale of the mining claim,—he giving up possession to the vendee,—for the reason that such sale would be an abandonment, and all his rights would be gone, and the lien with them. In support of this position counsel cite Murley v. Ennis, 2 Colo. 300, which declares that title by location may be lost by abandonment, and that if, without writing, he yield up the possession to another, 'the right of the first occupant is gone by abandonment, and by virtue of his occupancy a new right has arisen in him who succeeds.' It is to be noted that the transfer is said to be abandonment if made without writing. The alleged transfer from Ritchie to Frank was in writing; hence the authority does not fit the averment of the complaint. Section 2332, Rev. St. U. S., clearly contemplates the buying and selling of mining claims, as it provides that, upon application for patent, evidence may be offered to show the possession of and work done by the applicant's grantors. It would be absurd to permit sales for the benefit of the vendees, and then declare such sales proof of abandonment of all rights of the grantor."

HOMESTEAD—FAILURE OF DEBTOR TO OCCUPY LAND UNTIL AFTER EXECUTION WAS LEVIED.—It is the general rule that the homestead right is never forfeited when there has been an occupancy, and then a temporary removal, with the intention to return and make the premises a home; but where there has never been an actual residence and use of the property as a home, a mere intention to so occupy it some future time will not be sufficient to protect the homestead. Solary v. Hewlett, 18 Fla. 756. An interesting phase of this question recently arose in the case of Marshall v. Mahorney, 63 S. W. Rep. 471, where the court of appeals of Kentucky held that land acquired by purchase could not be held exempt as a homestead, where it was not occupied as such until after the creditor's execution was levied thereon, though it was so occupied at the time it was sold under the levy. The court in this case says: "We are aware that in a number of cases this court has held that, where the title to the homestead was derived by descent, the heir was entitled to a reasonable time after the death of the ancestor to claim homestead, and that until such time had elapsed it could not be levied on and sold, even if the debt existed at the time it was inherited. See Jewell v. Clark's Exr., 78 Ky. 398; Dwelly v. Galbraith, 5 Ky. Law Rep. 209, and Miller v. Bennett (Ky.), 12 S. W. Rep. 194. The opinions are predicated upon the idea that the statute does not deny exemption if the title be derived by descent, and not by purchase. But this doctrine has not been extended to cases where the title to the homestead was acquired by purchase, and the construction by this court seems to be generally supported by those of other states." Authorities sustaining the position of the court are as follows: Austin v. Stanley, 46 N. H. 51; Jackson v. Bowles, 67 Mo. 609; Kelly v. Dill, 23 Minn. 435; Ingels v. Ingels, 50 Kan. 755, 32 Pac. Rep. 387; Tiller v. Bass, 57 Ark. 179, 21 S. W. Rep. 34; Freeman v. Stewart, 5 Biss. 19, Fed. Cas. No. 5088. It may be stated, therefore, as the general rule, that in cases of levy under execution, the homestead exemption must exist or be claimed at the time the writing came into the officer's hands. The defendant, moving into the property thereafter, cannot hold it exempt as a homestead.

RECEIVERS—RAILROADS—LIABLE AS COMMON CARRIER.—Whether receivers in control of a railroad are liable as common carriers has always been an interesting question. It is well settled, however, that in his official capacity, at least, he is liable to the same extent as a common carrier. He is liable for injuries to passengers. Dillingham v. Anthony, 73 Tex. 47; Brown v. Railroad, 96 Ill. 297; Newell v. Smith, 49 Vt. 255; Bartlett v. Keim, 50 N. J. Law, 260. He is liable for goods lost or damaged in transportation. Nichols v. Smith 115 Mass. 332; Melendy v. Barbour, 78 Va. 544. He is liable for injuries

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to employees from defective appliances and for the negligence of other servants. Mears v. Holbrook, 20 Ohio St. 137; Sloan v. Railroad, 62 Iowa, 728; Kain v. Smith, 80 N. Y. 458. But in recent case of Powell v. Sherwood, 63 S. W. Rep. 485, the Supreme Court of Missouri ran up against the question in its relation to laws relating to fellow-servants, and held that Laws of 1897, p. 96, defining the liabilities of railroad corporations in relation to damages sustained by their employees, and stating who are fellow-servants, applies to receivers of railroad corporations, as well as to the corporations themselves. There is some conflict of authority on this point, some cases affirming the position of the Missouri court. McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. Rep. 11; Sloan v. Railroad, 62 Iowa, 728; Pierce v. Van Dusen, 78 Fed. Rep. 693. Other cases take a contrary view: Henderson v. Walker, 35 Ga. 481; Campbell v. Cook, 86 Tex. 630, 26 S. W. Rep. 486; United States v. Harris (1900), 20 Sup. Ct. Rep. 609; Thurman v. Railroad, 56 Ga. 376. In Henderson v. Walker, *supra*, the court construed a statute commencing "Railroad companies shall be liable to such employees as to passengers for injuries," etc. Suit was brought under this statute against the receivers of a railroad to recover damages for injury to a servant caused by the negligence of a fellow-servant. It was held that the statute referred only to servants of a railroad company, and would not be construed as extending to servants of the receivers of a railroad company, and that the receivers were not liable. In the principal case, however, the court said: "In respect of liability, such as is set up. here, the receiver stands in the place of the corporation. In other words, the receivership is *pro hac vice* the corporation itself under the management of one man, instead of that of a board of directors. To hold, therefore, that the statute applies to corporations of a certain kind under one management, and not to corporations of the same kind under another management, would be to create the inequality before the law."

TAXATION MUST BE FOR A PUBLIC PURPOSE.—The power of a legislature to levy or to authorize the levy of a tax and to create or authorize the creation of a public debt to be paid by taxation is limited to its exercise for a public purpose. Sharpless v. Mayor, 21 Pa. 147; Cole v. City of La Grange, 113 U. S. 1, 5 Sup. Ct. Rep. 416. The decision of the question whether a tax or a public debt is for a public or private purpose is not a legislative, but a judicial function. Thus, in the recent case of Dodge v. Township, 107 Fed. Rep. 827, it was held that the promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup is a private and not a public purpose, and township bonds issued for this purpose, and the Act of March 1, 1889, authorizing their issue, are beyond the powers of the legislature and the township, and are void. The court said:

"A legislature which has no power to authorize the levy of a tax or the creation of a public debt for a private purpose, has no power to draw that authority to itself, or to create it by its mere declaration that a private purpose is a public one. A legislature cannot make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public or private is a judicial, and is not a legislative function. Allen v. Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. Rep. 185; Tyler v. Beacher, 44 Vt. 648, 651, 8 Am. 398; *In re* Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42, 47, 48. If the bonds and coupons upon which this action is founded are ever paid, the money to discharge them must be raised by the levying of taxes upon private property situated in the township of Mission. Their validity, therefore, must depend upon the answer to the question whether they were issued for, and their proceeds were applied to a public or a private purpose. They were issued to raise money to pay a subscription made by the township to the stock of a private corporation organized to erect and operate mills to make sugar and syrup from sorghum cane, and their proceeds were applied to that purpose. The question, then, is whether or not the construction and maintenance of factories owned by private corporations to manufacture sugar and syrup from sorghum cane is a public or a private purpose. The true answer to the question seems to be plain and certain. Speaking generally, a public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained among men, such as the maintenance of order, the prevention and punishment of crime, the care of highways, the relief of the destitute, the education of youth, the erection of buildings for the use of schools and of the officers of the government; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization. There seems to be no doubt in which category the promotion of the construction and maintenance of sugar factories falls."

THE APPLICATION OF THE "ALIEN CONTRACT LABOR LAWS" OF THE UNITED STATES.

The "alien contract labor law" of the United States provides that it shall be unlawful to "assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, under contract or agreement, parol or special, express or implied, made previous to the im-

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portation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States."[1] Section 5 of the act designates the classes of aliens whose employment is not forbidden, namely: (1) private secretaries, servants or domestics of foreigners temporarily residing here; (2) skilled workmen to perform labor in or upon any new industry not at present established here, where such skilled labor cannot be otherwise obtained; and (3) professional actors, artists, lecturers or singers, and persons employed strictly as personal or domestic servants. The act, it will be observed, forbids in broad and general terms the employment of aliens "to perform labor or service of any kind," and specifies the classes of laborers or persons performing services to whom the prohibition shall not apply. In the case of United States v. Church of the Holy Trinity,[2] it was held in 1888, by the circuit court of the United States, that the act was violated by the employment of a foreign clergyman to officiate as rector of a church in New York. The court said that every kind of industry and every employment, manual or intellectual, was embraced by the words "to perform labor or service of any kind," and prohibited the employment of alien ministers, lawyers, surgeons and all others who labor in any professional calling, and that the mention of certain classes of professionals as not being within the prohibition of the act was equivalent to an express prohibition of the employment of all other classes of professionals.

This decision was reversed by the Supreme Court of the United States in 1892,[3] upon the ground that the act was intended to prohibit only the employment of foreign "cheap, unskilled labor." In other words, the supreme court indirectly decides that the employment of an alien skilled laborer is not prohibited by the act. A person who receives as much as $2 per day for his labor or services cannot be termed a "cheap, unskilled laborer," in the sense intended by the supreme court. Therefore, the supreme court in effect decides that the employment of foreign artisans or mechanics at $2 or more per day is not prohibited by the alien contract labor law. To that extent the decision is, of course, a mere *obiter dictum*, as the court did not have before it the case of an artisan or mechanic or other "skilled laborer," as distinguished from the case of a professional man. In consequence of this difference of opinion between the courts as to the true construction of the act, it was amended in 1891 by adding to the second proviso, excepting certain classes of persons from the operation of the law, the words "nor to ministers of any religious denomination, nor persons belonging to any recognized profession nor professors for colleges and seminaries."[4] In the case of United States v. Laws,[5] the supreme court held, affirming the court below, that a foreign chemist, employed to superintend the making of sugar on a plantation in Louisiana, was a member of a "recognized profession," within the meaning of the amendment of 1891, and that his employment was therefore not a violation of the law. But the court went further and reiterated the *dictum*[6] of Mr. Justice Brewer in Holy Trinity Church v. United States, that the act prohibits only the employment of "cheap, unskilled foreign labor." The construction which the treasury department and the public at large have placed upon the law, as it now stands, is that the employment of aliens in any business, calling or occupation, or to perform any labor or service, is prohibited by the act of 1885, unless the employee falls within one of the classes specially excepted by section 5 of that act, or by the amendment of 1891, from the operation of the law. The *obiter dictum* of the supreme court that the prohibition of the act extends only to the employment of "cheap, unskilled labor" has not been enforced by the treasury department, nor taken seriously by the great body of employers throughout the United States.

Inasmuch as the case of the employment of an alien mechanic or other "skilled laborer" not within the professional or *quasi*-professional classes, has never been presented to the supreme court, and inasmuch as a doubt may be reasonably entertained that the supreme court would decide that the employment of such a person is permissible under

[1] Act Cong. February 26, 1885, 23 Stat. 332.
[2] 36 Fed. Rep. 303.
[3] 143 U. S. 457.
[4] Act March 3, 1891, sec. 5, 26 Stat. 1084.
[5] 163 U. S. 258.
[6] The writer disclaims the use of this term in the invidious sense in which it is sometimes employed.

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the "cheap, unskilled labor" theory if the question were squarely presented there, the writer conceives that he may, with propriety, submit several reasons why the construction placed upon the act by the treasury department and the public should be maintained, at least so far as it applies to persons who receive wages of $2 per day and upwards, and who cannot be described as "cheap, unskilled laborers."

1. The express prohibition of the employment and importation of aliens "to perform labor or service of any kind" in the United States. Lest this language might be construed to extend to certain classes who could not come in competition with the great mass of American laborers, congress, in the fifth section, excepted professional actors, artists, lecturers, and singers from the operation of the act, and afterwards, by the amendment of 1891,[7] extended the exception to "ministers of any religious denomination, persons belonging to any recognized profession, and professors for colleges and seminaries." Congress by these provisions unmistakably construes the act to extend to every class of laborers not embraced in the exceptions. It would be difficult to find any better evidence of the kind of laborers intended by the act. Congress having specified the classes of persons not within the operation of the statute, may the courts add another vague, general and indefinite class, namely, all persons coming here under contract "to perform labor or service" who cannot be classed as "cheap, unskilled laborers."

2. Section 5 of the act of 1885, provides[8] that the act shall not be so construed as to prevent the employment of "skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States, provided that skilled labor for that purpose cannot be otherwise obtained." This is as much as to say that no foreign skilled workman can be brought to the United States under contract, in the establishment of a new industry if skilled labor for that purpose can be obtained here. And it shows beyond possibility of cavil or doubt that the act was intended, as respects established industries, to prohibit the introduction of alien skilled laborers under contract to perform labor or services here. This provision of the law is not referred to by the supreme court in either of the two cases mentioned, and no attempt is made to reconcile the statement that the act was intended to exclude only "cheap, unskilled labor" with this indirect, but unmistakable, declaration that the purpose of the act is to exclude skilled as well as "cheap, unskilled laborers."

3. There is another provision in the act which shows that the prohibition is not to be restricted to the employment and importation of cheap, unskilled laborers. Section 4 imposes a severe penalty upon the master of any vessel who shall permit any "alien laborer, mechanic, or artisan" to land in the United States, knowing him to be under contract to perform labor or services here.[9] A mechanic or artisan is not a "cheap, unskilled laborer." The average wage paid him in America is from $2 to $3 per day, a sum three to four times as great as that paid laborers of the low and degraded kind referred to in the case of Holy Trinity Church v. United States.[10] The opinion in that case contains no reference to this provision of the act.

Other statutes also show that congress construes the prohibition to extend to the employment and introduction of alien skilled laborers. By the act of August 5, 1892,[11] it was provided that exhibitors at the World's Columbian Exposition at Chicago might contract with and bring in "such mechanics, artisans, agents, or other employees as they may deem necessary for the purpose of installing or conducting their exhibits," and that any such alien remaining in the United States a certain length of time after the close of the exposition should be subject to all the penalties of the alien contract labor law. A similar provision is contained in a number of acts relating to fairs and expositions.[12] Of course, there would have been no necessity for any of these acts if congress did not construe the act to exclude skilled as well as unskilled laborers.

4. A further evidence of the construction

[7] 26 Stat. 1084, sec. 5.
[8] 23 Stat. 332.
[9] Sec. 4, Act February 26, 1885, 23 Stat. 332.
[10] 143 U. S. 457.
[11] 27 Stat. 402.
[12] 28 Stat. pp. 1, 967, 224, 60 9, 29 Stat. 474, 30 Stat. 22.

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placed by congress upon the act of 1885 is found in the amendment of 1891.[13] At that time the construction given the act by the treasury department was well known to congress. It had been brought to their attention by the proceedings against Trinity church in 1888 to recover the penalty of $1,000 for a violation of the law in bringing an alien to this country under contract to officiate as a clergyman. The application of the law was, at that time, the subject of much discussion and of many interviews between committees of congress and the officials charged with the enforcement of the act. Yet the amendment consisted merely of a provision which excluded professional persons from the operation of the statute. It seems reasonable to assume that if congress intended the act to apply only to the employment and introduction of "cheap unskilled labor" having knowledge of a different construction adopted by the treasury department, they would have set the matter at rest by expressing such intention in the amendment. Their failure to restrict the application of the act to "cheap unskilled labor" at this opportune time must, under such circumstances, be deemed a legislative adoption or affirmation of the departmental construction of the act.

5. The cases which have been decided by the courts, with the exception of the two cases already referred to and the case of United States v. Gay,[14] recognize no distinction between skilled and unskilled labor in the application of the contract labor laws. The first case which arose was that of United States v. Craig,[15] which was a suit to recover the penalty for violating the law in employing and bringing to this country an alien ship carpenter. There was a demurrer to the declaration on the ground that the act was unconstitutional, but judgment was rendered for the plaintiff. It was not even suggested by the defendant that the employment of such a highly skilled mechanic was not forbidden by the act. The remarks of Mr. Justice Brown in this case were quoted in Holy Trinity Church v. United States as supporting the view that the act applies only to the employment of cheap unskilled laborers. The result of the suit scarcely justifies the citation.

The next case was that of United States v. Thompson.[16] Here the penalty of $1,000 was recovered from the defendant for employing and bringing in a French woman under contract as a milliner. Such a person, if very expert in her business, might be considered somthing more than a skilled laborer; the defense was that she was a "professional artist," within the exception of the statute. The court held that she was not such in the sense of the statute; but it was not suggested by any one that the act did not apply to the class of highly skilled operatives to which this person belonged.

In the case of United States v. McCollum[17] it was held that the manufacture of "French silk stockings" was a "new industry" in the United States, which would justify the employment of alien skilled laborers if such laborers could not be found in the United States, but judgment for the penalty $1,000 was rendered against the defendant upon the ground that he failed to show a proper effort to find skilled weavers in this country. In the case of United States v. Bromley,[18] in which the alleged violation of the law consisted in employing and bringing foreign lace curtain makers to this country, judgment was rendered for the defendant on the ground that the manufacture of fine lace curtains was a "new industry" in the United States.

In all these cases it must be conceded that the employees were, to say the least, skilled laborers of a high class, yet in none of them was it intimated by the court or suggested by the defendants themselves, that the act applied only to the employment and introduction of cheap unskilled laborers.

In the case of the United States v. Gay,[19] decided by the Circuit Court of Appeals in 1899, the question was squarely presented whether a certain person, who was not a common laborer, and who was not within any of the exceptions of the acts of 1885 and 1891, might lawfully be brought to the United States under a contract of employment. The employee in this case was a

[13] 26 Stat. 1028.
[14] 95 Fed. Rep. 226.
[15] 28 Fed. Rep. 795.
[16] 41 Fed. Rep. 28.
[17] 44 Fed. Rep. 745.
[18] 58 Fed. Rep. 554.
[19] 95 Fed. Rep. 226.

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"window dresser," and was to receive $14 a week for his services, about the average wages paid ordinary carpenters in this country. The court held that the employment and bringing in of this person was not a violation of the law. They said that the employment of such a person was not within the "spirit" of the statute, and quoted all that was said in Holy Trinity Church v. United States, and United States v. Lane in support of the view that the act is intended to exclude only "cheap unskilled laborers." They said that the only service congress intended to shut out was the "cheaper, grosser sort of unskilled and unhoused manual labor" which came in competition with the common labor of this country; common hands, who work with spade, shovel or wheelbarrow and the like, the value of whose labor consists principally in the physical results accomplished. They said this in spite of a provision in the act before them that made it an offense to employ and bring into this country foreign "skilled workmen" to establish a new industry here when adequate skilled labor could be obtained here. But the case contains no reference whatever to that clause of the statute, nor to other statutory provisions which indicate the construction which congress itself has placed upon the act. It is a mere adherence to the *obiter dictum* of the supreme court that the act was intended only to exclude cheap unskilled laborers. It is to be regretted that no appeal could be taken in this case by the United States, and no opportunity afforded for the decision of a case directly in point by the supreme court.

C. Lustily the impossibility of a consistent and harmonious administration of the law by the immigration officers at the different ports throughout the United States under the "cheap, unskilled labor" theory. No two officers can be found who will have precisely the same idea as to who are cheap, unskilled laborers. The statutes, as they stand, are capable of a fair degree of certainty and precision in their administration, because they provide that all foreign contract laborers shall be excluded except certain classes accurately described by reference to their occupations or professions. But that which is certain and fixed about the acts is dissipated by the loose expression, "cheap, unskilled laborers." Difficulties arise in two ways: First, as to the occupations which require and those which do not require skilled labor. There are certain occupations which an officer at one port would assign to the skilled labor class, but which an officer at another port would promptly classify as requiring only common, ordinary labor. Second; as to the particular persons in a trade or calling who may be classed as cheap, unskilled laborers. Some raw and inexperienced tailors receive less than 75 cents per day in the New York "sweat shops," others, expert in the business, receive high wages. Here are cheap, unskilled tailors and highly skilled tailors. And so with all other occupations and callings. In each there are "cheap, unskilled laborers" and highly skilled laborers. But it is obviously impossible for the immigration officers to discriminate the two classes when they land in this country under contract to work at their trade or calling. If the statute had, in terms, made unlawful the employment of foreign "cheap, unskilled laborers" to perform labor or service in the United States and had stopped there, it would beyond doubt have been condemned as crude legislation, by reason of the vague and general character of the description of the laborers, especially in view of the penalty of $1,000 imposed for violation of the act. Should the question of the validity of a contract with a foreign skilled workman to perform labor or service in the United States be directly presented to the Supreme Court of the United States in the future, and the attention of the court be particularly directed to that clause of the act which provides that skilled foreign labor may be employed in the establishment of a new industry in this country only in cases in which skilled workmen for that purpose cannot be found in the United States, it is confidently believed that the court will distinguish the case so presented from those of the minister and chemist and refuse to be bound by the *dictum* that the act applies only to contracts of employment with cheap, unskilled foreign laborers.[20]

CHAPMAN W. MAUPIN.

Washington, D. C.

[20] Other cases arising under the alien contract labor laws, but not specially pertinent to the point under consideration, are: Lees v. United States, 150 U. S. 476; *In re* Florio, 43 Fed. Rep. 114; *In re* Cummings, 32 Fed. Rep. 75; United States v. Mexico Nat.

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[Since the above article was prepared, the Attorney General of the United States, under date of January 28, 1901, has rendered an opinion that the employment of a foreign skilled laborer abroad by an American is a violation of the alien contract labor laws.]

R. Co., 40 Fed. Rep. 769; United States v. Borneman, 41 Fed. Rep. 751; *In re* Florio, 43 Fed. Rep. 114; United States v. Edgar, 45 Fed. Rep. 44; United States v. Mich. Cent. R. Co., 48 Fed. Rep. 365; Moller v. United States, 57 Fed. Rep. 490; *In re* Howard, 63 Fed. Rep. 268.

JUDGMENT — CONFESSION — POWER OF ATTORNEY.

CRIM v. CRIM.

Supreme Court of Missouri, May 21, 1901.

Where defendant gave a note authorizing any attorney at law to appear in any court in the United States, waive process, enter an appearance, and confess judgment thereon, such appearance by an attorney gives the court jurisdiction to enter a personal judgment against defendant, and an action on such judgment may be maintained in the courts of another state.

Marshall, J.: The following opinion was heretofore rendered in this case by division No. 1 of this court:

"Action upon a foreign judgment for $7,004. Judgment for defendant. Plaintiff appeals. The parties are brothers, and both formerly lived in Ohio. The defendant was in debt to the plaintiff, and on the 10th of November, 1881, was about to remove to Missouri. The plaintiff demanded a settlement, and the defendant, as he says, because he would have had trouble if he had not done so, gave the plaintiff his note for $4,000, payable at one year, with 6 per cent. interest, in settlement of the debt. The note contained a *cognovit* authorizing any attorney at law to appear in any court of the United States, waive process, enter appearance, and confess judgment against defendant for the amount due on the note, including interest and costs, and to release all errors. On the 14th of October, 1891, the plaintiff instituted suit against the defendant in the court of common pleas of Stark county, Ohio, upon the note. Pursuant to the terms of the note, W. J. Piero, an attorney of that court, entered the defendant's appearance, waived process and confessed judgment for $7,004, the principal and interest due on the note, released all errors, and waived all rights of appeal. Thereafter the plaintiff instituted this suit in the Barton county circuit court on the foreign judgment. The answer of the defendant is a general denial, with special pleas: (1) That the Ohio court had no jurisdiction, because defendant was, and had been for over 10 years a resident of Barton county, Mo., and was not summoned and did not appear in the Ohio court, and never authorized Piero or any one else to appear for him, and that at the time the suit was begun in Ohio the debt was barred by limitation in Missouri; (2) that the parties are brothers, and the defendant, being in debt to the plaintiff was about to remove to Missouri, and plaintiff asked defendant to sign a note for the balance due plaintiff, saying he only wanted a settlement and would never enforce the note against defendant; that defendant did not in fact owe the plaintiff as much as $4,000; that he signed the note understanding that it was only a promissory note, and not knowing that it contained a provision authoring a confession of judgment, and never having agreed to grant such authority to any one; that the plaintiff falsely and fraudulently represented to him that it was only a promissory note, and concealed from him the fact that it contained a *cognovit;* and that relying on the statements of the plaintiff, he signed the note without reading it or examining it. The trial developed the facts to be that notes of this character are usually used in Ohio; that the defendant had been largely engaged in dealing in cattle while he lived in Ohio, and had executed many such notes, and that several judgments had been rendered against him thereupon similar notes under the *cognovit* therein contained; that he had procured many loans from the banks upon similar notes, and that the banks would not make loans upon any other kind of paper; that he had given similar notes to other persons before leaving Ohio; that there were no representations made to him about the character of this note when he signed it, and no attempt made to conceal its character from him; that he owed his brother some amount,—the brother says $5,000, and he says it was not so much,—and that his brother offered to settle it if he would give him this note for $4,000; and that he did so because 'I expect I would have had to sign the note or got into trouble.' The court refused all the instructions asked by the plaintiff, and on its own motion instructed the jury as follows: 'You are instructed that your verdict will be for the plaintiff for the full amount of the judgment sued on, with interest on the same from October 14, 1891, to date at the rate of 6 per cent. per annum, unless you further believe, from the preponderance or greater weight of the evidence, that the defendant, at the time he signed the note upon which the judgment sued on is based, had no knowledge that the said note contained a power of attorney to confess judgment and had no intention to sign such a note, in which case your verdict will be for the defendant.' The jury found for the defendant, judgment was entered upon the verdict, and after proper steps the plaintiff appealed.

"1. There was no fraud, misrepresentation, trick, or concealment in the procurement of the note. It may be true the defendant did not read it before he signed it; but he was *sui juris*, had full opportunity to read it, and deliberately signed it. The law presumes he knew its contents, and he cannot be permitted now to take

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advantage of his own fault or negligence. O'Bryan v. Kinney, 74 Mo. 125; Snider v. Express Co., 63 Mo. 376; Railway v. Cleary, 77 Mo. 637; Mateer v. Railway Co., 105 Mo. 352, 16 S. W. Rep. 839; Kellerman v. Railroad Co., 136 Mo. 177, 34 S. W. Rep. 41, 37 S. W. Rep. 828; 1 Whart. Conv. § 196. The defendant relies on Wright v. McPike, 70 Mo. 175, approving what was said in Briggs v. Ewart, 51 Mo. 249, as follows: 'It may be assumed as an axiom that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing, and may have been written by himself, yet if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper, and not the one he really signed, he ought not to be bound by such signature.' In McPike's case this was quoted, and then it was said: 'Although that case has been overruled, the doctrine announced in the foregoing extract from the opinion was not disturbed by the court in the overruling decision. As between the original parties, if one has procured the signature of the other to a written agreement, whether by fraud or not, which does not contain the contract made by the parties, but a different one, he cannot be permitted to avail himself of that contract, but must stand by the one which was in fact entered into by both parties.' In Briggs v. Ewart, *supra*, it was held that such a defense could be made, even if the note was held by a *bona fide* purchaser for value and without notice before maturity. This case, as was also the case of Corby v. Weddle, 57 Mo. 452, which follow it, was expressly overruled in Shirts v. Overjohn, 60 Mo., *loc. cit.* 312. The doctrine further announced in McPike's case, that as between the original parties such questions are open to inquiry in a suit at law upon the note, whether the note was made by fraud or not, is no longer the law in this state, as the cases cited above clearly show. Courts of equity set aside contracts procured by fraud, and reframe contracts where there has been a mutual mistake of the parties; but it is an invariable rule of law that, in the absence of fraud or mistake, parol evidence is not admissible to contradict or vary a written contract. The written contract is conclusively presumed to merge all prior negotiations, and to express the final agreement of the parties. To permit a party, when sued on a written contract, to admit that he siged it, but to deny that it expresses the agreement he made, or to allow him to admit that he signed it, but did not read it or know its stipulations, would absolutely destroy the value of all contracts and negotiable instruments. The reason underlying the rule is to give stability to written agreements, and to remove the temptation and possibility of perjury, which would be afforded if parol evidence was admissible. But, aside from these considerations, this is a suit upon a judgment, and not upon the note. The note is merged in the judgment, and the defenses that might have been available, if properly interposed in the suit on the note, are not open to review here. Even if there was fraud in the note constituting the cause of action, the judgment cannot be attacked. Only fraud in the very act of procuring the judgment can be interposed as a defense to the judgment, even in the direct attack in equity to set aside the judgment. Hamilton v. McLean, 139 Mo. 678, 41 S. W. Rep. 224; Bates v. Hamilton, 144 Mo., *loc. cit.* 11, 45 S. W. Rep. 641.

"2. Judgments upon notes containing such a *cognovit* are valid judgments in Ohio. Matthews' Lessee v. Thompson, 3 Ohio, 272; Watson v. Paine, 25 Ohio St. 340; Clements v. Hill, 35 Ohio St. 141. Such judgments are also valid in other states. Hansen v. Schlesinger (Ill. Sup.), 17 N. E. Rep. 718; Roche v. Beldam, 119 Ill. 320, 10 N. E. Rep. 191; Holden v. Bull, 1 Pen. & W. 460; Ely v. Karmany, 23 Pa. 314; Stein v. Brunner, (La.), 7 South. Rep. 718; Shoe Co. v. Falk, (Wis.), 61 N. W. Rep. 562. The identical question here involved came before this court in Randolph v. Keiler, 21 Mo. 557, where the suit was upon a judgment rendered by the 'inferior court of common pleas, in and for the county of Sussex, state of New Jersey,' upon a note containing a *cognovit* in almost the exact terms with the note upon which the Ohio court entered judgment in this case. Practically the same defenses were made there that are made here. But it was held that such judgment was valid in New Jersey, even though neither of the parties were citizens of that state, or had ever been in that state, and, this being so, the judgment was entitled to 'full force and credit' in this state, under section 1 of article 4 of the constitution of the United States; and hence the New Jersey judgment was enforced here. Similar judgments are enforced in other jurisdictions, even though the defendant was a resident of another state than that in which the judgment sought to be enforced was rendered. Kitchen v. Bank (Kan. Sup.), 36 Pac. Rep. 344; Ritter v. Hoffman, 35 Kan. 215, 10 Pac. Rep. 576; Craft v. Clark, 38 Iowa, 237; Nicholas v. Farwell, 24 Neb. 180, 38 N. W. Rep. 820; Snyder v. Critchfield (Neb.), 62 N. W. Rep. 306; Sipes v. Whitney, 30 Ohio St. 69. The question whether the note upon which the judgment sued on was barred by limitation in Missouri is not open to review here. The suit is upon the judgment, and that is not barred by limitation. It follows that the trial court erred in giving the instruction quoted, and also that neither the answer nor the evidence shows any defense to the suit. The trial court should have directed a verdict for the plaintiff, and the judgment of that court is reversed, and the cause remanded, to be proceeded with in accordance herewith."

Upon motion the cause was transferred to court *in banc*, upon the dissent of Valliant, J. The case has again been fully argued and further briefed by counsel. In addition to what is said in the divisional opinion, it is proper to say that the cases of D'Arcy v. Ketcham, 11 How. 165, 13 L.

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Ed. 648, and Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, are not applicable to the case at bar, —the first, because there was no service of any kind upon the partner who lived in Louisiana, and therefore the personal judgment of the New York court against him was void; and the second, because the service was by publication, constructive, and therefore it would not support a personal judgment, while in the case at bar the defendant was in court by his own voluntary act when the judgment was rendered against him. Counsel for defendant, in a supplemental brief, has referred to the following cases as authority for the contention that the decision in this case and that in Randolph v. Keiler, 21 Mo. 557, are not in harmony with the rule and policy in this state. Overstreet v. Shannon, 1 Mo. 529; Sallee v. Hays, 3 Mo. 116; Smith v. Ross, 7 Mo. 464; Gillett v. Camp, 23 Mo. 375; Miles v. Jones, 28 Mo. 87; Foote v. Newell, 29 Mo. 400; Latimer v. Railway Co., 43 Mo. 105; Sevier v. Roddie, 51 Mo. 580; and State v. Bunce, 65 Mo. 349. A careful examination of these cases shows, however, that they have no application to the case at bar. Thus, in Overstreet v. Shannon, 1 Mo. 529, it appeared that the defendant had not been served in any manner in the foreign state. In Sallee v. Hays, 3 Mo. 116, the judgment was against the defendants, who were non-residents of the foreign state, without any service whatever, upon a covenant of their ancestor, and the decree charged the assets descended with the debt of the ancestor. It was alleged that such a decree was conclusive upon the parties in Kentucky. This court held that the judgment was not valid here, because the defendants had not been brought into court in any manner whatever. In Gillet v. Camp, 23 Mo. 375, and Latimer v. Railway Co., 43 Mo. 105, the judgment was based solely upon constructive service by publication. In Smith v. Ross, 7 Mo. 464, the action was upon a foreign judgment against Smith, who was served, and Hanlman, as to whom the return of process was "not found." The judgment was held to be void as to Hanlman, because he was never brought into court. In Miles v. Jones, 28 Mo. 87, the defendant was personally served; but the judgment was attacked and set aside because it was procured by fraud. In Foote v. Newell, 29 Mo. 400, it appeared that a judgment was rendered against the defendant in Indiana (it does not appear from the statement of facts whether the defendant was in court or not, but it seems to be assumed that he was; at any rate, that question was not involved in the case), and that the sheriff had levied upon the property, and that by virtue of a statute of that state the defendant replevied the property levied on, and obtained a stay of execution, according to the law of that state, by giving a bond to pay the judgment. The statute (Act Ind. Feb. 4, 1831), provided: "And such bond, from the date of its execution, shall be taken as, and have the force and effect of, a judgment confessed in a court of record against the person or persons executing the same and against their estates, and execution may issue thereon accordingly." The judgment was not paid, and the bond was sued on in this state as a judgment of the state of Indiana. It was held that such a bond had "no affinity" to a judgment, and was not such a judgment as is contemplated by the act of congress. All of which is undoubtedly right, for such a bond is no more a judgment than is any contract or power of attorney authorizing a confession of a judgment. It is the act of the parties, and is not the judgment of a court. In Sevier v. Roddie, 51 Mo. 580, the action was upon a Tennessee judgment. It appeared that a third person had obtained a judgment against the defendant as principal and the plaintiffs as his sureties. The sureties paid the judgment, and the laws of Tennessee obtained a summary judgment, without notice, against the principal, and the suit was upon this judgment. It was properly held that the judgment was not such a judgment as the act of congress contemplated, because, the defendant not being in court, the proceeding was void. In State v. Bunce, 65 Mo. 349, it appeared that under the laws of Arkansas the plaintiff, a minor, had been relieved of the disability of infancy, "so far as to authorize him to demand, sue for, and receive all moneys belonging to him in the state of Missouri, in the hands of his curator," etc. Thereupon he sued the defendant, the curator of his estate in Missouri, upon his bond as such curator, to recover the estate in his hands. It was held that the minor could not maintain the suit, as under the laws of Missouri a minor can only appear by guardian, and that the legislature of Arkansas could not pass a law which would have the effect of giving a non-resident minor of this state a different *status* in the courts of this state from that of a resident minor in this state, when seeking the aid of the courts of this state. This decision is right, but it is not perceived how it applies to the case at bar, nor how the act of congress has any bearing on it; for the action was not for the enforcement of a judgment of a foreign state, but was simply an attempt to make the minor of age when he came into the Missouri courts, contrary to the laws of this state. It did not remove his disabilities absolutely, or at all in Arkansas, but only "so far as to authorize him to demand, sue for, and recover all moneys belonging to him in the state of Missouri, in the hands of his curator," etc. This was simply a bungling attempt by the courts of Arkansas to control judicial proceedings in Missouri, and is without precedent in law that we are aware of.

The defendant strenuously contends that the case of Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34 L. Ed. 670, is "on all fours" with the case at bar. In that case it appeared: "B, a citizen of Maryland, having executed a bond containing a warrant authorizing any attorney of any court of record in the state of New York, or any other state, to confess judgment for the penalty, and judgment having been entered against him in Pennsylvania by a prothonotary, without

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service of process or appearance in person or by attorney, under a local law permitting that to be done, held, (1) that in a suit upon this judgment in Maryland the courts of Maryland were not bound to hold the judgment as obligatory, either on the ground of comity or of duty, contrary to the laws and policy of their own state; (2) that B could not properly be presumptively held to knowledge and acceptance of particular laws of Pennsylvania, or of all the states other than his own, allowing that to be done which was not authorized by the terms of the instrument he had executed." It was pointed out (1) that a judgment of a sister state was required to be observed in another state only when the defendant was served with process, or voluntarily entered his appearance, "or that he had in some manner authorized the proceeding;" (2) that an instrument authorizing a confession of judgment must be strictly followed, and its terms could not be enlarged by reading into it the laws of another state, of which he is not charged with knowledge, and hence, if the power to confess judgment was conferred upon any attorney of any court of record, its terms could not be enlarged so as to authorize a prothonotary to confess judgment, even if the laws of the state where the judgment was rendered expressly permitted a prothonotary to act whenever any attorney was authorized to do so. This case is "on all fours" with the case at bar, and is ample support for the decision herein, so far as it holds that, where the defendant has "authorized the proceeding," he is bound by the judgment, and the courts of other states must give force and effect to the judgment of the sister state whenever the authority has been strictly pursued, as is the case here; but it is unlike the case at bar in this: In that case the authority for the proceeding, conferred by the act of the defendant, was not strictly pursued; while here it was done. That judgment was held void in a sister state because a prothonotary does not come within the class of "attorneys of courts of record," and the act of such prothonotary was not, therefore, authorized by the defendant, and the law of the state could not enlarge the authority granted by the defendant. That decision is also valuable as showing plainly the principle upon which D'Arcy v. Ketchum and Pennoyer v. Neff, *supra*, both of which are referred to in that case, rested, to-wit, that in either case had the defendant been served with process, or voluntarily appeared, or in any manner authorized the proceeding. It also accentuates the proposition that, if the judgment is rendered against a party who is in court in any one of three ways specified, it is valid, not only in the state where it is rendered, but, under the act of congress, in all sister states.

We subscribe and adhere to all the cases cited and herein reviewed, but the rules there announced are not contravened by anything that is decided in the case at bar. On the contrary, those were all cases where the party sought to be charged had not been brought into court by personal service, and had not voluntarily entered his appearance, and had not authorized the proceeding against him, while in the case at bar the defendant had expressly authorized the exact proceeding that was had against him in Ohio. For these reasons, the opinion heretofore rendered in division No. 1 is adopted as the opinion of the court *in banc*, and the judgment of the circuit court is reversed, and the cause remanded, to be proceeded with in accordance herewith.

NOTE.—*Judgments on Confession by Warrant of Attorney.*—It is well settled that a debtor may authorize the confession of a judgment against him by warrant of attorney. Agard v. Hawks, 24 Ind. 276; Vliet v. Camp, 13 Wis. 198; Cross v. Moffat, 11 Colo. 210; Spence v. Emerine, 46 Ohio St. 433; Little v. Dyer, 138 Ill. 272; Harwood v. Hildreth, 24 N. J. L. 51; Wood v. Ellis, 10 Mo. 382; Athens v. Garland (Mich. 1896), 67 N. W. Rep. 559. And a warrant of attorney may authorize confession of judgment on a note. Parker v. Poole, 112 Tex. 86. In Kentucky it has been held that a warrant of attorney to confess judgment before suit is brought is void. O'Hara v. Lannier, 1 B. Mon. (Ky.) 100. A warrant of attorney to confess judgment must be strictly construed. Spencer v. Emerine, 46 Ohio St. 433; Little v. Dyer, 138 Ill. 272; Williams v. Bank, 67 Tex. 606. Also the authority thereby conveyed must be strictly pursued. Reid v. Southworth, 71 Wis. 288; Sweeny v. Stroud, 55 N. J. L. 97; Cushman v. Welsh, 19 Ohio St. 536; Whitney v. Bohlen, 157 Ill. 571; State Bank v. Sears, 13 Utah, 172. Thus where the warrant to confess judgment on a note of a specified date, judgment cannot be confessed on a note bearing a different date. Chase v. Dana, 44 Ill. 262. So also a judgment entered on a note by confession before anything was due, under a warrant of attorney which did not clearly confer authority for that purpose, will be set aside. Reid v. Southworth, 71 Wis. 288. A clause in a promissory note authorizing judgment "against me" will authorize it against the maker only and not against indorsers. Williams v. Bank, 67 Tex. 606. A power of attorney to appear before any court of record and confess judgment may be exercised before a clerk of the court in vacation. Kieth v. Kellogg, 97 Ill. 147. Where appearance was entered a day earlier than authorized by the warrant of attorney, the judgment is void for lack of jurisdiction. White v. Jones, 88 Ill. 159. The designation of the one who is to exercise the power must point out clearly the party intended; it may describe him, however, generally as "any attorney." Kieth v. Kellogg, 97 Ill. 147; Parker v. Poole, 12 Tex. 86; Sweeney v. Stroud, 55 N. J. L. 97. Thus where a warrant of attorney authorized A "or any other attorney" of the court in which judgment was to be confessed, to appear and confess judgment, and A and B, attorneys of the court, appeared and confessed, it was valid. Patton v. Stewart, 19 Ind. 233.

The contention made in the principal case, however, is that, although, the confession may be good in the state where it is entered, the judgment thereon has no extra territorial force where it does not comply with the law where the judgment is to be enforced. That, at least, is the contention of Justice Valliant in his dissenting opinion. He argues as follows:

"The question in the case at bar is, did the court in Ohio have jurisdiction of the person of the defendant when it rendered judgment against him? He was at

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the time a resident of Missouri, and was not in Ohio while the suit was pending; but some years before, when he was in Ohio, he executed the note sued on, and included in it what purported to be an authorization to any attorney at law to appear in any court in the United States, waive process, enter appearance, and confess judgment on the note against him. Under that authorization some one said to be an attorney at law, did essay to enter the defendant's appearance, waive process, and confess judgment. That character of proceeding is said to be valid in Ohio, and I will assume that it is, and that the judgment is valid in that state. Suppose there had been no such authorization in the note, and an attorney at law, without any authority from defendant whatever, had entered his appearance and suffered the judgment to go. That would be a valid judgment in the state where rendered to the extent, at least that it could not be avoided collaterally. But the decisions above cited are authority for saying that if that judgment should be sued on here, the defendant may avoid it by a plea showing that the court had no jurisdiction of his person. Now, the supposed case differs from the case at bar only in this: that in that case there was no semblance of authority to the pragmatical attorney, while here there is claimed to be authority. But, if what is here claimed as authority is no authority, then there is no difference between the cases. That so-called authorization would certainly not be recognized as valid under the laws of this state, not because we do not recognize the right of a man to appoint an attorney in the regular way to enter his appearance in a suit in court, even for the purpose of suffering judgment to go against him, but because it is against the policy of our law to permit a man when entering into an obligation, to bargain away his right to be heard in court, should a question ever arise between him and his adversary in relation to it. A man who has signed a paper of that kind, if it is valid, is completely at the mercy of the holder, whatever the merits of the case may be, because the holder may go to any forum in the United States and select any attorney whom he chooses, and have judgment entered against the maker, who does not know that he is being sued, and this judgment creditor comes to the state in which the judgment debtor resides, and asks the courts of such state to say that "full faith and credit" must be given to the judgment of that sister state. But it is said that this contract was good in the state where it was made, and is therefore valid everywhere. That is not a rule of universal application. In the case last cited the Supreme Court of the United States said: 'The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others; and so it is laid down by jurist as an elementary principle that the laws of one state have no operation outside of its territory, except so far as is allowed by comity.' That comity never admits the validity of an act done in another state by authority of the law there, if it contravenes the policy of the law here. In Missouri a man's right to be heard in court is inalienable, and a contract like the one in question is not only not authorized, but contrary to our policy. The pretended appearance that is entered under such authority is not real but fictitious. We are not forced to recognize it, and would do violence to our judicial policy if we did so.',

But two recent cases, very similar to the principa case, were not cited in either the court's opinion or that of Justice Valliant. These cases are, Teel v. Yost, 128 N. Y. 387, and First Nat. Bank of Athens v. Garland, 109 Mich. 515. In Teel v. Yost, it was held that a judgment duly entered in one state on a warrant of attorney is as conclusive in all other states as in the state where it is entered. The note in this case contained the ordinary "confession and release" clause. The court said: "This instrument is usually called a 'judgment note,'—an obligation quite common in Pennsylvania. The parties to the note were both residents of that state, and the court of common pleas was a court of general jurisdiction in that state, of which the prothonotary was clerk, and had charge of its records, and authority to enter judgments by confession. If this was a valid judgment under the laws of the state where it was rendered, it must, under the constitution of the United States, be accorded the same force and effect in this state that it had in the state where rendered." It will be noticed that in this case the warrant authorized "any attorney" to confess judgment; but since the law of Pennsylvania permitted a prothonotary to perform the duties of an attorney in such cases, the court held the proceeding valid and the judgment based thereon enforceable in any other state, although in such latter state no such proceeding would be authorized. The court after quoting from the decisions of the Supreme Court of Pennsylvania upholding such judgments, uses this strong language: "These clear and explicit announcements by the highest courts of the state, of the force and defect given to such judgments in that state, are entitled to the highest respect, and cannot, without ignoring the requirements of comity and propriety prevailing among sister states, be disregarded by the courts of other states. It should in any event be for the gravest reasons alone, and those demanded by the clearest rules of public policy and justice, that the courts of one state should deliberately deny to the decisions of the courts of another state the authority which they possess in the state where rendered." So also in First Nat. Bank v. Garland, 109 Mich. 515, it was held that a warrant of attorney, purporting to authorize "any attorney at law" to confess judgment on a note in "any court of record," is sufficient to sustain a judgment entered in a court of the state in which the warrant was executed, on confession of an attorney of such court, even though the warrant could be given no extra territorial force. This judgment was rendered in Ohio on a note containing the same clause as the note in the principal case. The court expressly followed the case of Teel v. Yost, *supra*, and held that "the warrant of attorney was such as to confer the necessary jurisdiction." It seems that Pennsylvania and Ohio have been flooding the country with these kind of notes and it is not unlikely that the questions of public policy as suggested by Judge Valliant in the principal case may yet become one of serious discussion. The weight of authority, however, is in favor of recognizing judgments based on such notes where the law of the state has been complied with.

JETSAM AND FLOTSAM.

RAILROAD TICKET "SCALPING."

The question as to the legal *status* of the business of ticket "scalping" appears to be still unsettled, though in the most recent cases the scalpers have had somewhat the better of the controversy. A short time ago the appellate division of the New York supreme court held the anti-scalping law passed by

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the legislature this year unconstitutional, and took the ground that when a ticket is sold it belongs to the person who buys it, and that, unless its use is in some way limited, it has the same quality as every other kind of property. More recently the Lackawanna Railroad Company applied to Judge Hazel, of the United States District Court of Buffalo, for an injunction to restrain a number of ticket brokers from dealing in special Pan American tickets issued by that road. The judge declined to grant the injunction, for the reason that the Lackawanna was a member of the Trunk Line Association, the members of which, he said, combined to fix rates in violation of law, and, therefore, was not entitled to redress in a court of equity. At the same time, he held that the railroad company has the right to make special contracts with individual purchasers of tickets, and that the purchasers cannot violate such contracts by selling their tickets. It will be seen that two opposing views of the law are here set forth, though in the second case the decision went against the railroad company on another ground. The question at issue is important enough to render a final settlement a matter of wide interest.—*Bradstreet's Journal.*

LAWYER AS POET.

Quite a valuable edition of poems entitled "In the Shadow and Other Poems," has lately been published by one of America's bright young lawyers, Herbert B. Robinson. The editor of the *Chicago Legal News*, in speaking of these poems and of its author, said: Herbert B. Robinson, the son of Ex-Senator M. W. Robinson, who was in the senate while James B. Bradwell was in the house, many years ago. The father and son are now practicing law together in this city. The son is twenty two years of age. After reading these poems we are convinced that close application to the law has not driven the music from his soul. The prayer, which concludes the volume, is as follows:

Take not away my simple faith
Oh God of Reason, sheathed in steel,
And glitt'ring with the shining points
Of bloodless logic;—Let me kneel
A child of nature still, aghast
At my strange future;—Let the past,
Which filled my infant mind with hope,
Still guide me as I vainly grope.

Away, dark clouds of doubt and fear;
Away, ye earth bound chains of thought;
From out this prison of the brain
My soul must fly! The answer sought
When my poor reason glowed with fire
Is not my goal,—not my desire;
I wish it not, Oh God of Love,
But Thee, Thy Blessing from above.

PROCRASTINATION.

In no profession is the tendency to procrastinate so strong as among lawyers. Hence, the appropriateness of the following lines, entitled

SOME OTHER DAY.

There are wonderful things we are going to do,
Some other day;
And harbors we hope to drift into.
But we say to ourselves, there's time to begin
Some other day;
And so, deferring, we loiter on,
The strength of the hope we leaned upon,
Some other day.

And when we are old and our race is run,
Some other day;
We fret for the things that might have been done
Some other day;
We trace the path that leads us where
The beckoning hand of grim despair
Leads us yonder out of there,
Some other day!

—*Sommerville Journal.*

BOOKS RECEIVED.

A Handbook of Parliamentary Practice. By Rufus Waples, Author of Treatises on Attachment and Garnishment, Proceedings in Rem, Homestead and Chattel Exemptions, etc. Second Edition, Enlarged. Chicago: Callaghan and Company. Cloth, pp. 306. Price $1.00. Review will follow.

A Treatise on Injunctions and other Extraordinary Remedies, covering *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari* or review. Containing an exposition of principles governing these several forms of relief, and their practical use; with citations of all the authorities to date. By Thomas Carl Spelling. Second edition, revised and enlarged. In two volumes. Boston: Little, Brown, and Company, 1901. Sheep, pp. 1894. Price $12.50. Review will follow.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

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iff must show that the steer came to his death by violence of defendant, held proper.—SPEARMAN v. ROBERTS, Ala., 30 South. Rep. 869.

3. APPEAL AND ERROR—Absence—Oath—Poor Person.—Appeal dismissed because of absence from record of bond or oath as poor person, as required by trial court when granting appeal.—TURNER v. TURNER, Tenn., 64 S. W. Rep. 888.

4. APPEAL AND ERROR — Assignment of Errors.—Filing of assignment of errors before issue of writ of error is indispensable under the eleventh rule of the circuit courts of appeals.—FRAME v. PORTLAND GOLD-MIN. CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 750.

5. APPEAL AND ERROR — Burden of Proof.—The burden is on appellant in an equity suit heard by a single justice on matters of fact to show that the decree is clearly wrong.—SIDELINGER v. BLISS, Me., 49 Atl. Rep. 1094.

6. APPEAL AND ERROR—Citation.—The mere fact that citation is not issued until after the time limited for taking the appeal has expired does not defeat the jurisdiction of the appellate court.—BERLINER GRAMOPHONE CO. v. SEAMAN, U. S. C. C. of App., Fourth Circuit, 108 Fed. Rep. 714.

7. APPEAL AND ERROR—Dismissal.—Where a case in equity has been held and reported to the law court, and it finds the allegations insufficient, it may dismiss the bill without considering the evidence.—LOGGIE v. CHANDLER, Me., 49 Atl. Rep. 1059.

8. APPEAL AND ERROR — Errors Considered.—On an appeal from an order denying a new trial, the court can consider only attacks made on the findings as not supported by the evidence and alleged errors in law occurring during the trial.—HUNTER v. MILAM, Cal., 65 Pac. Rep. 1079.

9. APPEAL AND ERROR — Excessive Verdict — Remittitur.—Where the judgment appealed from is for too large a sum, the error may be cured by a *remittitur* of the excess.—HUFF v. REILLY, Tex., 64 S. W. Rep. 387.

10. APPEAL AND ERROR — Excluding Evidence—Cured.—Any error in excluding certain evidence on cross-examination is cured by subsequently allowing another party to testify to such facts.—PERRY v. JEFFERIES, S. Car., 39 S. E. Rep. 515.

11. APPEAL AND ERROR — Grounds of Demurrer Sustained.—Where a demurrer to bill is sustained generally, if any of the grounds are well taken, the decree will be affirmed.—BARRETT v. CENTRAL BLDG. & LOAN ASSN., Ala., 30 South. Rep. 847.

12. APPEAL AND ERROR—Grounds of Motion.—On appeal from judgment of nonsuit, only those grounds on which motion was based can be considered.—BURNS v. SOUTHERN RY. CO., S. Car., 39 S. E. Rep. 567.

13. APPEAL AND ERROR — Jurisdictional Amount.—The supreme court will have jurisdiction where the amount of a set-off allowed and that of the decree rendered equal the jurisdictional amount.—BUNTING v. COCHRAN, Va., 39 S. E. Rep. 229.

14. APPEAL AND ERROR—Order Granting Change of Venue.—Where no abuse of discretion is shown, order granting change of venue will not be reviewed.—CARROLL v. CHARLESTON & S. R. CO., S. Car., 39 S. E. Rep. 364.

15. APPEAL AND ERROR—Record—Must Show What.—Record must show that the grounds set out in the

18. APPEARANCE — Presumption.—Presumption is that an attorney has full power to enter appearance for non resident defendant.—FLINT v. COMLY, Me., 49 Atl. Rep. 1044.

19. ASSIGNMENTS — Action—In Whose Name.—Under Rev. St. ch. 82, § 180, assignee of a chose in action not negotiable may sue in his own name, but must file with his writ the assignment or a copy thereof.—DAMREN v. AMERICAN LIGHT & POWER CO., Me., 49 Atl. Rep. 1092.

20. ATTORNEY AND CLIENT — Attorney of Record.—Where appellant's attorney is one of the firm who were his attorneys of record below, a motion to dismiss on the ground that such attorney is not the attorney of record should be denied.—WOODMEN OF THE WORLD v. RUTLEDGE, Cal., 65 Pac. Rep. 1105.

21. BANKRUPTCY — Alimony — Provable "Debt."—A decree awarding alimony to a wife on granting her a divorce, although creating a fixed liability payable at once, does not evidence a "debt" provable against the husband's estate in bankruptcy, under Bankr. Act 1898, § 63a.—TURNER v. TURNER, U. S. D. C., D. (Ind.), 108 Fed. Rep. 785.

22. BANKRUPTCY — Attachment.—An attachment of realty more than four months before filing petition in bankruptcy against defendant held not dissolved by such filing.—STICKNEY & BABCOCK COAL CO. v. GOODWIN, Me., 49 Atl. Rep. 1039.

23. BANKRUPTCY — Discharge — Fraudulent Bookkeeping.—A bankrupt not entitled to a discharge on the ground that he failed to keep proper books of account with fraudulent intent to conceal his true financial condition.—IN RE FELDSTEIN, U. S. D. C., S. D. (N. Y.), 108 Fed. Rep. 791.

24. BANKRUPTCY — "Mercantile Pursuits."—A livery stable is engaged principally in "trading or mercantile pursuits," within the meaning of Bankr. Act 1898, § 4b, and may be adjudged an involuntary bankrupt.—IN RE MORTON BOARDING STABLES, U. S. D. C., S. D. (N. Y.), 108 Fed. Rep. 791.

25. BANKRUPTCY—Sale of Homestead.—Where bankrupt may have entered into a contract for the sale of his homestead, held not to deprive him of his right to exemption.—IN RE CARMICHAEL, U. S. D. C., D. (Ky.), 108 Fed. Rep. 789.

26. BANKS AND BANKING — Certificates of Deposit.—An instrument executed by a cashier of a bank, which merely certifies that on a prior date named a party had a stated sum on deposit to its credit in the bank, is not a certificate of deposit.—MODERN WOODMEN OF AMERICA v. UNION NAT. BANK, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 758.

27. BILLS AND NOTES—Attorney's Fees.—A provision in a mortgage securing a note for attorney's fees in case of foreclosure renders the note non-negotiable.—MEYER v. WEBER, Cal., 65 Pac. Rep. 1110.

28. BILLS AND NOTES—Enforcement—Partnership.—Party on the faith of whose name and collateral credit was given to take up certain partnership notes entitled to participate in the funds in hands of firm's receiver.—LAWSON v. DUNN, N. J., 49 Atl. Rep. 1067.

29. BOUNDARIES—Evidence.—In trespass, after establishment of dividing line by defendant, no evidence of true boundary line as claimed by defendant held admissible.—PERRY v. JEFFRIES, S. Car., 39 S. E. Rep. 515.

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32. CARRIERS—Impending Danger.—A railroad company held liable for negligence in an impending danger in failing to make any effort to have a passenger get out of the car, beyond making an announcement in English, which the passenger did not understand. —SOUTHERN PAC. CO. v. TABIN, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 784.

33. CEMETERIES — Location—Consent.—By granting consent to the location of a rural cemetery, the municipal authorities necessarily approve that location within the meaning of the statutes.—BURDETTE v. BOROUGH OF FAIRVIEW, N. J., 49 Atl. Rep 1029.

34. CHAMPERTY AND MAINTENANCE — Ejectment.—Where plaintiff in ejectment has legal title, defendant's occupancy without permission is not such possession under claim of title as to make the deed to plaintiff champertous.—WILLEY v. GREENFIELD, 71 N. Y. Supp. 1046.

35. CHATTEL MORTGAGES—Cancellation.—That chattel mortgagee, after payment retains the mortgage, held not ground for a decree requiring its cancellation or surrender.—LOGGIE v. CHANDLER, Me., 49 Atl. Rep. 1059.

36. COLLISION—Fault.—A schooner is not in fault where, after she had been placed in peril through the fault of the steamer, she changed her course for the purpose of easing the blow.—MERCHANTS' & MINERS' TRANSP. CO. v. HOPKINS, U. S. C. C. of App., Fourth Circuit, 108 Fed. Rep. 890.

37. CONTRACTS—Delivery of Goods.—Where goods were not called for within the time provided by the contract, plaintiff was absolved from liability under the contract.—NEW BEDFORD COPPER CO. v. SOUTHARD, Me., 49 Atl. Rep. 1062.

38. CONTRACTS—Two Agreements to Same Effect.—Where two writings of different dates, do not differ in legal effect, first agreement is not discharged by the second.—RHODES v. CHESAPEAKE & O. RY. CO., W. Va., 39 S. E. Rep. 209.

39. CONVICTS—Employment.—A contract for the employment of convicts in the sawmill of a private citizen held against public policy.—PENITENTIARY CO. No. 2 v. ROUNDTREE, Ga., 39 S. E. Rep. 508.

40. CORPORATIONS—Assessments—Action on Call.—*Assumpsit* held the proper form of action by an English corporation against a stockholder to recover the amount of a call made on his stock.—NASHUA SAV. BANK v. ANGLO-AMERICAN LAND MORTGAGE & AGENCY CO., U. S. C. C. of App., First Circuit, 108 Fed. Rep. 764.

41. CORPORATIONS — Dissolved — Party to Suit.—A foreign corporation, which has been legally dissolved by judicial decree, cannot be made a party to a suit. —FITTS v. NATIONAL LIFE ASSN. OF HARTFORD, CONN., Ala., 30 South. Rep. 874.

42. CORPORATIONS—Foreign Corporations—Service. —Service of summon on traveling salesman of a foreign corporation held a good service, under Code Civ. Proc. § 155, as amended by Act March 2, 1899.—ABBEVILLE ELECTRIC LIGHT & POWER CO. v. WESTERN ELECTRICAL SUPPLY CO., S. Car., 39 S. E. Rep. 559.

43. CORPORATIONS—Note—Liability of Stockholders. —Where a note given by a corporation is paid by a surety thereon, the surety may recover the amount paid from those who are stockholders at the time payment is so made.—YULE v. BISHOP, Cal., 65 Pac. Rep. 1094.

44. COSTS — Sheriff — Liability. — Fees incurred by sheriff, after satisfaction of judgment to officer holding the original execution held payable by the defendant in execution, unless incurred after notice of satisfaction.—REICK v. STEELMAN, N. J., 49 Atl. Rep. 1063.

45. COSTS—Taxing Costs on Appeal.—Where the order appealed from is at first reversed, but finally affirmed on a ground first urged at the rehearing, costs should be allowed to appellant.—YULE v. BISHOP, Cal., 65 Pac. Rep. 1094.

46. COUNTIES — County Treasurer — Witnesses. — *Mandamus* lies to compel county treasurer to register certificate of state's witness, when duly authenticated though paid in part.—GRAY v. ABBOTT, Ala., 30 South. Rep. 846.

47. COURTS—City Courts.—Act establishing city court does not bring such court within the section of the constitution authorizing supreme court to review decisions of city courts.—SAVANNAH F. & W. RY. CO. v. JORDAN, Ga., 39 S. E. Rep. 511.

48. COURTS — Improper Remarks of Counsel.—An allusion by counsel to the fact that certain of the defendants did not testify in their own behalf held not reversible error, in view of the ruling of the court on objection made.—WRIGHT v. UNITED STATES, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 805.

49. COURTS—Jurisdiction of County Courts.—The county court has no jurisdiction of a suit to sell land for the enforcement of a judgment lien.—TURNER v. TURNER, Tenn., 64 S. W. Rep. 392.

50. COVENANTS — Breach of Warranty.— Where a grantee goes into possession under a warranty deed, a right of action for breach of the warranty does not accrue until his title is assailed.—HUFF v. REILLY, Tex., 64 S. W. Rep. 387.

51. CURTESY—Value.—In ascertaining the value of the interest of a tenant by the curtesy, the value of the timber on the land should not be deducted.—ROND v. GODSEY, Va., 39 S. E. Rep. 216.

52. CUSTOMS DUTIES—Papaw Juice.—Powder from the juice of the papaw melon is dutiable as a drug, not edible.—UNITED STATES v. AMERICAN FERMENT CO., U. S. C. C., S. D. (N. Y.), 108 Fed. Rep. 802.

53. CRIMINAL LAW—Court Expressing Opinion.—Instruction of court, in trial for violating banking law, that in his opinion it was the duty of the jury to convict, held ground for new trial.—BABESS v. UNITED STATES, U. S. C. C. of App., Fourth Circuit, 108 Fed. Rep. 804.

54. CRIMINAL LAW—Remark of Judge.—Remarks by judge held not violation of constitutional provision against instructing as to matters of fact.—STATE v. MARCHBANKS, S. Car., 39 S. E. Rep. 187.

55. CRIMINAL LAW—Argumentative Instruction.—Instruction that deposition in criminal case should receive same consideration as if witness was present, held argumentative and properly refused.—HOGAN v. STATE, Ala., 30 South. Rep. 859.

56. CRIMINAL TRIAL—Refusal to Give Instructions.—A refusal of a charge already in substance given held proper.—MITCHELL v. STATE, Ala., 30 South. Rep. 848.

57. DAMAGES—Fire—Evidence.—Difference in value of land before and after fire may be shown by proof of value of trees destroyed.—DENT v. SOUTH-BOUND R. CO., S. Car., 39 S. E. Rep. 527.

58. DAMAGES — Punitive Damages — Instruction. — Where punitive damages are claimed, but are not warranted by the evidence, it is error to refuse to charge expressly that punitive damages cannot be allowed, though the court charged that only compensatory damages should be awarded.—MABB v. STEWART, Cal., 65 Pac. Rep. 1085.

59. DEATH BY WRONGFUL ACT—Evidence.—In an action by a widow to recover for the negligent killing of her husband, evidence that decedent left no estate was inadmissible.—BRUNSWICK & W. R. CO. v. WIGGINS, Ga., 39 S. E. Rep. 551.

60. DESCENT AND DISTRIBUTION—Widow as Heir.—Under Pub. Laws 1895, ch. 157, the widow is not an heir of the husband, but takes as widow, and not as heir.—GOLDER v. GOLDER, Me., 49 Atl. Rep. 1050.

61. EJECTMENT—False Representation.—Where, in ejectment, plaintiff has legal title and defendant merely possession, false representation by plaintiff in obtaining his deed is immaterial.—WILLEY v. GREENFIELD, 71 N. Y. Supp. 1046.

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62. EJECTMENT — Possession. — Code, § 2726, as amended by Acts 1896-79, p. 514, held not to enable a person in possession of land to maintain ejectment against one claiming adversely to plaintiff.—STEINMAN v. VICAR, Va., 39 S. E. Rep. 227.

63. EJECTMENT — Sufficient Seisin.—Execution on judgment in attachment of property gives the creditor a *seisin* sufficient to maintain a real action for recovery of the property.—STICKNEY & BABCOCK COAL CO. v. GOODWIN, Me., 49 Atl. Rep. 1039.

64. EMINENT DOMAIN—Easement—Right of Way.—A railroad company acquires only an easement in land condemned.—SHIELDS v. NORFOLK & C. R. Co., N. Car., 39 S. E. Rep. 582.

65. EMINENT DOMAIN—Life Tenant—Remainder-men. —A life tenant receiving damages for injuries to life estate by condemnation held not liable therefor to the remainder-men.—TRIMMIER v. DARDEN, S. Car., 39 S. E. Rep. 873.

66. EMINENT DOMAIN—Street Railroads.—Holder of a franchise to build a street railway may lawfully take private property for the construction of the road, provided that just compensation is paid therefor.—WATSON v. FAIRMONT & SUBURBAN RY. CO., W. Va., 39 S. E. Rep. 198.

67. EQUITY—Accounting—Procedure.—The court of chancery has power to pass on an account without the intervention of a master.—GLOVER v. JONES, Me., 49 Atl. Rep. 1104.

68. EQUITY — Adequate Remedy at Law. — Where chattle mortgagor has reasonably paid the debt, he has an adequate remedy at law for determining questions as to the mortgaged property. — LOGGIE v. CHANDLER, Me., 49 Atl. Rep. 1059.

69. EQUITY—"Clean Hands" of Complainant.—The principle that he who comes into equity must do so with clean hands affects a complainant only when his equity has a necessary relation to the equity for which he sues.—SHAVER v. HELLER & MEEZ CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 821.

70. EQUITY—Master—Objection to Evidence.—Where evidence before a master is objected to, the master should receive it, subject to the objection, so that the court may pass upon the matter on review.—KANSAS LOAN & TRUST CO. v. ELECTRIC RY., LIGHT & POWER CO., U. S. C. C., W. D. (Mo.), 108 Fed. Rep. 702.

71. EQUITY—Pleading.—A pleading bearing one name will, in course of equity, operate to perform functions of another pleading if it contains proper matter.—PETHEL v. MCCULLOUGH, W. Va., 39 S. E. Rep. 199.

72. EQUITY—Pleading—Amendment.—A bill may be amended by inserting new prayers for relief, even after hearing, where no demurrer was filed.—LOGGIE v. CHANDLER, Me., 49 Atl. Rep. 1059.

73. EQUITY—Pleading—Special Prayer.—Where there is no general prayer for relief, a court can grant only the special relief asked.—LOGGIE v. CHANDLER, Me., 49 Atl. Rep. 1059.

74. EQUITY—Protection of Easement.—Equity has jurisdiction to protect enjoyment of easement.—COLEMAN v. BUTT, Ala., 30 South. Rep. 864.

75. EQUITY — Unliquidated Damages.—A court of equity has no jurisdiction to pass on a legal demand for unliquidated damages.—SCHWALBER v. EHMAN, N. J., 49 Atl. Rep. 1085.

76. ESCHEAT—Lands of Corporation.—Real estate purchased by a savings and loan association and not sold within five years does not escheat to the state.—PEOPLE v. STOCKTON SAVING & LOAN SOC., Cal., 65 Pac. Rep. 1078.

77. ESLOPPEL—Claim of Title.—One procuring a loan from a third person on a statement that the land offered as security belongs to borrower held estopped, in proceeding by lender to subject the land to his debt to claim title thereto.—WRIGHT v. MCCORD, Ga., 39 S. E. Rep. 510.

78. EVIDENCE—Fire Expert Witness.—Witnesses who have knowledge of the facts may give their opinion as to damages to land by fire.—DENT v. SOUTH BOUND R. CO., S. Car., 39 S. E. Rep. 527.

79. EVIDENCE—Impressions.—A witness cannot testify as to impression made by conversation with plaintiff as to material issue.—MARKINSVILLE MIN. CO. v. FLIPPO, Ala., 30 South. Rep. 358.

80. EVIDENCE—Proof of Foreign Statute.—An English statute held sufficiently authenticated to be admissible in evidence in a court of the United States.—NASHUA SAV. BANK v. ANGLO-AMERICAN LAND MORTGAGE & AGENCY CO., U. S. C. C. of App., First Circuit, 108 Fed. Rep. 764.

81. EVIDENCE — Res Gestæ.—Language used by conductor towards person ejected from train, after re-entry for purpose of continuing journey, held a part of the *res gestæ*.—MCGHEE v. CASHIN, Ala., 30 South. Rep. 867.

82. EVIDENCE—Res Gestæ.—Statements of an engineer injured in a collision to superintendent, after removal from the engine, held inadmissible as *res gestæ*.—WILLIAMS v. SOUTHERN PAC. CO., Cal., 65 Pac. Rep. 1100.

83. EVIDENCE — Secondary — Written Instrument.— Secondary evidence of written document held properly admitted on sufficient proof of loss of original.—PERRY v. JEFFERIES, S. Car., 39 S. E. Rep. 515.

84. EVIDENCE—Value of Timber—Experts.—To determine value of wood cut from lands, evidence of amount cut and measured on adjoining lands held admissible.—PERRY v. JEFFERIES, S. Car., 39 S. E. Rep. 515.

85. EVIDENCE—Weight of Evidence.—That a witness testified to the best of his knowledge or his recollection goes to the weight, and not to the competency of the evidence.—HOPPER v. HOPPER, S. Car., 39 S. E. Rep. 366.

86. EVIDENCE—Written Evidence—Parol.—A complete written antenuptial agreement cannot be added to or varied by parol.—RUSSELL v. RUSSELL, N. J., 49 Atl. Rep. 1081.

86. EXCEPTIONS, BILL OF—Narrative Form.—Bill of exceptions should contain the evidence set out in narrative form; and, where a stenographer's report of questions and answers is set forth, it will be stricken from the record.—WOODWARD IRON CO. v. HERNDON, Ala., 30 South Rep. 370.

88. EXECUTION—Chattels—Telephone Poles.—As between debtor and creditor, telephone poles and wires remain chattels, and may be seized on execution.—READFIELD TELEPHONE & TELEGRAPH CO. v. CYR, Me., 49 Atl. Rep. 1047.

89. EXECUTORS AND ADMINISTRATORS—Administration in Debt.—Where an administrator, who is also an heir, owes the estate more than the value of his distributive share, he should account for such share as a payment on the debt.—SANCHEZ v. FORSTER, Cal., 65 Pac. Rep. 1077.

90. EXECUTORS AND ADMINISTRATORS — Appeal.— Where, on appeal from settlement of an executor's account, no transcript is filed within 40 days, the appeal should be dismissed.—IN RE FRANKLIN'S ESTATE, Cal., 65 Pac. Rep. 1061.

91. EXECUTORS AND ADMINISTRATORS—Final Settlement—Surcharge.—In a suit to surcharge the final settlement of defendant as executor of his father's estate, the burden is on defendant to prove a claim adverse to the estate.—SCOTT v. PORTER, Va., 39 S. E. Rep. 220.

92. EXECUTORS AND ADMINISTRATORS—Power to Invest.—An executrix held under the will to have no power to invest the funds of the estate in improvements.—TRIMMIER v. DARDEN, S. Car., 39 S. E. Rep. 878.

93. EXECUTORS AND ADMINISTRATORS—Presentment of Claims.—A valid presentment of a claim within the statute of non-claim, must be made by some one hav-

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ing an interest or authority. RAYBURN v. RAYBURN, Ala., 30 South. Rep. 865.

94. EXEMPTION.—A widow with two infant children wholly dependent on her for support is the head of a family, and entitled to homestead exemption.—OPPENHEIM v. MYERS, Va., 39 S. E. Rep. 218.

95. EXEMPTION—Wages.—Wages held personal property within the meaning of the exemption law.—MCCORMICK HARVESTING CO. v. VAUGHAN, Ala., 30 South. Rep. 863.

96. FEDERAL COURTS — Mandamus—Jurisdiction.—The jurisdiction of a federal court to award a writ of *mandamus* is not dependent on the laws or practice of the state, but is derived from the federal statute.—BOARD OF LIQUIDATION OF CITY OF NEW ORLEANS v. UNITED STATES, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 689.

97. FERRIES—Establishment.—An order of the commissioners of a county to settle and lay out a ferry as petitioned for amounts to an establishment of the ferry.—ROBINSON v. LAMB, N. Car., 39 S. E. Rep. 579.

98. FIRE INSURANCE—Insurance Interest.—Mutual insurance company under its charter held not entitled to insure property of one not a member.—PEARSON v. MUT. INS. CO. OF GREENVILLE,, S. Car., 39 S. E. Rep. 512.

99. FIXTURES—Construction.—In determining question whether chattel has become a part of the realty, the intention, as shown by the structure and mode of attachment thereof and the use of the property, must be considered.—READFIELD TELEPHONE & TELEGRAPH CO. v. CYR, Me., 49 Atl. Rep. 1047.

100. FRAUD—Misrepresentations.—Fraudulent misrepresentations of a material fact on sale of personalty, as inducement to contract, held a defense to an action on a note given for the price.—HOOPER v. WHITAKER, Ala., 30 South. Rep. 855.

101. FRAUDS, STATUTE OF — Consent Agreement to Sell Land.—Where land of the decedent were sold to pay debts by consent order, parol evidence held admissible to establish the agreement under which the consent order was had.—SUBER v. RICHARDS, S. Car., 39 S. E. Rep. 540.

102. FRAUDS, STATUTE OF—Pleading.—The statute of frauds is not available as a defense unless pleaded.—SUBER v. RICHARDS, S. Car., 39 S. E. Rep. 540.

103. FRAUDULENT CONVEYANCES — Gifts.—A gift in fraud of creditors is good as against the administrator of the deceased donor, except to the extent necessary to pay the decedent's debts.—SCHWALBER v. EHMAN, N. J., 49 Atl. Rep. 1065.

104. GIFTS—Fraud of Creditors.—A gift in fraud of a pursuing creditor is good between the donor and the donee.—SCHWALBER v. EHMAN, N. J., 49 Atl. Rep. 1065.

105. HOMICIDE — Self-Defense.—An instruction that defendant was justified in taking prompter measures of self-defense on attack by deceased, if he was a dangerous man held erroneous.—MITCHELL v. STATE, Ala., 30 South. Rep. 848.

106. HUSBAND AND WIFE—Curtesy.—Where wife's separate estate was conveyed by deed, in which the husband united, a judgment against him did not constitute a lien on his estate by curtesy.—BANKERS' LOAN & INVESTMENT CO. v. BLAIR, Va., 39 S. E. Rep. 281.

107. INJUNCTION — Temporary — Finding of Fact.—Findings of fact on motion for temporary injunction held not conclusive on the hearing for permanent injunction.—ALSTON v. LIMEHOUSE, S. Car., 39 S. E. Rep. 188.

108. INJUNCTION—Title—Trial by Jury.—Where, in suit to enjoin trespass to land, question of title is raised, either party is entitled to trial by jury.—ALSTON v. LIMEHOUSE, S. Car., 39 S. E. Rep. 192.

109. INSURANCE—Conditions — Waiver.—Acceptance of premium after burning of property held to waive condition in policy that it should be void in the event the insurer's ownership was not unconditional.—MECHANICS' & TRADERS' INS. CO. v. SMITH, Miss., 30 South Rep. 862.

110. INSURANCE—Construction of "Serious Illness."—Term "serious illness," in application for insurance, means illness permanently impairing health.—DRAKEFORD v. SUPREME CONCLAVE KNIGHTS OF DAMON, S. Car., 39 S. E. Rep. 528.

111. INSURANCE—Misstatements.—It is fraud on the insurance company, where defendant makes misstatements to its physician and conceals facts.—DRAKEFORD v. SUPREME CONCLAVE KNIGHTS OF DAMON, S. Car., 39 S. E. Rep. 528.

112. INTERNAL REVENUE—Note not Stamped.—That a note sued on is not properly stamped as required by act of congress, held not to authorize its rejection in evidence.—HOOPER v. WHITAKER, Ala., 30 South. Rep. 855.

113. INTEREST—Collection Barred.—Interest may be collected on a debt barred by statute from date when first due, where it is acknowledged by an agreement in writing.—SUBER v. RICHARDS, S. Car., 39 S. E. Rep. 540.

114. INTOXICATING LIQUORS—Criminal Prosecution—Witnesses.—Witnesses not named in indictment as one to whom liquors were sold may testify as to sales to others.—STATE v. GREEN, S. Car., 39 S. E. Rep. 185.

115. INTOXICATING LIQUORS—Evidence.—Not competent to ask a witness, who had never drank "hop jack," as to whether the ordinary use thereof would make one drunk.—COSTELLO v. STATE, Ala., 30 South. Rep. 876.

116. INTOXICATING LIQUORS — Indictment — Proof.—Under an indictment for selling liquors, proof of sale on a day other than that charged held admissible.—STATE v. GREEN, S. Car., 39 S. E. Rep. 185.

117. JUDGMENT—Res Adjudicata.—The rule that an adjudication by an appellate tribunal becomes the law of the case on all subsequent trials should not be extended beyond the questions that were actually considered and decided.—PATILLO v. ALLEN-WEST COMMISSION CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 723.

118. JUDGMENT—Res Judicata.—A decree, dimissing a bill to have deed cancelled, held conclusive of all questions going to the validity of such deed.—SAMUELS v. REVIERE, U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 718.

119. JUDGMENT—Special Finding.—A finding that goods were sold to one defendant does not support an action for a sale to two defendants, or authorize a judgment against one.—DOBBS v. PURINGTON, Cal., 65 Pac. Rep. 1091.

120. JUDICIAL SALES—Payments—Protection.—Under Acts 1883-84, p. 218, a purchaser of land at a sale by a special commissioner held protected in payments to such commissioner.—PULLIAM v. TOMPKINS, Va., 39 S. E. Rep. 221.

121. JURY—Talesman.—It is not necessary that names of persons summoned as talesman in a criminal trial should appear on the list of jurors served on defendant.—MITCHELL v. STATE, Ala., 30 South. Rep. 848.

122. LIBEL AND SLANDER—Disparaging Circulars.—Statements in circulars which merely disparage the goods of plaintiff, will not support an action for libel.—NONPAREIL CORK MFG. CO. v. KEASBY & MATTISON CO., U. S. C. C., E. D. (Penn.), 108 Fed. Rep. 721.

123. LICENSES—Parol—Revocable—Licenses to enter and cut timber created, by parol, while it remains executory as to timber not cut, is revocable at will of the owner, or by his death or conveyance of the land without reservation.—EMERSON v. SHORES, Me., 49 Atl. Rep. 1051.

124. LIFE TENANT—Liability for Taxes.—A life tenant is only liable for taxes accruing during his life tenancy.—TRIMMIER v. DARDEN, S. Car., 39 S. E. Rep. 372.

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125. LIMITATIONS OF ACTIONS—New Promise.—A letter held a sufficient promise to pay debt to take it out of the statute of limitations.—SUBER v. RICHARDS, S. Car., 39 S. E. Rep. 510.

126 MARRIAGE—Slave Marriages.—Act March 12, 1872, legalizing certain marriages among slaves, applies only to cases where the parties had agreed to occupy the relation of husband and wife, but where the power to contract was wanting.—ROBERSON v. MCCAULEY, S. Car., 39 S. E. Rep. 570.

127. MASTER AND SERVANT—Defects—Master's Promise.—Remarks of foreman held not a promise by the master that defects would be cured and dangerous places made safe.—DWYER v. NIXON, U. S. C. C. of App., Second Circuit, 108 Fed. Rep. 751.

128. MASTER AND SERVANT—Reassumption of Risk.—Whether a servant reassumes risk pending the removal of the defects, or whether it remains on the master, held question for jury.—DEMPSY v. SAWYER, Me., 49 Atl. Rep. 1035.

129. MASTER AND SERVANT—Risk on Master—Assumption.—Risk of injury from defective machinery primarily on master, unless servant voluntarily assumes it.—DEMPSEY v. SAWYER, Me., 49 Atl. Rep. 1035.

130. MASTER AND SERVANT — Safe and Dangerous Methods.—Where there is a comparatively safe and a dangerous way of doing the same work, and a servant assumes the latter method, he is guilty of contributory negligence.—MORRIS v. DULUTH, F. S. & A. RY. CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 747.

131. MASTER AND SERVANT—Warning Servant.—Failure of foreman of street-railroad company to warn engineer of location of posts along the line of the road not negligence.—NORTH BIRMINGTON ST. R. CO. v. WRIGHT, Ala., 30 South. Rep. 360.

132. MASTER AND SERVANT—Wrongful Discharge—Compensation.—Where employee under contract to be retained until good cause shown for discharge is wrongfully discharged, he can recover the full value of his contract at the time of the breach.—RHOADES v. CHESAPEAKE & O. RY. CO., W. Va., 39 S. E. Rep. 209.

133. MECHANICS' LIENS—Notice.—Notice to claim lien need not be given, where the purchaser of the materials was the owner of the property.—MATTHEW v. MONTS, S. Car., 39 S. E. Rep. 575.

134. MINES AND MINERALS—Relocation.—*Prima facie* evidence of the location of a mine by the grantor of the one in possession is sufficient to justify a verdict against one who, knowing of such location, relocated it on the claim that it was abandoned.—YREKA MIN. & MILL. CO. v. KNIGHT, Cal., 65 Pac. Rep. 1091.

135. MINES AND MINING — Lease—Notice of Sale.—Where a mining lease provided for termination on a sale of the property, and the officer of lessor who executed the lease notified the lessee that the property was sold, such lessee was justified in relying on such notice.—OBER v. SCHENK, Utah, 65 Pac. Rep. 1078.

136. MORTGAGES—Foreclosure—Premature.—Suit to foreclose mortgage according to term thereof, though before principal of note secured was due, held not prematurely brought.—MEYER v. WEBBER, Cal., 65 Pac. Rep. 1110.

137. MORTGAGE—Note and Mortgage Considered Together.—Under Civ. Code, § 1642, a note and mortgage securing the same, delivered at the same time, must be taken and considered together.—MEYER v. WEBBER, Cal., 65 Pac. Rep. 1110.

138. MORTGAGES.—In writ of entry by mortgagee to recover possession for the purpose of foreclosure, the administrator of deceased mortgagor cannot be made a party defendant.—GOLDER v. GOLDER, Me., 49 Atl. Rep. 1050.

139. MUNICIPAL CORPORATIONS—City—Incorporation.—An incorporated town cannot become a city until legislative enactment to that effect.—SAVANNAH, F. & W. RY. CO. v. JORDAN, Ga., 39 S. E. Rep. 511.

140. MUNICIPAL CORPORATIONS—Sewer—Duty to Repair.—It is the city's duty to maintain and keep sewer in repair so long as it was used for drainage purposes.—HAMLIN v. CITY OF BIDDEFORD, Me., 49 Atl. Rep. 1100.

141. MUTUAL BENEFIT SOCIETIES—Financee as Beneficiary.—Where a life certificate of a member was payable to 'B "as his fiancee," his deserted wife cannot object that deceased was incapable of contracting marriage with B.—WOODMEN OF THE WORLD v. RUTLEDGE, Cal., 65 Pac. Rep. 1105.

142. NEGLIGENCE—Contributory Negligence.—In an action to recover for injuries held error to give the jury the impression that plaintiff would recover from defendant if both were equally negligent.—BRUNSWICK & W. R. CO. v. WIGGINS, Ga., 39 S. E. Rep. 551.

143. NEGLIGENCE—Nonsuit.—Where there is evidence of negligence by defendant and contributory negligence by plaintiff, held error to direct a nonsuit.—BURNS v. SOUTHERN RY. CO., S. Car., 39 S. E. Rep. 567.

144. NEGLIGENCE—Presumption—Carriers.—There is a presumption of negligence arising from the fact that the passenger was injured while on defendant's train.—COOPER v. GEORGIA, C. & N. RY. CO., S. Car., 39 S. E. Rep. 548.

145. NEW TRIAL—Immaterial Testimony.—Admitting immaterial testimony held not necessarily cause for new trial.—RALEIGH & G. R. CO. v. BRADSHAW, Ga., 39 S. E. Rep. 555.

146. NOTICE—Recorded Deed—Burden of Proof.—The burden of proof to show actual notice of a prior unrecorded deed, as against the holder of a subsequent deed by prior record, is on the party holding the unrecorded deed.—SIDELINGER v. BLISS, Me., 49 Atl. Rep. 1094.

147. NOTICE—Record of Judgment—Actual Notice.—Prior record of the judgment, though, constructive notice to subsequent purchasers, will not avail against actual notice given by announcements of the judgment creditor to bidders inviting them to purchase on a statement excluding the idea that the judgment was a lien.—BORDEN v. HUTCHINSON, N. J., 49 Atl. Rep. 1088.

148. NUISANCE—Sewer System—Though city has authority to establish sewerage system, equity will enjoin maintenance of the same, where it creates a nuisance dangerous to health.—CITY OF WAYCROSS v. HOUK, Ga., 39 S. E. Rep. 577.

149. NUISANCE — Street Railroad — Construction.—A street railway authorized by ordinance to construct its railroad cannot be regarded as committing a nuisance in so doing.—WATSON v. FAIRMONT & SUBURBAN RY. CO., W. Va., 39 S. E. Rep. 198.

150. PARTNERSHIP — Requisites.—An agreement between tug owners to place their vessels under a common management and to divide their net earnings on a fixed basis held to constitute a partnership.—FLEMING v. LAY, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 952.

151. PATENTS—"Improvements"—Sufficiency.—Superiority of device over patent must be due to a difference in function or mode of operation, or some essential change in character.—CROWN CORK & SEAL CO. v. ALUMINUM STOPPER CO., U. S. C. C. of App., Fourth Circuit, 108 Fed. Rep. 845.

152. PAUPERS—Legal Home.—In order to retain a legal home in a town, a person need not at all times have a house or room to which he is entitled to go.—INHABITANTS OF SOUTH THOMASTON v. INHABITANTS OF FRIENDSHIP, Me., 49 Atl. Rep. 1056.

153. PAYMENT—Application.—Creditor on receiving payments without application may apply them to debt already barred, thus tolling the statute.—HOPPER v. HOPPER, S. Car., 39 S. E. Rep. 866.

154. PLEADING — Amendment. — Plaintiff may be allowed to amend his declaration by striking out any portion of the claim sued.—INHABITANTS OF SOUTH THOMASTON v. INHABITANTS OF FRIENDSHIP, Me., 49 Atl. Rep. 1056.

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155. PLEADING—Amendment After Dismissal.—A motion for leave to amend is too late after dismissal on demurrer for want of jurisdictional facts.—SHAW v. AMERICAN TOBACCO CO., U. S. C. C. of App., Fifth Circuit, 108 Fed. Rep. 842.

156. PLEADING—Answer — Partial Defense.—Where answer contained averments showing partial defense, they should not be stricken out on a general demurrer.—HIGGINBOTHAM v. CONWAY, Ga., 39 S. E. Rep. 560.

157. PLEADING—Counterclaim.—There is no rule of law requiring facts set up in counterclaim to be separately and specifically stated.—CO-OPERATIVE PUB. CO. v. WALKER, S. Car., 39 S. E. Rep. 525.

158. PLEADING—Demurrer—Effect of Sustaining.—Where bill is demurred to, and one ground of demurrer is sustained, it puts the case out of court, unless the bill is amended.—COLEMAN v. BUTT, Ala., 30 South. Rep. 364.

159. PLEADING—General Issue.—Plea of general issue puts on plaintiff the necessity of proving material allegations of his complaint, unless waived.—MCGHEE v. CASHIN, Ala., 30 South. Rep. 367.

160. PLEADING—Redundancy.—Where redundant allegations are not objected to, evidence relating to the issue raised by them held admissible.—DENT v. SOUTH BOUND R. CO., S. Car., 39 S. E. Rep. 527.

161. PUBLIC LANDS—Contest—Register.—Under Pol. Code, §§ 501, 3414, 3498, a demand for reference of a contest between applicants for purchase of state lands is of no effect unless the fee of the register is paid.—SHERMAN v. WRIGHT, Cal., 65 Pac. Rep. 1096.

162. PUBLIC LANDS—Damages.—Under Laws 1891, ch. 185, action of board of claims in awarding no damages for failure of title to land granted by state held proper.—KILLAM v. STATE, 71 N. Y. Supp. 1041.

163. QUIETING TITLE — Timber Claims.—Under Laws 1893, ch. 6, where defendant claims an interest under contract in timber on plaintiff's land, the court, on adjudging the claim invalid, cannot properly dismiss the action.—RUMBO v. GAY MFG. CO., N. Car., 39 S. E. Rep. 581.

164. RAILROADS—Construction.—Railroad companies have the right to exercise reasonable discretion in the construction of their roadbeds.—MORRIS v. DULUTH, ETC. RY. CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 747.

165. RAILROADS—Judicial Sale—Liens.—A purchaser of railroad property at judicial sale succeeds to all the rights of the former owner and the owners of the liens foreclosed, as against an unforeclosed lien.—CONNOR v. TENNESSEE CENT. RY., U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 361.

166. RAILROADS—Liable for Fires.—Railroad company held liable, under Rev. St. § 1686, for injuries by fire from its locomotives to growing trees, turpentine boxes, etc.—DENT v. SOUTH BOUND R. CO., S. Car., 39 S. E. Rep. 527.

167. RAILROADS—Liability for Fires.—Railroad company permitting dry grass on its right of way, liable for fire caused by sparks.—SHIELDS v. NORFOLK & C. R. CO., N. Car., 39 S. E. Rep. 562.

168. RECEIVERS—Action Against—Proof.—In an action by a passenger to recover for wrongful ejection, as against receivers of road, plaintiff must prove that defendants were receivers and had control thereof, and that he was ejected by persons in defendant's employ.—MCGHEE v. CASHIN, Ala., 30 South. Rep. 367.

169. RECEIVERS—Authority to Continue Litigation.—A receiver does not, by virtue of his appointment, become a party to the litigation, so as to entitle him to file a pleading therein.—YOUTSEY v. HOFFMAN, U. S. C. C., D. (Ky.), 108 Fed. Rep. 696.

170. RECEIVERS—Not a Party to Suit—May Contest.—The receiver of an insolvent firm, not made a party to an action against such firm, may contest debt of the judgment creditor.—LAWSON v. DUNN, N. J., 49 Atl. Rep. 1067.

171. RECEIVERS—Party—Pending Litigation.—A judgment entered against a firm for which a receiver has been appointed in an action in which such receiver was not made a party has no force against him.—LAWSON v. DUNN, N. J., 49 Atl. Rep. 1067.

172. RECEIVING STOLEN GOODS — Sufficient Indictment.—Indictment for receiving stolen goods, not alleging that defendant knew they were stolen, held insufficient.—ANDERSON v. STATE, Ala., 30 South. Rep. 875.

173. REMOVAL OF CAUSES—Dismissal as to One Defendant.—A plaintiff may dismiss his action before trial as to one of two or more defendants, on whose application the cause was removed into a federal court on the ground of a separable controversy.—YOUTSEY v. HOFFMAN, U. S. C. C., D. (Ky.), 108 Fed. Rep. 699.

174. SAFE-DEPOSIT COMPANIES — Liability.—A contract of a safe-deposit company construed, and held not to relieve it of its obligation to guard the property placed in its charge as a bailee for hire.—CUSSEN v. SOUTHERN CALIFORNIA SAV. BANK, Cal., 65 Pac. Rep. 1099.

175. SALES — Repudiation of Contract.—The acts of a purchaser in refusing to pay for deliveries made, and in denying liability therefor, held to amount to a repudiation of the contract.—SCULLY STEEL & IRON CO. v. OLD MEADOW ROLLING-MILL CO., U. S. C. C. of App., Third Circuit, 108 Fed. Rep. 782.

176. SALVAGE—Authority of Master.—A master whose vessel has stranded has no authority on behalf of the insurers to promise his men extra pay for work done as salvage services.—THE C. F. BIELMAN, U. S. D. C., E. D. (Wis.), 108 Fed. Rep. 878.

177. SET OFF AND COUNTERCLAIM — Unliquidated Claim.—Set-off of unliquidated damages as against a liquidated claim held not permissible.—BUNTING v. COCHRAN, Va., 39 S. E. Rep. 229.

178. SHIPPING — Charters—Port Customs.—A custom of the port in order to be read into the charter, must be reasonable, certain, lawful, and consistent with the charter, and so general and long-established as to be conclusively presumed to have been within the knowledge of the parties.—CONTINENTAL COAL CO. v. BIRDSALL, U. S. C. C. of App., Fourth Circuit, 108 Fed. Rep. 882.

179. SPECIFIC PERFORMANCE — Part Performance.—Equity should not decree specific performance of parol agreement where the acts of part performance are not positive and substantial.—HUDSON v. MAX MEADOWS LAND & IMPROV. CO., Va., 39 S. E. Rep. 215.

180. SPECIFIC PERFORMANCE — Sale of Whisky.—Equity will not decree the specific performance of a contract of sale of whisky stored in a United States warehouse.—LANGFORD v. TAYLOR, Va., 39 S. E. Rep. 228.

181. STATUTES—Amending Amended Statute.—A statute is not invalid, although it purports to be amendatory of a prior amended statute where the provisions of the new statute are independent and complete in themselves.—CITY OF BEATRICE v. MASSLICH, U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 748.

182. STREET RAILROADS—Franchise—Assignment.—A franchise granted to an individual may be valid by assigned of the same to a private corporation.—WATSON v. FAIRMOUNT & SUBURBAN RY. CO., W. Va., 39 S. E. Rep. 198.

183. TAXATION—Tax Sale—When Made.—Power to sell land for taxes must be exercised during the existence of the tax lien.—HARNED v. CITY OF CAMDEN, N. J., 49 Atl. Rep. 1082.

184. TAXATION—Tax Title.—Where plaintiff holds the legal title, redemption by defendants from tax sale gives them no interest or right of occupancy as

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against a deed from the owner to plaintiff.—WILLEY v. GREENFIELD, 71 N. Y. Supp. 1046.

185. TELEGRAPHS AND TELEPHONES — Erection of Poles —A telephone company, which by permission of municipal authorities erects lines along highways, acquires a mere license, and not a permanent vested interest in the land itself.—READFIELD TELEPHONE & TELEGRAPH CO. v. CYR, Me., 49 Atl. Rep. 1047.

186. TENANCY IN COMMON.—Where tenant in common is liable for waste by the removal of coal from land, co-tenant may waive tort and sue for an accounting.—CECIL v. CLARK, W. Va., 39 S. E. Rep. 202.

187. TENANCY IN COMMON — Grantee of One Tenant—Adverse Possession.—Possession by grantee in deed of land held by tenants in common under a deed from one tenant held to amount to ouster and to establish title after 10 years.—SUDDUTH v. SUMERAL, S. Car., 39 S. E. Rep. 534.

188. TIMBER—Realty or Personalty.—Where growing timber is sold, it remains an incident of real property so long as it remains uncut, but, when cut, it becomes personalty.—EMERSON v. SHORES, Me., 49 Atl. Rep. 1051.

189. TOWNS — Charter of Incorporation — City.—Act incorporating a town never having been repealed, the existence of such place as a town held not affected by acts referring to it as a city.—SAVANNAH, ETC. RY. CO. v. JORDAN, Ga., 39 S. E. Rep. 511.

190. TRADE-MARKS AND TRADE-NAMES—Geographical Terms.—Use of geographical or descriptive terms to palm off the goods of one manufacturer as those of another may be enjoined.—SHAVER v. HELLER & MERZ CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 821.

191. TRADE-MARKS AND TRADE-NAMES — Unfair Competition.—Sale of goods of one manufacturer as those of another is unfair competition, authorizing an injunction.—SHAVER v. HELLER & MERZ CO., U. S. C. C. of App., Eighth Circuit, 108 Fed. Rep. 821.

192. TRESPASS — Life Tenant — Possession.—Party in possession, whether as life tenant or under conditional fee, can maintain trespass.—PERRY v. JEFFERIES, S. Car., 39 S. E. Rep. 515.

193. TRIAL—Assignment of Errors.—Errors assigned on exceptions entered consent of the court without the knowledge of plaintiff's counsel, should not be considered.—OBER v. SCHENCK, Utah, 65 Pac. Rep. 1073.

194. TRIAL — Cross-Examination.—Where court erroneously excludes certain cross examination, and afterwards admits his error, the witness may be restored for further cross-examination.—PERRY v. JEFFERIES, S. Car., 39 S. E. Rep. 515.

195. TRIAL—Eleven Jurors — Consent.—Where juror is excused for providential cause, and party consents that the trial should proceed before 11 jurors, he cannot complain.—RALEIGH & G. R. CO. v. BRADSHAW, Ga., 39 S. E. Rep. 555.

196. TRIAL—Examination—Leading Questions.—The asking of leading questions is within the discretion of the trial court.—STATE v. MARCHBANKS, S. Car., 39 S. E. Rep. 187.

197. TRIAL—Instruction — One Theory.—Instruction applicable to one theory proper, though ignoring another theory, as to which instruction has been given.—RHOADES v. CHESAPEAKE & O. RY. CO., W. Va., 39 S. E. Rep. 209.

198. TRIAL — Limitation of Evidence.—A verdict should not be set aside because evidence admissible for one purpose only was not so limited in the charge, unless such limitation was requested.—LIEBRANDT v. SORG, Cal., 65 Pac. Rep. 1096.

199. TRIAL—Nonsuit.—Where there was any evidence establishing plaintiff's case, held error to grant a nonsuit, not leaving the credibility of witness for the jury —RYKARD v. DAVENPORT, S. Car., 39 S. E. Rep. 272.

200. TRIAL — Order of Proof.—Allowing plaintiff in trespass to show certain parties trespassing, before proving that they were agents of defendant, held not error.—PERRY v. JEFFERIES, S. Car., 39 S. E. Rep. 515.

201. TROVER AND CONVERSION—Measure of Damages.—Measure of damages in trover is the value of the property, with interest.—CECIL v. CLARK, W. Va., 39 S. E. Rep. 202.

202. TROVER AND CONVERSION—Venue.—A defendant in an action for damages for conversion of oysters wrongfully taken from plaintiff's oyster beds cannot have change of venue to the county in which the beds are situated.—MAKELY v. A. BOOTHE CO., N. Car., 39 S. E. Rep. 582.

203. TRUSTS—De Son Tort.—A plaintiff who intrusted money to an agent which the agent wrongfully deposited to cover gambling transactions, held entitled to recover the amount so deposited from defendant as a trust *de son tort*.—CENTRAL STOCK & GRAIN EXCH. OF CHICAGO v. BENDINGER, U. S. C. C. of App., Seventh Circuit, 109 Fed. Rep. 926.

204. TRUSTS—Innocent Purchaser—Pleading.—To defeat a trust agreement affecting lands on the ground that defendant was a subsequent innocent purchaser such defense must be explicitly pleaded.—NEWMAN v. SCHWERIN, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 942.

205. USURY—Conflict of Laws.—Contract to pay interest is governed by the law of the place of making the contract or the place of its performance.—BARRETT v. CENTRAL BUILING & LOAN ASSN., Ala., 30 South. Rep. 847.

206. VENDOR AND PURCHASER—Payment—Evidence.—In action to recover price of land, where issue is whether it was to be paid in part by stock of the vendee corporation, evidence as to value of the land and the value of the stock held competent.—LARKINSVILLE MIN. CO. v. FLIPPO, Ala., 30 South. Rep. 858.

207. WATER AND WATER COURSES—Appropriation of Water Power.—Appropriation of unappropriated river valley space by a mill owner must be an actual occupation by dams.—NATIONAL FIBRE BOARD v. LEWISTON & A. ELECTRIC LIGHT CO., Me., 49 Atl. Rep. 1095.

208. WATER AND WATER COURSES — Diversion—Prescription.—Diverting all the waters of a stream for 40 years, does not give a prescriptive right to have all the waters entering the stream or any of its tributaries flow that way.—CAVE v. TYLER, Cal., 65 Pac. Rep. 1089.

209. WILLS—Contest—Evidence.—On the trial of an issue of *devisavit vel non*, *caveatrix* can prove that she was next of kin of the decedent by the declarations of the latter.—MALONE v. ADAMS, Ga., 39 S. E. Rep. 507.

210. WILLS — Trustee.—Agreement between trustee under will and beneficiary, whereby the son became absolutely entitled to receive one-fourth of the income quarterly, held not in conformity with the trust.—MURPHY v. DELANO, Me., 49 Atl. Rep. 1063.

211. WITNESSES—Death of One Party to Contract.—In a suit by an administratrix for the value of improvements put on defendant's lot under a parol promise to convey it to intestate, defendant, over objection, cannot testify as to such promise.—LUTON v. BADHAM, N. Car., 39 S. E. Rep. 561.

212. WITNESSES—Disregarding Testimony.—The jury cannot, because a witness was in the employ of one of the parties, arbitrarily disregard his testimony.—BRUNSWICK & W. R. CO. v. WIGGINS, Ga., 39 S. E. Rep. 551.

213. WITNESSES — Foreclosure—Mortgagee.—In foreclosure against widow of deceased mortgagor in possession, mortgagee is a competent witness.—GOLDER v. GOLDER, Me., 49 Atl. Rep. 1050.

214. WITNESSES—Impeachment.—Witness cannot be impeached by proof of contradictory statements, without laying foundation for the same.—RALEIGH & G. R. CO. v. BRADSHAW, Ga., 39 S. E. Rep. 555.

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Central Law Journal.

ST. LOUIS, MO., NOVEMBER 15, 1901

The law of master and servant is rapidly assuming a most remarkable pre-eminence, especially in this country. The reasons are not hard to discover. Vast combinations of capital have swept all business enterprises into the hands of the few, and the small independent merchant will in a few years be one of the curiosities of trade. While it is certain that there are fewer masters it has become equally a matter of common knowledge that there has been of recent years a most unprecedented increase in the number of those whose *status* in the eye of the law is that of servant. From the president of a railroad to the office boy of the smallest business establishment in the country is to be found the vast proportion of our population, all of them dependent upon the will of some one else for their daily occupation and sustenance. This may in more than one respect be justly regarded as a calamity. The courts, however, are beginning to recognize the changed conditions and some of its peculiar inequalities. One of these is the disadvantage of the employee in procuring a situation where the market for such employment is in control a few men backed by vast combinations of capital. In such a case a man has not the same opportunity to receive employment when discharged by one employer as formerly, and especially is this the case when the employers enter into an agreement not to employ persons discharged from other concerns except on certain conditions. So the rule has been laid down requiring corporations to give discharged employees "clearance" cards wherever such is the custom and holding them liable for compensatory and sometimes exemplary damages for their wrongful refusal. Hundley v. Railroad (Ky. 1898), 48 S. W. Rep. 429; New York, etc. R. R. v. Schaffer (Ohio, 1898), 17 Ohio Cir. Ct. Rep. 77. This rule in its application is of modern origin and is based on custom or agreements between employers. At common law no duty is imposed on an employer to give his employee a letter of recommendation or clearance card on the severance of the relation, in the absence of any custom or usage on the part of said employer. Cleveland, etc. R. R. v. Jenkins, 174 Ill. 398, 51 N. E. Rep. 811, reversing 75 Ill. App. 17. But of recent years agreements as to the employment and discharge of employees are very general among large corporations, and while they are justified in the making of such agreements, they are at the same time held strictly liable for any abuse thereof. Thus where there is a custom among railroads to keep a record of the causes for which employees have been discharged, and for one company not to employ persons who have been discharged for certain causes by another company, it is part of every contract of employment by such companies that such entries, when made, shall be true, and a discharged employee may sue, either in contract or tort, to recover damages resulting from the breach of that part of the contract. Hundley v. Railroad, *supra*. So also, when railroad companies agree not to employ any workmen who may have been discharged from any of such companies, parties to the agreement, unless such applicant presents a "clearance" showing that he had not engaged in a certain strike, a railroad company which, on discharge of an employee, maliciously refuses to give such a clearance is liable for exemplary as for compensatory damages. New York, etc. R. R. v. Shaffer, *supra*.

Questions of wrongful discharge of servant by employer are often litigated and the principles governing their settlement are as old as the common law. The reason for the great mass of litigation on this point is probably that already suggested, the vast increase in the number of those assuming the relation of master and servant, rather than to any uncertainty in the law itself. One phase of this question, however, not as yet altogether free from doubt, is the liability of third persons for malicious interference resulting in the discharge of the servant. The old rule in this country was founded on the case of Chipley v. Atkinson, 23 Fla. 206, which held that an employee can maintain an action against one who maliciously procures his discharge, provided he can prove damages resulting from such discharge. The case of Allen v. Flood, decided by the house of lords in 1897, 67 L.

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J. Q. B. Div. 119, shook the authority of some of the older decisions in England and America. In that case, which was very extensively considered, boiler makers in commom employment with the respondents, who were shipwrights working on wood, objected to work with the latter on the ground that in a previous employment they had been engaged on iron work. The appellant an official of the boiler makers' union, in response to a telegram from one of the boiler makers, came to the yard and dissuaded the men from immediately laying down their work, as they threatened to do, indicating that, if they did so, he would do his best to have them deprived of the benefits of the union, and also fined. They must wait until the matter was settled. The appellant then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boiler makers would leave their work or be called out. The respondents were thereupon dismissed. Held by six of their lordships as against three, that no actionable wrong had been committed by the appellant. In the very recent case of Hollenbeck v. Ristine, 86 N. W. Rep. 377, the Supreme Court of Iowa held generally that one person cannot advise another to discharge an employee, accompanying his advice with libelous charges and escape liability therefor. In this case the surgeon of a street railroad intimated to the president that he would discontinue his relation with the company unless a certain employee, a conductor on the road, was discharged. It seemed that the conductor owed the physician a bill for services which the latter claimed he refused to pay but was "cowardly slinking behind the statute of limitations." The court, in commenting on the case of Allen v. Flood, says: "In that case the appellant made no malicious charge against the complainants. There was no evidence of threat or coercion. We think the case is not in point, and, if it were, that the rule announced is well sustained

NOTES OF IMPORTANT DECISIONS.

UNBORN CHILD — RIGHT OF ACTION FOR WRONGFUL DEATH.—What rights have unborn children or their parents for injuries sustained while in that state of existence? This is certainly a very novel question of law, even if it is not one which is likely to arise with important frequency. An interesting phase of the question arose in the recent case of Gorman v. Budlong, 49 Atl. Rep. 704, where the Supreme Court of Rhode Island held that where a mother was injured through the negligence of defendant so that she gave premature birth to a child, which died as a result of the premature delivery, the statute did not entitle the child's father to maintain an action, as the next of kin, for its wrongful death. In this case Gen. Laws, ch. 233, § 14, provides that whenever death shall result from a wrongful act the next of kin may maintain an action therefor, if the negligence was such that the deceased could have maintained an action had he survived. A child *en ventre sa mere* is a child while yet unborn. Under Lord Campbell's Act, therefore, an infant may claim compensation for the loss, while *en ventre sa mere*, of an immediate relative. Nelson v. Railroad, 78 Tex. 621. This is about as far as the cases go in giving right to infants or parents to sue for injuries to either while the former are *en ventre sa mere*. That a parent cannot have a right of action in such case is based upon the fact that the sole reason giving a right of action in such cases is altogether wanting, *i. e.*, loss of services. The services of a child in that stage of being is, of course, of no value whatever, and the father suffers no pecuniary loss in its death.

ASSIGNMENT OF UNEARNED SALARY.—The question of the validity of an assignment of unearned wages is often litigated. In its application to public officers this question arose recently in the case of Holt v. Thurman, 63 S. W. Rep. 280, where the Supreme Court of Kentucky held that the assignment by a public officer of salary to be earned in future is void as against public policy. We review the latest authorities on this question as follows: An assignment of wages to become due, without limit as to amount or time, and without acceptance by the employer, and without notice to attaching creditor is void as to such creditor. Steinbach v. Brant, 29 Minn. 383, 82 N. W. Rep. 651. An assignment of future wages which may be earned under a contract of employment not yet in existence is void. Tohman v. Roofing

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ings. Dolan v. Hughes (R. I. 1898), 40 Atl. Rep. 344; Wellborn v. Buck (Ala. 1897), 18 South. Rep. 786. Where an assignment of salary or fees to become due to a district attorney is not filed until after such services are rendered, the assignment will be considered as made before the rendition of such services. State v. Barnes (S. D. 1897), 73 N. W. Rep. 80. An assignment by an assessor or other public officer of his salary or compensation, for future service, is contrary to public policy and void. This rule applies also where the service is continuing and incomplete, not yet payable. Stevenson v. Kyle (W. Va. 1896), 24 S. E. Rep. 886.

REMAINDERS—SALE BY PARENT AS LIFE TENANT FOR REINVESTMENT.—Whether a court of equity has authority to authorize a parent, who has a life estate in realty, with remainder over to her minor children, to sell the property in fee for the purpose of reinvestment, or to enhance the interest of the remainder-men, and whether such a sale defeats the interest of such remainder-men, has always been an interesting and controverted question. In the recent case of Hoskins v. Ames, 29 South. Rep. 828, the Supreme Court of Mississippi held that where a mother, who owns a life estate in real estate, with remainder over to her minor children, sells the property in fee under an order of court, which sale is invalid as to the remainder, limitations in favor of the purchaser do not commence to run against the remainder men until the death of the mother. The court gives this interesting review of the origin of the review in England:

"In England the rule is well settled that such equity has no inherent power to sell the real estate of an infant as being for its best interest or for reinvestment. Lord Chancellor Hardwicke, declared by Lord Campbell to be the most consummate judge who ever sat in the court of chancery, in Taylor v. Philips, 2 Ves. Sr. 23, said: 'There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done, but never as to the inheritance; for that would be taking on the court a legislative authority,—doing that which is properly the subject of a private bill.' And since that time—a period of more than 150 years—we find no case in the English decisions that contravenes the doctrine established in that case. The English parliament was accustomed, at the suggestion of the judges, to pass a bill authorizing the court of equity to decree a sale of the infant's real estate for reinvestment; but the court of its own authority, as an equity court and without the power conferred by a legislative act, has always declined to order the sale of the inheritance of an infant. Edmund Hatch, in his will, devised a life interest to his daughter and a fee to her children, his grandchildren. It is the clear intention of the testator that the life tenant should have no power to dispose of the fee; and yet if, by a petition in the chancery court, it can invest him with the power of sale, the intention of the testator is defeated. The power to make the devise is useless if equity can, in effect, annul it. Many American courts hold to the English doctrine on this subject; while many also hold that equity may decree the sale of land of an infant whenever it shall be for its interest to have a sale of them made. In reference to these American cases we are disposed to repeat what was said by the court in Freeman v. Guion, 11 Smedes & M. 58, above quoted, at most, if not all, the American cases holding a doctrine adverse to the English rule, have been decided since the adoption of our constitution of 1832, and of necessity it was not adopted with any reference to their holdings." A list of the authorities on each side of the question may be found in the case of Richards v. Railway Co., 106 Ga. 614, 33 S. E. Rep. 193.

JUDGMENT — EQUITABLE ASSIGNMENT.—The equitable assignment of judgment is a question often litigated. An interesting phase of the question appeared recently in the case of Harris v. Manufacturing Co., 30 South. Rep. 273. In that case complainant recovered a judgment of $436.13 against defendant, and a few days later defendant recovered a judgment of $200 against complainant. Defendant was insolvent, and had agreed to give his attorneys 40 per cent. of the judgment recovered in his favor. Complainant sued to set off the defendant's entire judgment of $200 against a like amount of complainant's judgment. Held, that there was an equitable assignment *in præsenti* of 40 per cent. of the judgment to defendant's attorneys, and it was error to grant the set-off for the full amount. The most striking part of the court's opinion is its reference to the briefs of counsel. The court said: "The principles of law applicable, and the authorities in which they may be found on both sides, are so admirably set forth by the respective counsel for appellant that we direct their briefs to be published in full." We quote from appellant's brief as follows:

"An assignment of a cause of action may be either a legal assignment or it may be equitable assignment. In case of a legal assignment, as a matter of course, all the formalities of transfer have to be complied with. But where it is an equitable assignment it does not obtain its validity from the observance of legal formalities, but from the intention of the parties. Any order, writing, or act, or any oral or written declaration evidencing an intention to make an assignment, is just as effectual as the most formal instrument. The leading authority is to be found in Pass v. McRhea, 36 Miss. 143; 3 Pom. Eq. Jur. §§ 1271, 1282; and Williams v. Ingersoll, 89 N. Y. 518. Also the following authorities are cited: Bisp. Eq. § 167; Macklin v. Kinealy, 141 Mo. 113, 41 S. W. Rep. 893; Story, Eq. Jur. 376. The agreement by Harris to give his attorneys '40 per cent. of the amount' that they should recover in judg-

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ment vested in the attorneys, then and there a valid equitable interest in the judgment. Harris has done all that he could do to make an equitable assignment to his attorneys. And if it is an equitable assignment as to him, it must be an equitable assignment to all parties who represent him, and they cannot avail themselves of any irregularties that Harris himself could not take advantage of. A leading case on this subject is to be found in Patton v. Wilson, 34 Pa. 299, and at the close of the opinion to be found in Ramsey's Appeal, 27 Am. Dec. 301; 3 Pom. Eq. Jur. §§ 1271, 1282; Bish. Eq. § 167.

"A judgment creditor only gets the right to satisfaction of his judgment out of the property that his judgment debtor actually owns, and his judgment lien only extends to the actual interest of the judgment debtor in any property on which he attempts to have his judgment satisfied, and if his judgment debtor is the apparent owner of any property, and an execution is levied by the judgment creditor on that property, and it is impressed with an equitable ownership in some third party, the equitable owner of the title is obliged to prevail, as against the execution of the judgment creditor without notice, for the reason that he can only succeed to such interest as the judgment debtor had in the property, and, being a volunteer, so to say, he cannot complain that he has no notice of the equitable ownership. Foute v. Fairman, 48 Miss. 536; Mississippi Val. Co. v. Chicago, St. L. & N. O. R. Co., 58 Miss. 846." Other cases which might be cited: Ames v. Bates, 119 Mass. 399; Hovey v. Morrill, 60 Am. Rep. 316; Van Pelt v. Boyer, 8 How. Pr. 320; Swift v. Prouty, 64 N. Y. 546; Hackett v. Connett, 2 Edw. Ch. 73; Deans v. Robertson, 64 Miss. 195.

DOES THE UNITED STATES CONSTITUTION INHIBIT STATE LAWS LIMITING HOURS OF PRIVATE DAILY EMPLOYMENT?

It is proposed to deal with this question irrespective of the wording of particular statutes, on its merits, in the light of judicial determination which seems to be in point, and the language of the constitution itself, as construed by the courts and leading text book writers. Should it or not seem possible, under existing law, that such statutes may be enacted, it is beyond the purpose of this article to discuss the desirability of doing so. In the absence of a constitutional bar, the latter question is purely legislative in character and thus beyond the purview of judicial inquiry, to which is confined the question here propounded. In the Declaration of Independence, which severed the political bonds theretofore existing between the American colonies and Great Britain, it is declared "that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do." This clause, considered in connection with the events succeeding the promulgation of the instrument which contains it, indicates an intention on the part of the colonists to be "free and independent" from restraint of whatever character, to the fullest extent consistent with the protection and conservation of their individual rights and liberties. The same instrument indicates further the state of mind to which oppression of various kinds had led the founders of our government, when it is declared that "we hold these truths to be self-evident that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness."

It cannot be doubted that the same ideas were present in the minds of the framers of our constitution, or that it was sought in the latter instrument to give permanent effect to the declarations of the former. In the present inquiry it becomes, therefore, pertinent to investigate the meaning of the "full power to * * * establish commerce," and of "life, liberty, and the pursuit of happiness." The federal constitution, article 1, section 8, provides that: The congress shall have power, * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Concerning what constitutes commerce between the several states Judge Cooley, in his Principles of Constitutional Law, at p. 66, says: "To constitute commerce between states it is essential that it be not confined to one state exclusively, but concern more than one. * * * The commerce of a state which congress may control must in some stage of its progress be extraterritorial." In this connection he cites the following cases.[1] In Veazie v. Moor[2] it is said: "A pretension as far reaching as this—'that because the products of domestic enterprise in

[1] Gibbons v. Ogden, 9 Wheat. 1, 189; The Passaic Bridges, 3 Wall. 782; Veazie v. Moor, 14 How. 568, 574.

[2] 14 How. 568, 574.

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agriculture or manufactures or in the arts may ultimately become the subjects of commerce outside the state, that the control of the means or the encouragements by which enterprise is fostered and protected is implied in the important grant of power'—would extend to contracts between citizen and citizen of the same state, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries, the mines and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce, and be borne, either by turnpikes, canals, or railroads, from point to point within the several states, towards an ultimate destination. Such a pretension would effectually prevent or paralyze every effort at internal improvement of the several states; for it cannot be supposed that the states would exhaust their capital and their credit in the construction of turnpikes, canals, and railroads, the remuneration derivable from which might be immediately wrested from them, because such public works would be facilities for commerce which, whilst availing itself of these facilities, was unquestionably internal, although immediately or ultimately it might become foreign."

It follows that, because of its very nature, labor is not to be included within the commerce, power to control and regulate which is granted to congress. What, then, may be the federal powers, touching labor, under other clauses of the constitution? The clauses which bear upon the question are as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[3] "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."[4] * * * "No state shall make or enforce any law which shall abridge the privileges or immunities of

Principles of Constitutional Law, p. 225, Judge Cooley says: "Life and liberty.—These words are used in constitutional law as standing for and representing all personal rights whatsoever, except those which are embraced in the idea of property. The comprehensive word is liberty; and by this is meant, not merely freedom to move about unrestrained, but such liberty of conduct, choice and action as the law gives and protects."

In his Constitutional Limitations, at p. 734, the same author says: "In the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than than of anything else, the local magistrate being generally allowed to exercise authority over the subject. The practice was followed in this country and prevailed to some extent up to the time of independence. Since then it has commonly been supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty. It has nevertheless been conceded that in some cases this might be done; * * * the ground appears to be that the employment * * * is a public or *quasi*-public employment; that their property in the business is 'affected with a public interest.' and thereby brought under that general power of control which the state possesses in the case of other public employment. * * * What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business and are accommodated by it cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or

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franchise. * * * 2. Where the state, on public grounds, renders to the business special assistance, by taxation or otherwise. 3. Where, for accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases."

Thus clearly is it stated by the eminent authority quoted that the rights indicated by the words "life, liberty and property," as here used, include all personal rights whatsoever, emphasizing meanwhile the proposition that the only rights which our constitution contemplates shall be conserved to the individual are such as may be exercised with due consideration to the equal rights of others. He also points out that the right to labor and to contract for the employment of labor as shall seem best to the contracting parties, has, since the institution of our government, been considered so distinctively a matter of personal concern, properly independent of governmental interference, as that its regulation by the state has been deemed "inconsistent with constitutional liberty." Concerning the right of the individual to seek employment for his labor, the same learned authority says: "The general rule is that every person *sui juris* has a right to choose his own employment, and to devote his labor to any calling, or at his option to hire it out in the service of others. This is one of the first and highest of all civil rights, and any restrictions that discriminate against persons or classes are inadmissible. * * * Employments are nevertheless subject to control under the state power of police, and may be regulated in various ways, and to some extent restricted: 1. The state may forbid certain classes of persons being employed in occupations which their age, sex or health renders unsuitable for them. * * * 2. The state may require special training for some employments, and forbid persons engaging in them who have not proved their fitness on examination, and been duly licensed. * * * 3. Any occupation opposed to public policy, like that of gaming, may be prohibited altogether."[6]

Again he says: "If the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."[7] Also: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This great right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or aliens, offering their services in lawful business, or to subject others to penalties for employing them."[8] Again: "Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf or to hire it out in the service of others. This is one of the first and highest of civil rights."[9] Also: "Every man controls his own property as he pleases, puts it to such use as he pleases, improves it or not, as he may choose, subject only to the obligation to perform, in respect to it, the duties he owes to the state and to his fellows. The state cannot substitute its judgment for his as to the use he should make of it for his own advantage."[10]

Along similar lines is the following: "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitionality of any statute which prohibits their

[6] Cooley's Principles of Constitutional Law, p. 231.

[7] Cooley's Constitutional Limitations, p. 486.

[8] Cooley's Constitutional Limitations, p. 745.

[9] Cooley on Torts, p. 326.

[10] Cooley on Torts, p. 337.

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prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. Minors are under the guardianship of the state, and their actions can be controlled so that they may not injure themselves. But when they have arrived at majority they pass out of the state of tutelage and stand before the law free from all restraint, except that which may be necessary to prevent the infliction by them of injury upon others. It may be, and probably is, permissible for the state to prohibit pregnant women from engaging in certain employments, which would be likely to prove injurious to the unborn child, but there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the state to prohibit men from working in the manufacturing of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of the iron smelting works, because the lives of men so engaged are materially shortened."[11] Further, the same writer says: "Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments are unconstitutional because they operate as an interference with one's natural liberty, in a case in which there is no trespass upon private right, and no threatening injury to the public. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day, which the employer may demand. There can be no constitutional interference by the state in the private relation of master and servant except for the purpose of preventing fraud and trespasses."[12]

If the statement of the law by these two authorities—Cooley and Tiedeman—is to be accepted as correct, it must be concluded that every [illegible] on the part of the state, so long as his undertakings are confined to those employments, the character of which is not under the ban of legal inhibition, or so long as their public or *quasi*-public character does not subject them to state control, unless, being a minor, he is under the special guardianship of the state; or, being a pregnant woman, she is to be restrained because of possible injury to her child; or, unless the pursuit of such employment under the particular circumstances is so far injurious to the public generally as to be properly restrained for that reason. Mr. Tiedeman plainly says that in no event is a person *sui juris* to be restricted in his employment because of possible injury to himself, pointing out most excellent and convincing reasons why not. It is to be noticed also that the discussion refers to no particular provisions of state constitutions, but to "liberty" and "the pursuit of happiness" as protected and conserved to the individual by the federal constitution. Pointing to the same end is the language of Field, J., in Butchers' Union Company v. Crescent City Company:[13] "Among those inalienable rights, as proclaimed in that great document (the Declaration of Independence), is the right of men to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their facilities, so as to give them the highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hinderance except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said: 'The property which every man has in his own labor, as it is the

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proper, without injury to his neighbors, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' "[14] Equally strong is the language of Matthews, J., in Yick Wo v. Hopkins:[15] "When we consider the nature and the theory of our institutions of government, the principle upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to gift of life there necessarily goes to every one the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by the force of legislation or constitutional enactments, but by their creator, and to secure them, not to grant them, governments are instituted among men."

Further authorities to this end are as follows: "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any one of its essential attributes, deprives the owner of his property. * * * So, too, one may be deprived of his liberty and his constitutional rights thereto violated, without the actual restraint or imprisonment of his person. Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power), are infringements upon his

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for the promotion of health, when it is manifest that such is not the object and purpose of the regulation."[18] "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen."[19] "All sorts of restrictions and burdens are imposed under the police power, and when these are not in conflict with any constitutional prohibition or fundamental principle they cannot be successfully assailed in a judicial tribunal. * * * But under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any one of the just rights of the citizen which the constitution intended to secure against abridgment."[20]

The language of Mr. Justice Field and Mr. Justice Matthews, and that of the other authorities cited, certainly tends strongly to support the proposition that the right of residents in the United States to freely contract with reference to their own labor in any lawful calling is secured to them, not alone by our Declaration of Independence and constitution, but by the even more inviolable fundamental principles of liberty itself. It is pointed out, also, that this right may not be abridged on any trumped-up pretext for the exercise of the police power of the state. There is no doubt that, in proper cases, every right of the individual may be abridged to conform to the just demands of the people at large. To what extent is indicated by Harlan, J., in Patterson v. Kentucky:[21] "By the settled doctrines of this court, the power extends, at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislalation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. * * * Whether the policy thus pursued by the state is wise or unwise, it is not the province of the national authorities to determine. That belongs to each state, under its own sense of duty, and in view of the provisions of its own constitution. Its action, in those respects, is beyond the corrective power of this court." Yet it is not conceivable that this language should be construed to mean that the legislature may exceed the limitations of constitutional law or the basic principles of our government.

The laws thus far enacted for the regulation of hours of employment rest upon an exercise of the police power, either because the employment is public or *quasi*-public in character and the interests of the public demand such regulation; or that the health of the community will become impaired, in the absence of such regulation, because of the effect of such employment on the persons so employed. To the first class of cases, obviously, no attention need be given in connection with the present discussion. Cases and statutes, squarely in point, which go so far as to regulate the hours of labor of men engaged in private employments, are few. The Utah statute, regulating the hours of labor of men employed in smelters, etc.,

[18] Austin v. Murray, 16 Pick. 121, 126.

[19] Watertown v. Mayo, 109 Mass. 315, 319.

[20] Slaughter-House Cases, 16 Wall. 36, 87. See also: People v. Otis, 90 N. Y. 52; Fertilizing Company v. Hyde, 97 U. S. 659; Rockwell v. Nearin, 35 N. Y. 302; Wynehamer v. People, 13 N. Y. 378; Craig v. Klein, 65 Pa. St. 399; Herdic v. Young, 5 P. F. Smith, 176; Thorpe v. Rutland, 27 Vt. 149; Coe v. Shultz, 47 Barb. 64; Green v. Savannah, 6 Ga. 1; People v. Hawley, 3 Pick. 330; Ames v. County, 11 Mich. 139; Vanderbilt v. Adams, 1 Cow. 349; *In re* Danville Cemetery Association, 66 N. Y. 560; Town of Lakeview v. Rose hill Company, 70 Ill. 181, 2 Kent's Com. 1; Berthalf v. O'Reilly, 74 N. Y. 515; Live Stock, etc. Association v. Crescent City, etc., 1 Abb. (U. S.) 398, 16 Wall. 106; *Corfield* v. Coryell, 4 Wash. C. C. 380; Mayor, etc. v.

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mines."[22] In Holden v. Hardy,[23] the decision of the state court is affirmed, Brown, J., using the following language: "Upon the principles stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts. * * * We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion on this subject. It is sufficient to say of them, that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class." This, then, seems to be the *status* of affairs: The restriction by the state of the right of individuals to contract with reference to their own labor, is in contravention of any fair construction of American constitutional law and individual rights as declared by our Declaration of Independence; such restrictions may be exercised only in certain cases where the rights of the public are plainly paramount to those of the individual; but the United States Supreme Court will not interfere to prevent such restriction so long "as there are reasonable grounds for believing that the restriction is the result of a proper exercise of the police power of the state."

Denver, Colo., DANA T. JONES.

[22] See State v. Holden, 14 Utah, 71; State v. Holden, 4 Utah, 96; Short v. B. B. & C. M. Company, 57 Pac. Rep. 720.

[23] 169 U. S. 366, 395.

MUTUAL BENEFIT ASSOCIATIONS—CHANGE OF BY LAWS—CONSENT OF MEMBER—RECOVERY OF PREMIUMS—MANDAMUS.

STRAUSS v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

Supreme Court of North Carolina, June 4, 1901.

1. A mere general consent, given by a member of a mutual benefit association, that its constitution and by-laws may be amended, does not authorize such a change in its rules as will destroy his vested rights under his insurance contract by subjecting him to pay a greater rate of assessment than the contract calls for.

2. Where a mutual benefit association violates its contract with a member, the most practical remedy is the recovery of premiums paid, with interest thereon, and *mandamus* for reinstatement need not be resorted to.

DOUGLAS, J.: This case is before us on a hearing, being originally reported in 126 N. Car. 971, 36 S. E. Rep. 352. We have again given it careful consideration, and have been forced to the same conclusions announced in our former opinion. It seems useless to again discuss the principles involved, as they are few and simple, as the case is viewed by us. The plaintiff had a contract of insurance with the defendant, which the latter seems to have violated in its most essential features, with the result of having destroyed its value to the plaintiff, But it is said that the plaintiff made such contract of insurance with a mutual insurance association, of which he was a member, and by virtue of such membership; and that he is, therefore, bound by all such rules and regulations as may be thereafter lawfully adopted. "Lawful adoption" may mean much or little. Rules may be adopted under the forms of law that might nevertheless be so unreasonable and inequitable as to be clearly beyond any possible contemplation of law. In any event, such rules can never have any greater force than the law that authorizes their adoption; and, if this has the effect of impairing the obligation of a contract, it is void by constitutional inhibition. But it is said that the plaintiff, upon entering the association, agreed, expressly or impliedly, that changes might be made in its constitution and by-laws, and is bound thereby. We have no evidence that he agreed that such changes might be made as were made, and we have no idea that he ever intended to place it within the power of the association to break his contract at pleasure, or render it utterly valueless by subsequent stipulations or regulations adopted without his consent. A mere general consent that the constitution and by-laws may be amended applies only to such reasonable regulations as may be within the scope of its original design. We must again repeat what we said in our former opinion: "Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights."

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It is urged by the defendant that, if the plaintiff is entitled to any relief, it is not by recovery of the premiums he has paid, but by *mandamus* for reinstatement. This remedy is not demanded by the plaintiff, nor does it seem practicable to us. It is true, we might issue the *mandamus* to a foreign corporation having its general offices in New York; but how to make such a *mandamus* effective is a different question, the solution of which is not at all clear to us. Moreover, in the present instance the plaintiff, Strauss, is now dead. Much stress has been laid upon the fact that the Supreme Court of Minnesota, in Ebert against this defendant (83 N. W. Rep. 506), while agreeing with us upon the main question of the right of recovery, differs with us as to the measure of damage. We are much impressed with the views of the court upon that point, which have much to commend them as theoretical propositions; but we are equally impressed with the frank admission of the court as to the difficulty of their practical application. Our own rule, even in our own minds, falls short of theoretical perfection; but, after most careful consideration, we are unable to find a better. The impaired health of the insured, or his having passed the insurable age, would present complications practically insurmountable in the actual trial of an action. Moreover, the defendant claims that the plaintiff's insurance has cost more than he has paid in, and therefore his recovery would be nothing. The plaintiff would have no means of disproving the alleged cost of his past insurance, the proof of which would be exclusively in the possession of the defendant. He might cross-examine the defendant's witnesses, or demand its books and papers; but if he got them, what could he do with them? It seems to have taken the defendant several years to find out that the plaintiff's insurance was costing more than his premiums, and this it did only with the assistance of the insurance commissioner of New York and expert actuaries. With or without such assistance, what chance would the average juror have of mentally digesting five hundred pages of insurance statistics? All actions must be capable of a practical determination, with a reasonable certainty of substantial justice; and rules of law must be adjusted to that end, even if, in exceptional cases, they fall short of the full measure of ideal right. A distinguished jurist has said: "Indeed, one of the remarkable tendencies of the English common law upon all subjects of a general nature is to aim at practical good, rather than at practical theoretical perfection; and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business." Story, Eq. Jur., p. 115. The rule we have followed is not new. It was laid down by Chief Justice Pearson in Braswell v. Insurance Co., 75 N. Car. 8, and has been uniformly followed in this state for the past 25 years. But it is said that this rule was intended to apply to "old line" companies, and not to mutual associations. Where is the essential difference in principle or in its practical result? Both companies pay back only what they have received, with legal interest thereon, and neither company is permitted to retain anything for the cost of past insurance. If the mutual association receives less, it pays back less. If the old time company collects more than the actual cost of insurance, it pays back that much more, and loses its surplus, as well as its cost of insurance. As we see no reason to change our former judgment, the petition to rehear is denied. Petition dismissed.

NOTE. — *Beneficial Associations—Right to Alter, Repeal or Amend By Laws—Must Not Impair Vested Rights.*—Of course, a benefit society, like any other society, may alter and repeal its by laws. In incorporated associations this right is implied from the express power to enact by laws. Supreme Lodge v. Knight, 117 Ind. 497. But one very important limitation of this right is that it must not impair rights which have become vested. Borgards v. Insurance Co., 79 Mich. 440; Wist v. Grand Lodge, 22 Oreg. 271, 29 Am. St. Rep. 603; Supreme Lodge v. Malta, 95 Tenn. 157; Morrison v. Insurance Co., 59 Wis. 166; Hobbs v. Association, 82 Iowa, 107, 31 Am. St. Rep. 466; Stohr v. Society, 82 Cal. 557; Becker v. Society, 144 Pa. St. 232. There is no controversy of any importance over the rule of limitation just announced, but its practical application appears to be a most difficult undertaking, the decisions being in apparent conflict over the question as to what are vested rights in such cases. The right must be a property right, it must have accrued in the sense that it must not be something merely in prospect In other words, an amendment must not affect a present right of property. Thus, after a member's death an association cannot, by adopting a new article or repealing the old one, relieve itself of the obligation to pay to the widow benefits which had become fixed by death. Gundlach v. Association, 4 Hun (N. Y.), 339. But where the value of a certificate was reduced by a by-law creating another class upon more advantageous terms from a prospective two thousand dollars to one hundred and seventy three dollars, the beneficiary was not allowed to recover the difference. Supreme Lodge v. Knight, 117 Ind. 489. The question of whether a provision for sick benefits in force at the time of the contract of membership can be reduced by subsequent amendment passed before the sickness of the member is generally answered in the affirmative. The New York courts vacillated over this question for some time before they came to the same conclusion. A study of the case from this state is interesting and profitable. Gundlach v. Association, 4 Hun (N. Y.), 339; McCabe v. Society, 24 Hun (N. Y.), 149; Poultney v. Backman, 62 How. Pr. 466, 10 Abb. N. Cas. (N. Y.) 252, reversed 31 Hun, 49. See also St. Patrick's Society v. McVey, 92 Pa. St. 510. In the case of Becker v. Beneficial Society, 144 Pa. St. 232, 27 Am. St. Rep. 624, will be found a strong opinion against the right of a benefit society to reduce the amount of benefits agreed to be paid on the death of the member by subsequent by law. A contrary view, however, is expressed in the case of Fagan v. Mutual Society, 46 Vt. 362.

Remedy of Member of Benefit Society Unjustly Expelled or Whose Contract is Violated.—On the question whether a benefit society can restrict the right of its members to sue, the authorities are

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divided. Some hold to the affirmative. Fillmore v. Great Camp, 103 Mich. 437; Osceola Tribe v. Schmidt, 57 Md. 98; Hembeau v. Great Camp, 101 Mich. 161, 45 Am. St. Rep. 400. Other authorities hold such restriction to be void on grounds of public policy. Mulray v. Knights of Honor, 28 Mo. App. 463; Austin v. Searing, 16 N. Y. 112; Olery v. Brown, 51 How. Pr. 92; Supreme Council v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298.

It is the general rule that where a member of a beneficial association is illegally expelled or deprived of benefits to which he was entitled as a member of the order, and it does not appear that he had any redress within the association, a court of equity will inquire into the reasonableness and propriety of the society's action and afford such relief as the case warrants. Olery v. Brown, 51 How. Pr. (N. Y.) 92. Thus, when a member of a beneficial society has been denied his benefits and illegally expelled, equity will restore him to membership and compel an accounting. Glover v. Lodge, 1 Del. Co. Rep. (Pa. 1882) 317. The most general remedy in cases where a member of a beneficiary association has been wrongfully expelled therefrom is to compel his reinstatement by *mandamus*. Meurer v. Association, 95 Mich. 451, 54 N. W Rep. 954; Lavalle v. Societe, 17 R. I. 680, 24 Atl. Rep. 467; Otto v. Union, 75 Cal. 308; State v. Adams, 44 Mo. 570; Manning v. Club, 63 Tex. 166, 51 Am. Rep. 639; Savannah Cotton Exchange v. State, 54 Ga. 668; Sibley v. Club, 40 N. J. L. 295; Evans v. Club, 50 Pa. St. 107; People v. Union, 118 N. Y. 101.

In such cases, however, the member cannot resort to the courts for reinstatement without first exhausting the remedies provided by the constitution and by laws of the society, and this though the order of expulsion be void. People v. Order of Foresters, 162 Ill. 78, 44 N. E. Rep. 401; Screwmen's Assn. v. Benson, 76 Tex. 552, 13 S. W. Rep. 379; State v. Knights, 10 Wkly. L. Bul. (Ohio) 2. In Missouri this latter rule is not adhered to, and in such cases it is not incumbent on the member whose rights have been violated to take steps to exhaust all remedies within the order or to have it reversed in a higher judicatory. Hoeffner v. Grand Lodge, 41 Mo. App. 30; Glasdon v. Knights of Pythias, 50 Mo. App. 45. Whether an action for damages can be maintained in such cases is a point much controverted and not clearly settled. The court in the principal case holds this to be the most practicable remedy in many cases. It is sustained by the following authorities: Ludowiski v. Benevolent Society, 29 Mo. App, 337; Dilcher v. Church, 53 N. Y. 103; Koppstein v. Lipu, 28 Ohio St. 665. It is opposed by the following authorities: Lovalen v. Society, 17 R. I. 680, 24 Atl. Rep 467; Peyre v. Mutual Relief Society, 90 Cal. 240; Ebert v. Association, 83 N. W. Rep. (Minn. 1900) 506. The last case sums up the reason for holding a beneficial association not liable in damages in such cases in the following language: "Purely fraternal benefit associations are not liable in damages for the unlawful cancellation of a membership, because such a corporation acts purely as a trustee to collect and distribute a sick or death fund, and has no other fund, and no power to collect any money except to meet such a payment."

JETSAM AND FLOTSAM.

IS IT PERMISSIBLE FOR A LAWYER TO CALL A WOMAN A LIAR.

A Chicago paper recently published a criticism of Mr. Albert S. Barnes, assistant states attorney, on an incident occuring in a recent trial in which one of the attorneys in the case denounced one of the opposing witnesses, who was a woman, as a "liar." Mr. Barnes says:

"I am asked if there is anything in the code of ethics of the legal profession which permits a lawyer, in court, to call a woman, no matter what her character may be, a liar. I do not pretend to be an authority on legal ethics, although I have decided opinions as to what constitutes a gentleman, at any time and in any place. Moral ethics forbids a man, lawyer or no lawyer, from addressing a woman as a liar and I should say that legal ethics did likewise.

"In any position in life a woman is more or less defenseless. Her sex, her training, her habits, her physical weakness leave her without many of those elements for resistance that a man possesses. But in court, interested in a case, either as witness or one of the principals, she is even more helpless than elsewhere. She is not familiar with legal procedure. Few, if any, of her own sex are about her. Man's ways, man's laws, man's authority is over her more strikingly than in any other position in life. Her natural timidity at being placed in strange attitudes overwhelms her and she sits shrinking from dangers, apprehended if not seen. Hence the grievous shock to her sensibilities if under such circumstances she is denounced as a liar. Her natural protectors are not by her side, perhaps; if they were, they could show no resentment without displeasing the court. She must take the blow and suffer. I do not believe, to the honor of the legal profession, that such an insult is justified. In the case at question—that of Miss Knabjohann—a more truthful woman never came under my notice. I found her straightforward, womanly, truthful at all times. This made the reflection upon her veracity particularly unwarranted, because in the entire trial (if it could be justifiable) nothing occurred to justify the aspersion.

"It is permissible in courts of law for an attorney to analyze evidence of witnesses; to take the evidence bit by bit and from it to say to the jury or the court that on its face it is false or that a falsehood has been told. But in this particular case no evidence existed of perjury or lying, and the lie direct was given without provocation on the part of the evidence of the young woman who suffered from the charge. Its effect on the jury was particularly noticeable. Jurymen like the rest of us, have mothers, wives, sweethearts. They carry in their bosoms the same innate respect, chivalry, admiration for womanhood that we do. They were looking into the face of the speaker for the defense when he delivered his invective. Their eyes instantly fell, then raised and rested, not upon his face, but upon that of the woman wrongfully accused. It was palpable then and there that their manhood revolted; that their sympathies instantly went out to her; that if the charge had been ten thousand times true they did not justify the conduct of that manhood which call a woman a liar under any circumstances.

"It is the tendency of judges, juries and attorneys to uphold the hands of woman; to throw extraordinary safeguards about her to keep her still the ideal of the best manhood; the guardian of the cradle; the theme of the song and poem; the one thing that makes the life better and purer for us all. This tendency cannot be made too strong. It should be as powerful in private life as in public. I believe the legal profession with few exceptions means that it shall be so."

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CORRESPONDENCE.

EQUITABLE ASSIGNMENT OF INTERESTS IN JUDGMENT FOR PERSONAL INJURY.

To the Editor of the Central Law Journal:

In a recent issue (53 Cent. L. J. 245), in treating of assignment of judgments, you say: "The assignment of an interest in a right of action for a personal injury which is to be prosecuted in the name of the assignor, with an agreement to assign a corresponding interest in the judgment which might be recovered in the future, is equivalent to an equitable assignment of the specified interest in the judgment the moment it is perfected, and binds all parties having notice or knowledge of the same. North Chicago Street Ry. Co. v. Ackley, 58 Ill. App. 572," adding that the rule is different in Missouri.

Now, as a matter of fact, this decision was not sustained by the Supreme Court of Illinois. See 171 Ill. 100. In the first place, however, the supreme court did uphold the judgment of the appellate court, and its decision to that effect was published immediately following its rendition in the *Chicago Law Journal Weekly* (the correct name, I think). On rehearing, the supreme court reversed the judgment of the appellate court, but it entirely omitted any reference to the very interesting fact that the court, at first, had reached the opposite conclusion.

Topeka, Kansas. THOMAS R. BEMAN.

BOOK REVIEWS.

WAPLE'S PARLIAMENTARY PRACTICE.

A new edition of the excellent work on parliamentary law has just come under our observation. The subject of this little treatise, now eighteen years old, is a most important one to laymen and lawyers alike. The law of order in deliberative assemblies is not dependent upon arbitrary rules and meaningless forms, as has been often supposed, but is founded upon reason and established precedent. Mr. Waple's book proceeds upon the recognition of the law as a science, and is therefore the more easily mastered and retained in the memory. We regard this book the highest and clearest authority on this important subject. Printed in one volume of 306 pages, duodecimo size, and bound in cloth. Published by Callaghan & Co., Chicago, Ill.

SPELLING ON EXTRAORDINARY REMEDIES.

No subject is more important to litigant or lawyer than the one covered by the work which is the subject of this review. It is a practical treatise on injunctions and other extraordinary remedies including *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, by Thomas Carl Spelling, of the San Francisco Bar. The constant strain and most extended use to which these *extraordinary* remedies have been subjected of late years suggests that they are becoming the most ordinary remedies for a large class of civil wrongs. The remedy by injunction, especially, has, in recent years, come into such common use, that men are tempted to regard the writ as no longer a measure of extraordinary relief in equity, and are in danger of looking at it as a matter of right in law. Mr. Spelling, however, has from civil wrongs, threatened, or irremediable if redress be long delayed, in the whirl and clash of twentieth century progress, and the greater satisfaction afforded a client, when the practitioner is able to speedily obtain for him such a remedy, constitute the strongest recommendations for a meritorious publication of this character." The purpose of this treatise is therefore thoroughly practical. Mr. Spelling writes with the confidence of one who knows fully all the intricate workings of his subject and is therefore the master not the slave of the mass of authorities, which confuse the ordinary practitioner. On almost any other subject of law a digest of the cases is practically all that a lawyer needs, but on the question of extraordinary remedies, depending, as they do, in great measure on the discretion of the court, no simple list of precedents will suffice. Careful discrimination and analysis of decided cases and consideration of equitable and legal questions involved are needed, and these by a man competent for his work. In this regard Mr. Spelling's work takes rank as one of the highest authorities on the law of extraordinary remedies to which the profession has any access. The revised edition has been greatly enlarged and carefully revised. It will undoubtedly commend itself to the bench and bar throughout the country. Printed in two volumes of 1894 pages and bound in the best quality of law sheep. Published by Little & Brown & Co., Boston, Mass.

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated, by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. LXXX. San Francisco: Bancroft Whitney Company, Law Publishers and Law Book Sellers, 1901. Sheep. Price, $4.00. Review will follow.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

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1. ABATEMENT—Revival Limitation.—Where an action is not revived within a year, the court may strike it from the docket.—PETERS v. HUFF, Neb., 87 N. W. Rep. 184.

2. ABATEMENT AND REVIVAL—Striking Case from Docket.—Striking action from docket for failure to revive on death of party not equivalent to dismissing case.—PETERS v. HUFF, Neb., 87 N. W. Rep. 184.

3. ACKNOWLEDGMENTS—Corporation—Notary a Stockholder.—It is no ground for collateral attack on a deed to a corporation that the notary public taking acknowledgment was a stockholder.—NATIONAL BUILDING & LOAN ASSN. v. CUNNINGHAM, Ala., 30 South. Rep. 835.

4. ACKNOWLEDGMENT—Omission of Notary's Address.—Under Ballinger's Ann. Codes & St. § 4533, the omission of the notary's place of residence in a certificate of acknowledgment is not a material defect.—GRIFFIN v. CATLIN, Wash., 65 Pac. Rep. 755.

5. ACTION — Parties —Authority—Relief.—Where an action is not authorized by one of the parties plaintiff, no relief should be granted as to him.—TOOLE v. JOHNSON, S. Car., 39 S. E. Rep. 254.

6. ADVERSE POSSESSION—Hitching Horses.—Where for 50 years persons attending a church hitched their horses on adjoining land, such use was not adverse possession which would give the church title.—HEARN v. JONES, Tenn., 64 S. W. Rep. 344.

7. AGRICULTURE—Killing Insects on Trees.—In an action to foreclose a lien on realty for killing insects on the defendant's fruit trees, the fact that the petition contained a prayer for a personal judgment did not vitiate it.—RIVERSIDE COUNTY v. BUTCHER, Cal., 65 Pac. Rep. 745.

8. APPEAL AND ERROR—Ambiguous Instructions.—No reversal will be had for ambiguities in instructions in a criminal case, where it is clear the instructions as an entirety did not prejudice appellant and the verdict was justified by the evidence.—MUSSER v. STATE, Ind., 61 N. E. Rep. 1.

9. APPEAL AND ERROR—Attorney's Fees.—Where no attempt was made to prove attorney's fees below, they will not be considered on appeal.—SWAIN v. WEBBE, La., 30 South. Rep. 851.

10. APPEAL AND ERROR—Bonds.—Where two appeals are granted in one order and one bond is filed, the order and bond suffices for one appeal, though the other is dismissed.—MACKIN v. WILDS, La., 30 South. Rep. 257.

11. APPEAL AND ERROR — Conflicting Evidence.—Where the evidence is conflicting, the findings of the lower court will not be disturbed.—RIDDELL v. BROWN, Wash., 65 Pac. Rep. 758.

12. APPEAL AND ERROR—Denying Order of Distribution.—An order denying petition for distribution on the ground that petitioner is not an heir held appealable.—MORTON'S ESTATE v. MORTON, Neb., 87 N. W. Rep. 180.

13. APPEAL AND ERROR — Dismissal —"Final Judgment."—Where action is against four persons jointly, a judgment dismissing it as to three on demurrer is final and appealable.—KOLLOCK v. WEBB, Ga., 39 S. E. Rep. 889.

14. APPEAL AND ERROR—Exceptions—Requisites.—Complaining of the overruling of certain exceptions, numbering them and referring to the transcript pages, is too general for consideration.—YOUNG v. YOUNG, Tenn., 64 S. W. Rep. 319.

15. APPEAL AND ERROR—Failure to File Authorities.—Appeal reinstated where failure to file points and authorities was caused by sickness of attorneys.—BAKER v. IRVINE, S. Car., 39 S. E. Rep. 260.

16. APPEAL AND ERROR—Finding of Fact.—Findings on questions of fact will not be reviewed without a bill of exceptions.—UNIVERSITY OF MICHIGAN v. MCGUCKIN, Neb., 87 N. W. Rep. 180.

17. APPEAL AND ERROR—From Nunc Pro Tunc Order.—An appeal lies from a *nunc pro tunc* order amending a decree entered on default, where the *nunc pro tunc* order was void.—HOOVER v. HOOVER, Oreg., 65 Pac. Rep. 796.

18. APPEAL — Remanding — Duty of Trial Court.—Where a judgment of conviction had been affirmed by the appellate court, the lower court on remand cannot vacate it.—STATE v. BOYCE, Wash., 65 Pac. Rep. 768.

19. APPEAL AND ERROR—Special Findings.—Where a case is tried to the court, and a special finding of facts is not asked, and bill of exceptions fail to show exceptions taken to the judgment, it cannot be reviewed.—WESTERN UNION TEL. CO. v. WHITE, Ala., 30 South. Rep. 279.

20. APPEAL AND ERROR—Sufficiency of Plea.—Where no question is made below as to sufficiency of a plea, none can be made on appeal.—SMITH v. CARMACK, Tenn., 64 S. W. Rep. 372.

21. ARREST — Escaped Convict.—A sheriff has authority to arrest an escaped convict at any time, and is allowed reasonable time thereafter within which to deliver such convict to the hirer of county convicts.—MCQUEEN v. STATE, Ala., 30 South. Rep. 414.

22. ASSIGNMENTS—Agreement as to Probate of Will.—Agreement by executrix and residuary legatee with attorneys as to probate of will held not an equitable assignment of a portion of her interest under the will, so as to authorize them to compel an accounting by her as executrix.—IN RE SHAFER, N. Y., 71 N. Y. Sup. 1033.

23. ASSIGNMENT - Contingent Fee.—In a suit to set off a judgment, where the party obtaining it had agreed to give his attorneys 40 per cent. of the judgment recovered, held that there was an equitable assignment *in præsenti* to defendant's attorneys.—HARRIS v. HAZELHURST OIL-MILL & MFG. CO., Miss., 30 South. Rep. 278.

24. ASSIGNMENT FOR BENEFIT OF CREDITORS—Insurance Policies.—Where a warehouseman, includes certain insurance policies in a trust deed for benefit of creditors, their rights will be governed thereby.—SMITH v. CARMACK, Tenn., 64 S. W. Rep. 372.

25. ATTORNEY AND CLIENT—License of Attorney.—A complaint against a lawyer, charging him with engaging in practicing law, without having procurred or paid a license, held not demurrable.—ALDRICH v. CITY OF CULLMAN, Ala., 30 South. Rep. 415.

26. ATTORNEY AND CLIENT — Lien — Waiver. — The parting with possession of a client's papers by an attorney waives the latter's lien for his compensation given thereon.—GOTTSTEIN v. HARRINGTON, Wash., 65 Pac. Rep. 758.

27. BAILMENT—Hiring Animals—Conversion.—Where a person hires an animal for a specified work and for a definite time, and uses it for other labor and for a longer time, it constitutes conversion.—LEDBETTER v. THOMAS, Ala., 30 South. Rep. 342.

28. BANKRUPTCY —Discharge—Incorrect Schedule.—Debt held not discharged, where a schedule gives a debtor's name incorrectly.—LISBUM v. KRAUS, N. Y., 71 N. Y. Supp. 1022.

29. BILLS OF LADING—Varying by Parol Evidence.—Terms of bill of lading to the extent that it is a contract cannot be charged by parol evidence.—SONIA COTTON OIL CO. v. THE RED RIVER, La., 30 South. Rep. 308.

30. BUILDING AND LOAN ASSOCIATIONS—Insolvency.—A building and loan association is insolvent when it cannot pay back to its stockholders the amount of their contributions.—BINGHAM v. MARION TRUST CO., Ind., 30 South. Rep. 29.

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31. BUILDING AND LOAN ASSOCIATION—Purchase of Stock.—A purchase of paid-up stock in a building and loan association is not a loan, and the purchaser has no rights superior to other members on insolvency.—BINGHAM v. MARION TRUST CO., Ind., 61 N. E. Rep. 29.

32. BUILDING AND LOAN ASSOCIATIONS—Receivers.—A receiver of an insolvent building and loan association represents, not only the creditors, but also the stockholders, and must adjust its affairs equitably among them.—BINGHAM v. MARION TRUST CO., Ind., 30 South. Rep. 29.

33. CARRIERS—Negligence—Backing Up.—A carrier, held negligent in backing an engine on a main track without any efficient lookout or warning of its approach.—ST. LOUIS, I. M. & S. RY. CO. v. TOMLINSON, Ark., 64 S. W. Rep. 847.

34. CARRIERS—Refusal to Accept Goods.—On refusal of consignee to accept goods, the master of the carrier must place them at the expense of the consignee, where they will not be exposed to loss.—SONIA COTTON OIL CO. v. THE RED RIVER, La., 30 South. Rep. 263.

35. CARRIERS—Violating Instructions.—Where carrier was instructed to carry goods in bond, taking them out of bond is an interference with plaintiff's right, rendering the carrier responsible for actual damages.—SMITH BROS. & CO. v. NEW ORLEANS & N. E. R. CO., La., 30 South. Rep. 265.

36. CERTIORARI—Court of Appeals.—A litigant cast in the court of appeals must apply there for rehearing, but apply to supreme court for writ of review.—COLOMB v. ROLLING, La., 30 South. Rep. 298.

37. CHAMPERTY AND MAINTENANCE—Litigious Claims.—Evidence held to show that plaintiff's claim is a litigious one.—MEANS v. ROSS, La., 30 South. Rep. 300.

38. CHAMPERTY AND MAINTENANCE—Litigious Claims.—Where claim is transferred without consideration, it is litigious, entitling defendant to release from payment.—INDEPENDENT ICE & DISTILLED WATER MFG. CO. v. ANDERSON, La., 30 South. Rep. 272.

39. CHARITIES—Failure of Trust.—Where testator bequeathed money to trustees to establish a home for poor orphans, on petition of persons showing an incorporation for such purpose, held, that the trust fund would be given to such corporation.—IN RE STEVENS' ESTATE, Pa., 49 Atl. Rep. 985.

40. CHATTEL MORTGAGES—Probating—Indexing.—A chattel mortgage for less than $100 need not be probated before indexing.—MILFORD v. AIKEN, S. Car., 39 S. E. Rep. 288.

41. CONFUSION OF GOODS—Liability of Vendor.—Vendor's privilege on machinery put in sugar house held lost if he permits it to be sold confusedly with a mass of other things.—PAYNE v. BUFORD, La., 30 South. Rep. 263.

42. CONSPIRACY—Common Design—Proof.—It was proper, after defining conspiracy, to charge that it is sufficient if the common design be shown by circumstantial evidence.—MUSSER v. STATE, Ind., 61 N. E. Rep. 1.

43. CONSPIRACY—Description.—It is sufficient to describe the crime of burglary by its name, where the offense charged is conspiracy to commit such crime.—STATE v. SLUIZ, La., 30 South. Rep. 298.

44. CONSPIRACY — Instruction—Reasonable Doubt.—Where accused was indicted jointly with another for murder, it was not necessary that the elements or facts constituting the crime of conspiracy should be proven beyond reasonable doubt.—MUSSER v. STATE, Ind., 61 N. E. Rep. 1.

45. CONSTITUTIONAL LAW—Death Penalty—Class Legislation.—Code, § 4859, providing that a convict sentenced to imprisonment for life who commits murder must suffer death, held not class legislation.—WILLIAMS v. STATE, Ala., 30 South. Rep. 336.

46. CONSTITUTIONAL LAW—Due Process of Law.—The granting of a new trial for insufficiency of evidence without requiring the trial judge to first pass on that question or to sit with the court considering the same, does not deprive persons of property without due process of law.—GUNN v. UNION R. CO., R. I., 49 Atl. Rep. 999.

47. CONSTITUTIONAL LAW—Farm Labor Contracts.—Prosecution for breach of farm labor contracts, held not to violate provision of constitution against imprisonment for debt.—STATE v. EASTERLIN, S. Car., 39 S. E. Rep. 250.

48. CONTEMPT—Affidavit — Necessary.—The commitment of petitioner for contempt, without an affidavit presenting the facts constituting the contempt to the court, held illegal.—IN RE COULTER, Wash., 65 Pac. Rep. 759.

49. CONTRACT—Mistake of Fact.—Where an error of fact was the principal cause for yielding consent to a certain contract, relief against it may be had.—CALHOUN v. TEAL, La., 30 South. Rep. 288.

50. CONTRIBUTION—Assignee of Mortgage.—Where an administrator pays and has assigned to him a mortgage owning by him and others to the estate, he may recover from such others their share with attorney's fees.—MORRISON v. WARNER, Pa., 49 Atl. Rep. 985.

51. CORPORATIONS—Foreign Corporations.—Foreign corporation held not liable on renewal notes made by a domestic corporation of a somewhat similar name given for debts contracted before the organization of the foreign corporation.—GINSBURG v. UNION CLOAK & SUIT CO., N. Y., 71 N. Y. Sup. 1080.

52. CORPORATIONS—Foreign Corporation—Authority.—Failure of foreign corporation to file certificate authorizing it to do business in the state does not invalidate its contracts made within the state.—NORTH MERCER NATURAL GAS CO. v. SMITH, Ind., 61 N. E. Rep. 10.

53. CORPORATIONS — Inspection of Books.—That a stockholder demanding inspection of books is unfriendly with the officers, and owns stock in a rival corporation, held not ground for refusal.—COBB v. LAGARDE, Ala., 30 South. Rep. 326.

54. CORPORATIONS—Inspection of Books—Mandamus. President and general manager of an industrial corporation held to have sufficient control over its books to authorize *mandamus* requiring him to allow stockholder to inspect them.—COBB v. LAGARDE, Ala., 30 South. Rep. 326.

55. CORPORATIONS—Lease—Dissenting Stockholder.—Lease of corporate property on ground that it was necessary, as capital to run the business, can be set aside at suit of non assenting stockholder.—PARSONS v. TACOMA SMELTING & REFINING CO., Wash., 65 Pac. Rep. 765.

56. CORPORATIONS—License of Foreign Corporation.—License of foreign corporation to be paid city of New Orleans must be calculated on the business done in such city.—CITY OF NEW ORLEANS v. PENN MUT. LIFE INS. CO., La., 30 South. Rep. 254.

57. CORPORATIONS—Notice to President.—Notice to a bank president in an individual transaction held insufficient to charge the bank with notice.—SMITH v. CARMACK, Tenn., 64 S. W. Rep. 872.

58. CORPORATIONS — Voting Stock in Another Corporation.—Though the articles of a corporation express a power to own stock in another corporation, such stock cannot be voted at stockholders' meetings.—PARSONS v. TACOMA SMELTING & REFINING CO., Wash., 65 Pac. Rep. 765.

59. COSTS—Attorney's Fees.—Fees allowed attorney representing tax collector, to be paid by unsuccessful tax register, are costs.—LIQUIDATING COM'RS OF NEW ORLEANS WAREHOUSE CO. v. MARRERO, La., 30 South. Rep. 305.

60. COURTS—Recess to Day Named.—Where judge orders that the court take a recess until a named day,

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it is in lawful session when it assembles, though there is no order calling a special term.—COCHRAN v. STATE, Ga., 39 S. E. Rep. 832.

61 COURTS — Stenographers — Fees.— Reporter appointed to record the testimony on preliminary examination held not entitled to fees for transcribing his notes where defendant was discharged.—MATTINGLY v. NICHOLS, Cal., 65 Pac. Rep. 748.

62. CRIMINAL EVIDENCE — Acquittal of One Joint Criminal.—Where two persons jointly indicted for murder are tried separately, the record of the acquittal of one is not admissible in evidence on the trial of the other.—MUSSER v. STATE, Ind., 61 N. E. Rep. 1.

63. CRIMINAL EVIDENCE — Irrelevant Evidence. — Where irrelevant evidence has been introduced by the state, defendant may introduce in rebuttal other evidence, though also irrelevant.—LONGMIRE v. STATE, Ala., 30 South Rep. 418.

64. CRIMINAL EVIDENCE—Non-experts on Insanity.—Opinions of non-experts as to insanity of accused held admissible only in connection with testimony as to the facts on which opinions are based.—STATE v. SMITH, La., 30 South Rep 248.

65. CRIMINAL EVIDENCE—Res Gestæ.—Appeal made by the deceased, who was killed in an altercation between defendant and her husband, to defendant, held admissible in prosecution of defendant for the killing, as *res gestæ*.—HALL v. STATE, Ala., 30 South. Rep. 422.

66. CRIMINAL LAW — Instructions.— The use of the words "assumption" and "supposition" as synonyms of "hypothesis" held proper.—STATE v. HABBAS, Wash., 65 Pac. Rep. 774.

67. CRIMINAL TRIAL—Change of Venue—Costs—Counties.—On change of venue in a criminal case, the county from which the venue is changed is not liable for costs.—KERSHAW COUNTY v. RICHLAND COUNTY, S. Car., 39 S. E. Rep. 268.

68. CRIMINAL TRIAL — Continuance — Discretion. — Discretion of trial judge in denying a continuance will not be reviewed where the motion was apparently not made in good faith.—COCHRAN v. STATE, Ga., 39 S. E. Rep. 852.

69. CRIMINAL TRIAL—Remittitur.—Filing of a *remittitur* in the court below invests it with jurisdiction.—KNOX v. STATE, Ga., 39 S. E. Rep. 830.

70. DAMAGES—Excessive.—Where there was evidence that stock sold for 50 cents per share near the time the demand for it was made, a verdict for $5,000 damages for a failure to deliver 10,000 shares according to contract held not excessive.—SAUNDERS v. UNITED STATES MARBLE CO., Wash., 65 Pac. Rep. 782.

71. DAMAGES—Liquidating Damages.—An agreement to repay a certain sum on breach of a contract to maintain a dike to protect land from tide water held to be a stipulation for liquidating damages.—JENNINGS v. MCCORMICK, Wash., 65 Pac. Rep. 764.

72. DEEDS — Delivery.—Where the grantee in an unwitnessed deed found among his papers at his death never claimed any right under it, though he lived 20 years after its date, a finding that it was never delivered is justified.—GALBREATH v. GALBREATH, Tenn., 64 S. W. Rep. 861.

73. DEPOSITIONS—Supposed Depositions.—The court may grant a rehearing, and permit the retaking of suppressed depositions, there was an understanding with opposing counsel that the depositions might be read, which prevented their retaking. — YOUNG v. YOUNG, Tenn., 64 S. W. Rep. 819.

74. DETINUE—Amount of Recovery.—Where a bill in detinue to recover the value of certain articles specifies them and fixes a total value, recovery must be limited to the amount stated in the bill.—YOUNG v. YOUNG, Tenn., 64 S. W. Rep. 819.

75. DISCOVERY—Interrogatories.—Answer of party to interrogatories on facts and articles as to verbal sale of an immovable, which negative such sale, connot be contradicted by parol. — WRIGHT-BLODGETT CO. v. ELMS, La., 30 South Rep. 811.

76. EASEMENTS—Drain Servitude.—Servitude of drain is established where it is located for more than 20 years under a written agreement.—SWAIN v. WEBRE, La., 30 South Rep. 831.

77. EASEMENTS—Prescription.—Prescription will not begin to run against a servitude until it is shown that from the time pleaded the servitude was not exercised.—SWAIN v. WEBRE, La., 30 South. Rep. 831.

78. EJECTMENT — Church Trustees.—Where land is conveyed to trustees for the benefit of certain churches, ejectment to recover the land should be brought by the holders of the legal title, and not by one of the churches.—HEARN v. JONES, Tenn., 64 S. W. Rep. 844.

79. EJECTMENT — Subsequent Grantee. — Where an alleyway was reserved by a deed in partition, a subsequent grantee can bring ejectment against the owner of adjoining lots out of which it was reserved.—REMSON v. HYAMS, N. Y., 71 N. Y. Supp. 1002.

80. ELECTION—Conclusiveness.—Validity of election annexing certain district to a town cannot be questioned at a subsequent dispensary election.—HUNTER v. SENN, S. Car., 39 S. E. Rep. 235.

81. ELECTIONS — Designating Precincts.—The fact that a council followed the wrong provision in designating precincts for voting, held not to invalidate the election; such provision being merely directory.—PEOPLE v. CITY OF LOS ANGELES, Cal., 65 Pac. Rep. 749.

82. ELECTION — Liquor Tax—Inspectors.—That inspectors at a liquor tax election selected one of their number as poll clerk in violation of statute held not to render election void.—PEOPLE v. PIERSON, N. Y., 71 N. Y. Supp. 998.

83 ELECTION—Poll Lists Not Subscribed.— That the poll lists in certain districts were not subscribed as required by statute did not render the election void.—PEOPLE v. PIERSON, N. Y., 71 N. Y. Supp. 998.

84. ELECTIONS—Registration.—Statute did not provide for registration, as directed by the constitution, held not to render election invalid, where as a matter of fact the voters were registered.—HUNTER v. SENN, S. Car., 39 S. E. Rep. 235.

85. EMBEZZLEMENT—Instructions.—In a prosecution for embezzlement, an instruction that, to constitute larceny, there must be a felonious taking with intent to steal, was not prejudicial to defendant.—PEOPLE v. GORDON, Cal., 65 Pac. Rep. 746.

86. EMINENT DOMAIN—Public Purposes.—Evidence in proceedings to condemn land for water supply held to show that such land was in no way used for public purposes.—VILLAGE OF FULTONVILLE v. FONDA WATER-WORKS CO., N. Y., 71 N. Y. Supp. 1009.

87. EQUITY — Enjoining — Foreclosure.—On bill by mortgagor to enjoin foreclosure of mortgage and for its cancellation, register's finding as to disputed question of usury is *prima facie* correct.—WARD v. BANK OF ABBEVILLE, Ala., 30 South. Rep. 841.

88. ESTOPPEL—Illegitimacy.—In proceedings for the distribution of an estate, a daughter held estopped from raising the question of the illegitimacy of others claiming a share therein as children of the deceased. —SCOTT v. MATHEWS, Wash., 65 Pac. Rep. 756.

89. ESTOPPEL—Recitals in Will.—A married woman making nuncupative will by public act held not estopped by recitals that certain community property is the separate property of her husband.—SUCCESSION OF MULLER, La., 30 South. Rep. 829.

90. EVIDENCE—Marriage License.—Where a marriage license, bond, and certificate are introduced, a charge is proper that a marriage record is only a circumstance, and not conclusive evidence of the facts recited therein.—WOODS v. MOTEN, Ala., 30 South. Rep. 82

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91. EVIDENCE—Res Inter Alios Acta.—Proceedings *res inter alois acta* held not to prejudice rights of one not a party.—SWAIN v. WEBRE, La., 30 South. Rep. 831.

92. EVIDENCE — Vendor's Lien — Priority.—Vendor, having lost his privilege, has no interest to contest the rank of other mortgage and privilege creditors on proceeds of sale on execution.—PAYNE v. BUFORD, La., 30 South. Rep. 263.

93. EVIDENCE—Written Contract—Parol.—A person in possession of writings from another which do not *per se* evidence a sale cannot eke out such writings by parol evidence.—WRIGHT-BLODGETT CO. v. ELMS, La., 30 South Rep. 311.

94. EVIDENCE—Written Contract—Parol Evidence.—Where written contract does not show the entire transaction, parol evidence held admissible.—VIRGINIA-CAROLINA CHEMICAL CO. v. MOORE, S. Car., 39 S. E. Rep. 846.

95. EXECUTION—"Chilling the Biddin."—Evidence held to justify setting aside a sale on execution for chilling the bidding.—TOOLE v. JOHNSON, S. Car., 39 S. E. Rep. 254.

96. EXECUTION—Unlawful Seizure.—Seizing creditor held not at fault in assuming that a judgment debtor was still the owner of certain personalty, so as to render him liable to the vendee thereof for unlawful seizure.—LABAT v. WALDMEIER, La., 30 South. Rep. 262.

97. EXECUTORS AND ADMINISTRATORS—Assignment of Claims.—Where surety pay claim pending against estate of principal, he may take an assignment of the claim, and proceed in the name of the original claimant or in his own name.—HARMAN'S ESTATE v. HARMAN, Neb., 87 N. W. Rep. 177.

98. EXECUTORS AND ADMINISTRATORS — Claims — Judgment.—A judgment docketed against an intestate in his lifetime cannot be rejected, and referred under the statute.—IN RE BROWNE, N. Y., 71 N. Y. Supp. 1084.

99. EXECUTORS AND ADMINISTRATORS—Cost of Opposition.—Administrator will not be required to pay costs of opposition as to his entire account because it is sustained as to some of the items.—SUCCESSION OF CONERY, La., 30 South. Rep. 294.

100 FRAUD—Unsound Food.—To recover for fraud in the sale of unsound food, plaintiff must show knowledge of unsoundness by seller at the time of sale.—POAG v. CHARLOTTE OIL AND FERTILIZER CO., S. Car., 39 S. E. Rep. 845.

101. FRAUDULENT CONVEYANCES—Directing Verdict.—Directing verdict in favor of the purchasers, in an action to recover possession of the goods from attaching creditors of the vendor, held proper.—BERLIN v. VAN DE VANTER, Wash., 65 Pac. Rep. 756.

102. FRAUDULENT CONVEYANCES—Nominal Consideration.—A conveyance upon the nominal consideration of one dollar and an agreement for the support of the grantor for life held fraudulent as to creditors.—SPIERS v. WHITESELL, Ind., 61 N. E. Rep. 28.

103. GAMING—Faro Game.—What is meant by a "banking house," within Rev. St. § 911, prohibiting the game of faro at such a place, held sufficiently defined.—STATE v. HUNTER, La., 30 South. Rep. 261.

104. HABEAS CORPUS—Contempt Proceedings.—The legality of an order committing petitioner for contempt in not applying certain money to the satisfaction of a judgment against him may be inquired into on petition for a writ of *habeas corpus*.—IN RE COULTER, Wash., 65 Pac. Rep. 759.

105. HIGHWAYS—Assessments—"Front-Foot" Rule.—Act May 23, 1889, authorizing the assessment of cost of street paving on abutting property by front-foot rule, held not a taking of property without due process of law in the case of original paving.—CITY OF HARRISBURG v. MCPHERRAN, Pa., 49 Atl. Rep. 968.

106. HOMICIDE—Evidence.—In a prosecution of a third person for the murder of a wife, evidence that the husband and wife did not live happily together was inadmissible.—HALL v. STATE, Ala., 30 South. Rep. 422.

107. HOMICIDE—Evidence—Stolen Money.—On prosecution for murder committed for purpose of robbery, held proper to admit evidence that a joint defendant had shortly thereafter money of the kind and denomination stolen.—MUSSER v. STATE, Ind., 61 N. E. Rep. 1

108. HOMESTEAD—Right of Alienation.—A wife may not alien her homestead interest, though her husband has abandoned her.—COUCH v. CAPITOL BUILDING AND LOAN ASSN., Tenn. 64 S. W. Rep. 340.

109. HOMESTEAD—Sale and Right of Redemption.—Under Const. 1879, conveyance of homestead in form of sale, with right of redemption, to secure a debt, will be set aside.—MAXWELL v. ROACH, La., 30 South. Rep. 251.

110. HUSBAND AND WIFE—Community Property.—In establishing assets of community after deduction of debts, only debts of the community, and not debts secured by special mortgage are to be deducted.—SCOVILL v. LEVY'S HEIRS, La., 30 South. Rep. 322.

111. HUSBAND AND WIFE—Community Property.—Property purchased by husband is community property, unless husband manifests an intention to acquire it on his own account.—SUCCESSION OF MULLER, La., 30 South. Rep. 329.

112. HUSBAND AND WIFE—Separation Agreement.—Question whether agreement of separation executed by a husband and wife was a bar to proceeding for support held not reviewable.—COMMONWEALTH v. SMITH, Pa., 49 Atl. Rep. 981.

113. INDICTMENT AND INFORMATION — Sufficiency.—An indictment is not defective by an insertion therein, in addition to the words of the statute, of the words "unlawfully" and "feloniously."—STATE v. JACKSON, La., 30 South. Rep. 309.

114. INFANTS—Consent Decree.—There can be no consent decree ordering partition by licitation where a minor is concerned.—MACKIN v. WILDS, La., 30 South. Rep. 257.

115. INFANTS—Vacating Judgment.—Proceedings by a minor to vacate a judgment erroneously taken against him should be the same as in ordinary action.—MORRISON v. MORRISON, Wash., 65 Pac. Rep. 779.

116. INJUNCTION—Attorney's Fees as Damages.—Whether the defendant in injunction suit can recover on the bond his attorney's fees as damages, and, if so, how much, is to be determined by the facts of each case.—ELMS v. WRIGHT-BLODGETT CO., La., 30 South. Rep. 315.

117. INJUNCTION—Conjectural Profits.—Defendant in action on injunction bond cannot recover conjectural profits as damages.—ELM v. WRIGHT-BLODGETT CO., La., 30 South. Rep. 315.

118. INJUNCTION — Dissolving—Notice.—Under Code Civ. Proc. § 532, a court has no power to dissolve an injunction granted without notice, without first giving notice to the plaintiff.—PAGE v. VAUGHN, Cal., 65 Pac. Rep. 740.

119. INSURANCE—Mortgaged Property.—In an action on an insurance policy, held, that the mortgagee of the property was the insured, and the policy was not invalidated by transfer by the mortgagor.—BOYD v. THURINGIA INS. CO. OF ERFURT, GERMANY, Wash., 65 Pac. Rep. 785.

120. INSURANCE—Trust—Assignee.—A policy covering property held in trust for others is sufficient to put an assignee on inquiry as to what other persons were interested therein.—SMITH v. CARMACK, Tenn., 64 S. W. Rep. 372.

121. INTOXICATING LIQUORS—Election.—Members of town council, signing petition for election under dispensary law, held not thereby disqualified from de-

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termining whether petition was properly signed.—HUNTER v. SENN, S. Car., 39 S. E. Rep. 234.

122. INTOXICATING LIQUORS—Liquor Tax—Compelling Payment.—Under statute payment of liquor license tax to township treasurer by county treasurer may be compelled, though the latter has paid such sum to the township supervisors.—KRZYKWA v. KRONINGER, Pa., 49 Atl. Rep. 979.

123. INTOXICATING LIQUORS—Refunding License Fees.—An amendment to prohibition law providing for refunding the amount paid on licenses, held unconstitutional, in so far as it seeks to refund the licenses.—STATE v. DAVIS, Ala., 30 South. Rep. 844.

124. INTOXICATING LIQUORS—Selling Cider.—It is competent to prove that defendant had sold witness cider which made him "foolish."—STATE v. ROBINSON, S. Car., 39 S. E. Rep. 247.

125. JUDGES—Disqualification.—A judge is not disqualified from trying an indictment because he held a court of inquiry and bound the prisoner over.—COCHRAN v. STATE, Ga., 39 S. E. Rep. 337.

126. JUDGMENT—Finding of Jury—Inconsistent Decree.—A finding of a jury in an equitable action, which is not mentioned in the decree, and is inconsistent with the decree as entered, held not to create an estoppel as to such question in a subsequent action.—GLIDDEN v. WHIPPLE, R. I., 49 Atl. Rep. 997.

127. JUDGMENT—Order Nunc Pro Tunc.—The court, after decree of divorce setting aside part of the husband realty "for the use and benefit" of the wife, cannot amend it two years later by a *nunc pro tunc* order vesting a fee in the divorced wife.—HOOVER v. HOOVER, Oreg., 65 Pac. Rep. 796.

128. JUDGMENT—Relief.—Under a prayer for general and special relief, held competent to render judgment for plaintiff for the value of the movable property which was the matter at issue.—INDEPENDENT ICE & DISTILLED WATER MFG. CO. v. ANDERSON, La., 30 South. Rep 270.

129. JUDGMENT—Satisfaction.—Satisfaction by grantee of mortgaged land of deficiency judgment on mortgage assumed by him held not a compromise of joint obligation.—IN RE BROWNE, N. Y., 71 N. Y. Supp. 1084.

130. JURIES—Affidavit of Juror.—Statements in the affidavit of a juror as to remarks made in the jury room will be presumed to be true in the absence of a denial thereof.—STATE v. PARKER, Wash., 65 Pac. Rep. 776.

131. JURY—Initials of Jurymen.—That the initials and not the Christian names of jurors were written on slips prepared, held not ground for quashing the venire in a criminal case.—HALL v. STATE, Ala., 30 South. Rep. 422.

132. JURY—Quash Venire.—Motion to quash the venire, after the jury in a criminal case has been organized and the state's case is ended, is too late.—LONGMIRE v. STATE, Ala., 30 South. Rep. 418.

133. JURY—Relationship—Disqualification.—Act of judge in setting aside jurors because disqualified by relationship, in a criminal case, within the sixth degree, held not erroneous, under Rev. St. § 2403.—STATE v. BROCK, S. Car., 39 S. E. Rep. 359.

134. JURY—Trial by Jury—Right to Waive.—A person indicted for crime punishable at hard labor, who pleads not guilty, cannot waive trial by jury.—STATE v. JACKSON, La., 30 South. Rep. 309.

135. JUSTICES OF THE PEACE—Judgment at Subsequent Term.—A justice of the peace may take the case under advisement at the close of the trial, and a judgment rendered several months thereafter is valid.—AMERICAN TYPE-FOUNDERS CO. v. JUSTICE'S COURT OF SAULSALITO TP., Cal., 65 Pac. Rep. 742.

136. JUSTICES OF THE PEACE—Jurisdiction.—Jurisdiction of magistrate in Greenville county held to extend throughout the entire county.—BAKER v. IRVINE, S. Car., 39 S. E. Rep. 252.

137. LANDLORD AND TENANT—Reasonable Rental.—Where there was no express rental contract, defendant was liable for the reasonable rental value of the land.—ROBBINS v. VOSS, Tex., 64 S. W. Rep. 813.

138. LARCENY—Stolen Property—Presumption.—Where, in a prosecution for theft, the court gives a general charge on circumstantial evidence it is not error to refuse to instruct on presumption arising from possession of stolen property.—STATE v. HARRAS, Wash., 65 Pac. Rep. 774.

139. LIBEL AND SLANDER—Truth as Mitigation.—An instruction that the truth could be received in a prosecution for libel only as a mitigation held error.—STATE v. BROCK, S. Car., 39 S. E. Rep. 359.

140. LICENSES—Legality.—Legality and constitutionality of license held not involved in a suit as to whether return of year's business was too small.—STATE v. PUTNAM, La., 30 South. Rep. 285.

141. LIENS—Accountant—Lien.—An accountant employed to examine books at request of owner has no lien thereon for his services.—SCOTT SHOE MACHINERY CO. v. BROAKER, N. Y., 71 N. Y. Supp. 1028.

142. LIMITATION OF ACTIONS—Setting Aside for Fraud.—Right of action to set aside sale under execution for fraud held to accrue from time of discovery of the fraud.—TOOLE v. JOHNSON, S. Car., 39 S. E. Rep. 254.

143. LIMITATION OF ACTIONS—Trusts.—Action to establish trust in land held not barred by limitations, the trustee not having repudiated the trust.—MORGAN v. TURNER, N. Y., 71 N. Y. Supp. 996.

144. MANDAMUS—Payment of Warrants.—*Mandamus* will not lie to compel the payment of a warrant for recording grants for which no appropriation has been made.—STATE v. CRAIG, Tenn., 59 S. W. Rep. 826.

145. MARRIAGE—Capacity.—Where minds of parties capable of entering into such contract meet in a common consent, there is a valid marriage.—UNIVERSITY OF MICHIGAN v. MCGUCKIN, Neb., 87 N. W. Rep. 150.

146. MASTER AND SERVANT—Contributory Negligence of Servant.—Where workmen employed in loading a ship had used the rigging in ascending to the wharf, a workman placing his weight on a ratline held not guilty of contributory negligence.—MCDONALD v. SVENSON, Wash., 65 Pac. Rep. 789.

147. MASTER AND SERVANT—Labor Contracts.—In prosecution for violation of verbal labor contract, either party may testify as to its terms.—STATE v. EASTBERLIN, S. Car., 39 S. E. Rep., 250.

148. MASTER AND SERVANT—Making Known Dangers.—Danger of an employment should be pointed out, and an employee cautioned, in order that he may assume the risks.—DALY v. KIEL, La., 30 South. Rep. 254.

149. MASTER AND SERVANT—Safe Appliances.—An employer, under Laws 1897, ch. 415, § 18, must not only furnish a safe scaffold, but maintain it in that condition.—HEALY v. BURKE, N. Y., 71 N. Y. Supp. 1027.

150. MORTGAGES—Cancellation—On bill by mortgagor to cancel mortgage transferred by mortgagee the transferee is a necessary party.—MARSHALL v. SHIFF, Ala., 30 South. Rep. 335.

151. MORTGAGE—Foreclosure.—Purchaser at foreclosure of an assessment on mortgaged property held accountable to the mortgagee for only the rents and profits received, and a fair rental value of that portion occupied by him.—KRUTZ v. GARDNER, Wash., 65 Pac. Rep. 771.

152. MORTGAGES—Recorder—Cancellation.—Recorder of mortgages can compel parties to resort to the courts to determine whether mortgage should be canceled.—SUCCESSION OF VIARD, La., 30 South. Rep. 246.

153. MORTGAGES—Right of Redemption.—Where a mortgagee purchased at his own sale without authority, two years is a reasonable time within which the mortgagor or his privies must elect to disaffirm and redeem.—ELROD v. SMITH, Ala., 30 South. Rep. 420.

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154. MUNICIPAL CORPORATIONS — Assessments for Sewer Construction. — In the construction of trunk sewers, the assessment is to be made at the same time with that on property presently benefited, but the lien does not come into existence until the connecting sewer is built.—SEAMEN v. CITY OF CAMDEN, N. J., 49 Atl. Rep. 977.

155. MUNICIPAL CORPORATIONS — Concealed Weapons—Prohibition.—A city held to have authority to pass ordinance prohibiting the carrying of concealed weapons within the city.—CITY COUNCIL OF ABBEVILLE v. LEOPARD, S. Car., 39 S. E. Rep. 248.

156. MUNICIPAL CORPORATIONS—Constructing Sewer. —In action by a city to recover for expenses in constructing a sewer, affidavit of defense held to show a good defense.—CITY OF SCRANTON v. LEVERS, Pa., 49 Atl. Rep. 980.

157. MUNICIPAL CORPORATIONS — Ice on Sidewalk.— Where the evidence would justify finding that a fall on a sidewalk was caused either by ice or by defects in the walk, the question of the city's liability is for the jury.—ZIEGLER v. CITY OF SPOKANE, Wash., 65 Pac. Rep. 752.

158. MUNICIPAL CORPORATIONS—Original Paving.— Question whether a paving is an original one, so as to render abutting property liable for the cost thereof, held for the court.—CITY OF HARRISBURG v. FUNK, Pa., 49 Atl. Rep. 992.

159. MUNICIPAL CORPORATIONS—Public Contractor— Liability.—Contractor for public improvement held not liable for consequential damages to an individual because of the use of a portion of the street in front of his hotel, where no negligence is shown.—BATES v. HOLBROOK, N. Y., 71 N. Y. Supp. 1018.

160. MUNICIPAL CORPORATIONS — Tax Levied for Light.—Where a tax is levied to meet the expense of a contract by a city for water and light, so far as it has been paid, the city is bound to remit to the plaintiff furnishing such water and light.—LAKE CHARLES ICE, LIGHT & WATERWORKS v. CITY OF LAKE CHARLES, La., 30 South. Rep. 280.

161. OFFICE AND OFFICERS—Action Against Treasurer—Plaintiff.—Action against city treasurer on his bond should be brought in the name of the person aggrieved, and not in the name of the city for his use.— SOMERVILLE v. WOOD, Ala., 30 South. Rep. 280.

162. PARTITION—Fees of Solicitors.—Under a bill in partition, where a sale is made, the solicitors for complainant are not entitled to fees out of the funds arising therefrom.—JORDAN v. FARROW, Ala., 30 South. Rep. 338.

163. PARTITION—Legatees.—Petition by legatees in disregard of injunction of testator held valid.—RAPIER v. O'DONNELL, La., 30 South. Rep. 256.

164. PARTITION — Minors — Attack.—Minors cannot claim right to property disposed of in partition as long as the proceedings are not attacked in a direct action.—SCOVELL v. LEVY'S HEIRS, La., 30 South. Rep. 322.

165. PARTITION — Order of Sale—Indivisibility.—A judge cannot order the sale at auction to effect partition without proof that the property is indivisible.— MACKIN v. WILDS, La., 30 South. Rep. 257.

166. PARTITION—Private Sale.—In partition by private sales, liens of parties are transferred to the proceeds.—SUCCESSION OF VIARD, La., 30 South. Rep. 246.

167. PLEADING—Amendment.—Where plaintiff sues to foreclose in her individual capacity, an amendment asking for relief as trustee held properly disallowed. LAPIERRE v. WEBB, Ga., 39 S. E. Rep. 844.

168. PLEDGES—Director Holding Collateral of Bank. —Where the cashier of a bank to secure his private debt pledges to a director collaterals of the bank, such director cannot hold the collaterals.—MAJOR v. STONE'S RIVER NAT. BANK, Tenn., 64 S. W. Rep. 852.

169. PRINCIPAL AND AGENT—Authority to Collect.— One who makes payment to a second person, not the owner of a note or in possession of it, assumes the burden of proving that such person was authorized to collect.—GILBERT v. GARBER, Neb., 87 N. W. Rep. 179.

170. PRINCIPAL AND AGENT — Collecting Agent— Powers.—Power of collecting agent held limited to receiving that which the law declares to be a legal tender, or which, by common consent, is treated as money.—GILBERT v. GARBER, Neb., 87 N. W. Rep. 179.

171. PRINCIPAL AND AGENT—Failure of Principal— Terminating Agency.—An agent cannot terminate his agency, and become employee of a third person to the contract, because of the failure of his principal.— MEANS v. ROSS, La., 30 South. Rep. 300.

172. PUBLIC LANDS—Patent—Invalid on Face.—Where a patent of land sold to the state was valid on its face, its invalidity could not be established by evidence outside of it.—MORGAN v. TURNER, N. Y., 71 N. Y. Supp. 996.

173. QUO WARRANTO—Sufficiency.—The state in *quo warranto* proceedings against a city, held to stand or fall on the sufficiency of facts alleged in the complaint.—PEOPLE v. LOS ANGELES, Cal., 65 Pac. Rep. 749.

174. RAILROADS — Action for Recklessness.—Where action charges defendant with doing an act wilfully, wantonly, and recklessly, plaintiff cannot recover on showing ordinary negligence of defendant.—PROCTOR v. SOUTHERN RY. Co., S. Car., 39 S. E. Rep. 851.

175. RAILROADS—Intersection—Rights of Trains.— Where a train has obtained a right of way over a railroad intersection, it is negligence for engineer on train on other road to attempt to make crossing in front of approaching train.—DAVIS v. HOUSTON & S. RY. Co., La., 30 South. Rep. 250.

176. RAILROADS—Liability for Leased Road.—A railroad corporation organized to manage a railroad held liable to one injured thereon, though the road had not been transferred to the corporation.—SAN JACINTO & S. RY. CO. v. MCLIN, Tex., 64 S. W. Rep. 814.

177. RAILROADS—Reckless Speed.—A railroad company running trains recklessly fast through city held liable, though there was no statute or ordinance regulating the speed.—SUNDMAKER v. YAZOO & M. V. R. CO., La., 30 South. Rep. 285.

178. RECEIVERS—Sale of Business.—Goods ordered by receiver of a mercantile business as a going concern, but not paid for, held not included in a sale of the business by receiver.—CHARTER OAK STOVE & RANGE CO. v. RICE, La., 30 South. Rep. 321.

179. REMAINDERS — Life Tenants—Waste.—Remainder men may appeal to equity to prevent life tenant from wasting and destroying the *corpus* of the estate. —KOLLOCK v. WEBB, Ga., 39 S. E. Rep. 839.

180. SALES—Installments.—Where a contract for the sale of personalty provides that title shall not pass until full payment of installments, the vendor may maintain a suit for each installment as it falls due.— GRAY v. BOOTH, N. Y., 71 N. Y. Supp. 1015.

181. SEQUESTRATION — Consignee. — Consignee of goods can sustain sequestration against the master of the carrier for their recovery.—SONIA COTTON OIL CO. v. THE RED RIVER, La., 30 South. Rep. 303.

182. SET-OFF AND COUNTERCLAIM—Independent Contract.—Defendant in action on written contract may show an independent agreement entered into at the same time by parol.—VIRGINIA-CAROLINA CHEMICAL CO. v. MOORE, S. Car., 39 S. E. Rep. 846.

183. SLAVES — Legitimation.—In ejectment, where plaintiffs claim as children of former slaves, a charge held proper that if the mother of plaintiffs died not earlier than the day of the passage of the ordinance legitimating the children of slaves, they must find for plaintiffs.—WOODS v. MOTEN, Ala., 30 South. Rep. 324.

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184. STATUTES—Title.—Act Dec. 12, 1884, held unconstitutional, in so far as it prohibits the giving away of liquors, as not expressing the subject of the act in the title.—STATE v. DAVIS, Ala., 30 South. Rep. 344.

185. STATUTES—Title—More Than One Subject.—Act March 25, 1873, held unconstitutional, as embracing more than the subject expressed in its title.—STATE v. CRAIG, Tenn., 64 S. W. Rep. 326.

186. STATUTES—Title—Object.—Act May 17, 1894, entitled "An act to protect the planting and cultivating of oysters in the tide waters of the state," held not to state the object of the act in the title.—STATE v. STEELMAN, N. J., 49 Atl. Rep. 978.

187. TAXATION — Excessive Assessment.—The law contemplates that if taxpayer's property is excessively assessed he should sue, after complaint seasonably made before board of review. — LIQUIDATING COM'RS OF NEW ORLEANS WAREHOUSE v. MARRERO, La., 30 South. Rep. 805.

188. TAXATION—Failure to Collect State Tax—County Liable.—A county having failed to collect a tax for state purposes, is liable therefor to the state.—COMMONWEALTH v. MCKEAN COUNTY, Pa., 45 Atl. Rep. 982.

189. TAXATION—Lien—Foreclosure.—Lien created by filing of town collector's bond may be foreclosed in equity. — CHATFIELD v. CAMPBELL, N. Y., 71 N. Y. Supp. 1004.

190. TAXATION— Sale.— Sale for taxes to the state, where patent thereafter issued from the state, and was recorded, held valid under Tax Law, 1896, ch. 908, § 132.—MORGAN v. TURNER, N. Y. 71 N. Y. Supp. 996.

191. TAXATION— Transfer Tax. — Money of non-resident, temporarily deposited in New York, held, on his death, not subject to transfer tax.—IN RE LEOPOLD'S ESTATE, N. Y., 71 N. Y., Supp. 1082.

192. TAXATION—Transfer Tax.—A surrogate cannot amend an order assessing transfer tax on a life interest in United States bonds, subsequently declared by court of appeals to be exempt from taxation.—IN RE VON POST'S ESTATE, N. Y., 71 N. Y. Supp. 1089.

193. TELEGRAPHS AND TELEPHONES — Mandaums—Furnishing Facilities.—*Mandamus* lies to compel telephone company to furnish facilities to all similiarly situated without discrimination.—STATE v. CITIZENS' TEL. CO., S. Car., 39 S. E. Rep. 257.

194. TELEGRAPHS AND TELEPHONES—Refusing Connection.—A telephone company may refuse connection to one who attaches private extension instruments to its lines, where the company is willing to furnish such instruments at reasonable rates.—GARDNER v. PROVIDENCE TEL. CO., R. I., 49 Atl. Rep. 1004.

195. TRIAL—Amending Special Findings.—After final judgment, the trial court has no power to amend a special finding.—POLLARD v. FIRST AVE. COAL-MIN. CO., Ind., 61 N. E. Rep. 9.

196. TRIAL—Assuming Truth of Certain Facts.—Where certain facts are clearly proven without conflict, a charge assuming them as true held not erroneous.—WOOD v. MOTEN, Ala., 30 South. Rep. 824.

197. TRIAL — Clerks — Minutes. — Clerks of court, whether the testmony is taken down in writing or not, must make a minute of the swearing of the witnesses, giving their names.—MACKIN v. WILDS, La., 30 South. Rep. 257.

198. USURY—Excess of Principal.—On bill to cancel mortgage because of usury, decree requiring complainant to pay anything in excess of principal, with legal interest, held erroneous.—WARD v. BANK OF ABBEVILLE, Ala., 30 South. Rep. 841.

199. VENDOR AND PURCHASER—Damages.—In action by vendee to recover damages for alleged breach of contract for sale of land, plaintiff held not entitled to recover, where he fails to show tender of the purchase money due, or of a deed ever executed.—HARPER v. JOHNSON, Ala., 30 South. Rep. 286.

200. VENDOR AND PURCHASER—Non-Performance.—In action for failure to perform a contract for support, made in consideration of a good and sufficient deed to certain property, a deed not duly executed and acknowledged held inadmissible in evidence. — GUNDERSON v. GUNDERSON, Wash., 65 Pac. Rep. 791.

201. WATERS AND WATER COURSES—Irrigation.—The right to the water for irrigation may be obtained by prior appropiation, though the diversion is not made on any portion of the public domain.—BROWN v. BAKER, Oreg., 65 Pac. Rep. 799.

202. WATER AND WATER COURSES—Prior Appropriation.—Allegation in reply of right to the entire flow of a stream by reason of riparian proprietorship held a departure, where the complainant asserted a right by prior appropriation.—BROWN v. BAKER, Oreg., 65 Pac. Rep. 799.

203. WILLS—Bequest of Personalty for Life.—Where personalty was given to wife, her children to take what was unconsumed at her death, the wife took an absolute estate therein.—CAIN v. ROBERTSON, Ind., 61 N. E. Rep. 26.

204. WILLS— Codical—Construction.— In construing codicil of will, limitations expressed in will, and refererd to in codicil, must be considered.—VAUGHAN v. BRIDGES, S. Car., 39 S. E. Rep. 847.

205. WILLS— Construction of "Heirs."— Wills construed, and word "heirs" held used in the sense of children, and that on the death of testator's wife his children take a life estate, and on their death his grandchildren acquire a fee.—WATSON v. WILLIAMSON, Ala., 30 South. Rep. 281.

206. WILLS—Omitting Children—Evidence of Intention.—Where plaintiff's mother died, leaving a will in terms giving her entire estate to their father, making no mention of her children, oral testimony that she intended to omit them is inadmissible.—MORRISON v. MORRISON, Wash., 65 Pac. Rep. 779.

207. WILLS—Omitting Reference to Children.—Where plaintiff's mother died, leaving a will in terms giving her entire estate to their father, making no mention of her children, the will is void as to them.—MORRISON v. MORRISON, Wash., 65 Pac. Rep 779.

208. WILLS—Partnership Contract as a Will.—An instrument creating a partnership between father and son held in effect a will by the father, and not a deed.—GOMEZ v. HIGGINS, Ala., 30 South. Rep. 417.

209. WITNESSES—Donee Causa Mortis.—In an action by administrator of depositor against savings bank, and a defense of payment to donee *causa mortis*, the latter is not an incompetent witness.—PODMORE v. SEAMEN'S BANK FOR SAVINGS, N. Y., 71 N. Y. Supp. 1026.

210. WITNESSES— Duces Tecum. — Where a witness summoned by subpœna *duces tecum* produces the books of a corporatitn, it is no objection to their admission that the statute provides another mode of securing them.—COBB v. LAGARDE, Ala., 30 South. Rep. 826.

211. WITNESSES—Farm Labor Contracts.—Brother of one contracting party held a disinterested witness in a prosecution for violation of a verbal contract to labor on farm.—STATE v. EASTERLIN, S. Car. 39 S. E. Rep. 250.

212. WITNESSES—Impeachment.—Proof of particular vices is inadmissible as against accused in an attempt to impeach his character.— STATE v. GUY, La., 30 South. Rep. 268.

213. WITNESSES—Name on Back of Indictment.— A witness for the state will not be excluded because his name does not appear on the back of the indictment.—STATE v. ROBISON, S. Car., 39 S. E. Rep. 247.

214. WITNESSES—Relative—Credibility.—That a witness in behalf of accused is a relative, or jointly indicted for the offense, may be considered by the jury in passing on his credibility.—COCHRAN v. STATE, Ga., 39 S. E. Rep. 332.

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Central Law Journal.

ST. LOUIS, MO., NOVEMBER 22, 1901

Our honored correspondent at Galveston, Mr. E. T. Harris, a prominent attorney of that city, has just sent us a marked copy of his brief in the case of Hildenbrandt v. Ames, now pending in the Court of Civil Appeals of Texas, First Supreme Judicial District. This case is one of many suits which will probably arise out of the late flood disaster at Galveston, in which that very difficult and unsettled question of law will prominently protrude itself,—the proof of survivorship in a common disaster. Perhaps that phase of the question arising under wills and the distribution of estates of decedents will occasion little difficulty, the law being quite well settled on that point. See the leading case of Newell v. Nichols, 75 N. Y. 78. That phase of the question, however, arising under policies of life insurance, is in hopeless confusion and considerably complicated by the further question of the vested interest of the beneficiary peculiar to regular life policies. Mr. Harris' brief canvasses this question, and in the marked copy to which we have alluded we observe that what he expressly considers his most valuable citation is from the CENTRAL LAW JOURNAL. In closing his discussion of the authorities Mr. Harris says: "The ablest article or *resume* of the law bearing upon the case at bar is found in the 53d CENTRAL LAW JOURNAL, pages 184-189, inclusive. Were it not for wearying this court we would embrace the entire language of said article in this argument, and submit it as the fairest presentation of both sides of the questions involved which has reached the eye of counsel for appellee. On page 189 of that article the author states, 'where the policy provides that the beneficiary shall take, "if surviving," no difficulty should arise in any view of the case, as, in such case, survivorship is clearly a condition precedent to the enjoyment of the fund, and upon the representatives of the beneficiary must be the burden of proving survivorship before they are entitled to take anything under the policy.' The article in question cites many cases, and we doubt not it will have the calm consideration of this Honorable Court." This is not the only instance in which this particular article has been cited. In a similar case pending in the Supreme Court of Missouri, the attorney for the administrator has sent us acknowledgment of its valuable assistance. We mention this simply as an evidence of the practical aid and assistance which the CENTRAL LAW JOURNAL renders the active practitioner in winning his cases. The JOURNAL is not a legal storybook nor a graveyard of obituaries. It is devoted solely to the law—the announcement of its latest principles, and the solution of its most difficult problems. It is for that reason more often cited in the decisions of the courts than any other law journal in the country. The great mass of digests and reports are, of course, invaluable to the lawyer in ordinary cases. But questions of extreme rarity or peculiarity, or which have been settled unsatisfactorily or contrary to right principles or on which there is great conflict of authority, must be determined by exhaustive and dispassionate analysis and not by the mere partisan citation of authorities, the mind of the court being more inclined toward the former than the latter. The CENTRAL LAW JOURNAL has a staff of paid contributors—practicing lawyers—of most exceptional competency who wrestle with these difficulties and boldly announce a solution based on the best considered authorities and the clearest principles of law. Such assistance is of all things most valuable to the court which seeks to be guided by right principle rather than solely by precedents, even if the latter are all "hog cases" and "on all fours."

No subject is more often litigated, apparently, than that of the liability of telegraph companies for negligent delivery of messages. The rule is that in all cases delivery must be made to the addressee or his authorized agent. The difficulty is not, however, in the rule itself as in its application. In the recent case of Western Union v. Hendricks, 63 S. W. Rep. 341, the Supreme Court of Texas held that where a telegraph message is addressed to a person residing in the country in care of a resident of the town, both of whom are temporarily in another town, and a special price is paid to secure

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its delivery, the delivery to the partner of the latter is insufficient, but it should be delivered at the residence of the addressee. Other recent authorities on this question might be cited as follows: Pearsall v. Western Union, 124 N. Y. 256, 21 Am. St. Rep. 662; Telegraph Co. v. Mitchell, 91 Tex. 454, 44 S. W. Rep. 274, 66 Am. St. Rep. 906; Hendricks v. Western Union, 126 N. Car. 304, 35 S. E. Rep. 543; Western Union v. Mitchell (Tex. 1898), 44 S. W. Rep. 274; Western Union v. Jackson (Tex. App. 1898), 46 S. W. Rep. 279; Martin v. Telegraph Co., 18 Wash. 260, 51 Pac. Rep. 376. In the case of Western Union v. Tressall, 98 Ind. 566, however, it was held that there was an implied authority on the part of a hotel clerk to receive a telegram for a guest, and the company cannot be held responsible for the clerk in failing to deliver it. On the other hand, in the case of Western Union v. Jackson, 46 S. W. Rep. 279, it was held that though a telegram is directed in care of a certain person, the company must use diligence to deliver to the addressee. So also in the case of Telegraph Co. v. Mitchell, 91 Tex. 454, it was held that a charge that, in the absence of the husband, it was the duty of the company, if his wife was at the residence, to deliver to her a message addressed to him, was error, she not being the general agent of her husband.

NOTES OF IMPORTANT DECISIONS.

ACTION ON FOREIGN JUDGMENT—PROOF OF LAWS ALLOWING INTEREST ON JUDGMENTS IN FOREIGN STATE.—In the recent case of Sehroeder v. Boyce, 86 N. W. Rep. 387, the Supreme Court of Michigan reversed the decision of a trial court because of failure to prove that a foreign state allowed interest on judgments. The appellate court held that where the trial court, in a suit on a judgment of another state, allowed interest thereon without proof of the rate of interest in such state, there was reversible error, since the common law was presumed to be in force in the foreign state, and at common law judgments do not carry interest. The court said: "There was no proof given in the case showing what the rate of interest is in the state of Indiana. As the common law is presumed to be in force in other states unless the contrary is shown, and at common law judgments do not carry interest, interest is not recoverable on a judgment rendered by the courts of another state without proof that the law of such state allows interest on judgments." Judgments at common law do not bear interest, so that in the absence of express legislation which, if of a foreign state, must be proved, a recovery on a judgment would not include interest. Hamer v. Kirkwood, 25 Miss. 95; Winch v. Ice Co., 86 N. Y. 618; *Ex parte* Brown, 18 S. Car. 87; Ormsby v. Johnson, 1 B. Mon. (Ky.) 80; Atchison, etc. R. R. v. Gabbert, 34 Kan. 132; Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Cavender v. Guild, 4 Cal. 253; Kermott v. Ayer, 11 Mich. 181.

CRIMINAL TRIAL—IMPROPER REMARKS OF TRIAL JUDGE.—Some courts seem to have fallen into the very bad practice of commenting on the evidence and insidiously infecting the jury with their own opinion of the facts in the case. As a general rule, however, these remarks do not call for a reversal of the cases unless it is clearly shown that appellant has been injured by them. Thus, in the recent case of Hinzar v. State, 63 S. W. Rep. 329, the Supreme Court of Texas held that a comment of the court in a criminal prosecution on rejected evidence that: "That cuts no ice. The only question is whether defendant assaulted her [the prosecutrix]," —while improper, is not reversible error.

While the court in this case may be correct in its view that such remark did not injure the appellant in this case, it is not difficult to imagine a case in which such a remark could be highly prejudicial. No comment could be more calculated to impress upon the jury the court's opinion that the evidence sought to be introduced was frivolous and in a close case would certainly affect the weight of the evidence and the verdict of the jury. It is the well-settled rule that any improper remarks of the court in the presence and hearing of the jury, liable to influence their action, is misconduct. Wanack v. Macon, 53 Ga. 163; Bowman v. State, 119 Neb. 523; Skelly v. Boland, 78 Ill. 438; Cronkhite v. Dickerson, 51 Mich. 177. Thus where in charging the jury the judge playfully remarked that the jury might give "such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others," it was held that the instructions were erroneous, because the remarks were calculated to make the jury believe that the judge thought the facts justified heavy exemplary damages. Hair v. Little, 28 Ala. 236.

LIFE INSURANCE—MISREPRESENTATIONS AND WARRANTIES.—One of the most often litigated questions in the law of life insurance is the effect of misrepresentations in the application. The whole question lies wrapped up in the further question whether such representations are to be given the legal effect of warranties or of mere representations only. In the former case the statements in the application unless literally true will avoid the policy, however immaterial such misrepresentations may be; in the latter case mis-

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statements in the application, sufficient to work an avoidance of the policy, must be of facts substantially material to the risk. In the recent case of Kansas Mutual Life Insurance Co. v. Pinson, 63 S. W. Rep. 531, the Supreme Court of Texas held that an application for life insurance recited that the applicant agreed that his statements to the medical examiner were true, and were offered to the company as a consideration of the contract. The policy stipulated that the insurance was granted in consideration of the statements and agreements in the application, "which are made a part of the contract." The applicant stated to the medical examiner that he had five sisters, aged, respectively, 52, 50, 47, 45, and 36 years, but their ages were in fact, respectively, 49, 46, 44, 36, and 33 years. The court held that the provisions of the policy constituted a warranty of the truth of the statements in the application, and that the discrepancy forfeited the contract. The court makes this peculiar statement of the law: "There is nothing in the facts stated in connection with the question which will take this case out of the general rule that the breach of a warranty in an insurance policy works a forfeiture of the contract. The rule that a substantial performance of a warranty is sufficient does not apply in this case, and we are not called upon to say what would be the effect if the variance between the actual ages and the ages warranted was very slight. Lest this opinion might be misunderstood, we will state that we do not intend to assert that a literal compliance with such a warranty would be necessary, but, in our opinion, the facts do not justify the court in assuming that the discrepancy in the ages is so irrelevant as to avoid the effect of the warranty. To the question, we answer that the provisions of the policy constitute a warranty of the truth of the statements made in the application, and that the discrepancy between the ages of the sisters as stated and their actual ages caused a forfeiture of the contract of insurance." The court's reference to a rule of law stating that a substantial performance of a warranty is sufficient, fails to find support from the authorities. The latter are all agreed that if the statements in the application, have by express agreement been made a part of the policy, and given the effect of warranties, they must be literally complied with. Hartford Insurance Co. v. Gray, 91 Ill. 159; Connecticut Mutual Life Insurance Co. v. Pyle, 44 Ohio St. 19; Alabama Insurance Co. v. Garner, 77 Ala. 210; Blooming Grove Insurance Co. v. McAnerney, 102 Pa. St. 335. It is only when the statements have simply the effect of representations and are not made a part of the contrac. that a substantial performance or accuracy will suffice. Horn v. Insurance Co., 64 Barb. (N. Y.) 81; Monlor v. Insurance Co., 101 U. S. 708; Lamb v. Insurance Co., 70 Iowa, 288.

VENUE IN FORECLOSURE SUITS.

The General Rule as to Venue in Chancery.—As the foreclosure proceeding, in the form we are here considering, is essentially a suit in chancery[1] the rules which govern its venue have their source in that forum. The prevailing doctrine is that all equity suits were once transitory.[2] Hence, chancery would entertain a bill for specific performance[3] or for redemption[4] where the defendant was served within the realm, though the suit involved land in a foreign jurisdiction. There are, indeed, decisions in which a contrary opinion is expressed,[5] but the above is the doctrine prevalent in England when the law as to venue originated, and is also the one most in harmony with the maxim that "equity acts *in personam.*"

Strict Foreclosure a Transitory Proceeding.—The original foreclosure proceeding shared this characteristic of the other remedies of chancery, for it was a proceeding *in personam.*[6] But the proceeding of which this was true was not the modern foreclosure and sale; it

[1] Price v. State Bank, 14 Ark 50.

[2] Georgia: Clements v. Tillman, 79 Ga. 451, 11 Am. St. Rep. 441. Maryland: Carroll v. Lee, 3 G. & J. (Md.) 504, 22 Am. Rep. 350; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448. Tennessee: Newman v. Stuart, Cooke, 339. Virginia: Dickinson v. Hoomes, 8 Gratt. (Va.) 410. Canada: "The foreclosure suit has come down from the chancery practice, and in that practice there never was any fixed locality of venue applying to certain actions as in the common law practice." Seymour v. De Marsh, 11 Ont. Prac. Rep. 472.

[3] Penn v. Lord Baltimore, 1 Ves. 444 (1750).

[4] Kanawha Coal Co. v. Kanawha, etc. Coal Co., 7 Blatchf. (U. S.) 415; *Cf.* Cholmondeley v. Lord Clinton, 2 Jac. & W. 134.

[5] Dunn v. McMillen, 1 Bibb (Ky.), 409, the court saying: "Analogous to this distinction at law between actions local and transitory, it has been held in chancery, that where the decree is to affect the land directly, as in the case of a suit brought for partition, or for dower, then the court cannot entertain jurisdiction only where the land lies." *Cf.* Parker v. McAllister, 14 Ind. 12; Gill v. Bradley, 21 Minn. 15; Collins v. Park (Ky.), 18 S. E. Rep. 1013; Chapin v. Circuit Judge (Mich.), 62 N. W. Rep. 351; Neal v. Reynolds, 38 Kan. 432.

[6] Federal Cases: Pennoyer v. Neff, 95 U. S. 714; Armdt v. Griggs, 134 U. S. 316, 326; Deck v. Whitman, 96 Fed. Rep. 873, 889. California: Fallon v. Butler, 21 Cal. 24, 33. Florida: Judge v. Forsyth, 11 Fla. 257, 262. Iowa: McConnell v. Hutchinson, 71 Iowa, 512. 516. But see Cole v. Conner, 10 Iowa, 299. Kentucky: Downing v. Palmater, 1 T. B. Mon. (Ky.) 164. Nebraska: Hurley v. Estes, 6 Neb. 386; Peters v. Dunnels, 5 Neb. 465. New Jersey: White v. Williams, 8 N. J. Eq. 376. New York: Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609, 616. South Carolina: Trapier v. Waldo, 16 S. Car. 276, 283.

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was the ancient remedy of strict foreclosure. This was in truth a suit *in personam*, because the relief obtained operated not to affect the land but to cut off the mortgagor's personal right or equity of redemption.[7] Now it was because of this fact that the proceeding was also transitory[8] and might be instituted in any place where the court had jurisdiction of the mortgagor's person.[9] The fact that the mortgaged land might be situated in another county[10] or state[11] or in a colony[12] or dependency,[13] having a different legal and judicial system, was wholly immaterial, so far as the *locus* of the suit was concerned. And conversely the fact that the land itself might be within the jurisdiction of the court would not authorize the court to entertain the bill if the parties could not be served there.[14] Such was the ancient law of venue in this proceeding, and such is still the rule where strict foreclosure alone is sought.[15]

Change Necessitated by Introduction of Equitable Foreclosure—Proceeding Becomes Either Local or Transitory.—With the introduction of the sale as a substitute for strict foreclosure came a necessary change in the law as to the venue of the suit. For in order to effect a sale the court must have jurisdiction of the *res;* title to land cannot be affected by a foreign tribunal, and hence a decree of foreclosure and sale in one state is without validity as to land in another.[16] Again, the mere fact that the land is within the jurisdiction enables a court to take cognizance of a bill praying for a sale.[17] Hence

[7] See Lansing v. Goelet, 9 Cow. (N. Y.) 346.

[8] "Originally it was regarded as transitory. In so far as it is local it is so made by statute." Ladd, J., in McDonald v. Second National Bank, 106 Iowa, 517-523.

[9] England: Toller v. Carteret, 2 Vern. 494 (1705); Paget v. Ede, 18 Eq. Cas. 118. Connecticut: Palmer v. Mead, 7 Conn. 149, 157; Broom v. Beers, 6 Conn. 198 In the latter case it is observed: "The plaintiff in error has taken several exceptions to the decree in question. The first is, that the suit was not brought in the proper county. The title of land is not in question; and such suits have always been considered transitory. 2 Swift's Dig. 197; How. Mort. 1043; Anon. 2 Chan. Cas. 244; Owen v. Granger, cited. Arguendo, 2 Day, 477; Owen v. Hather, Superior Court, Hartford County, 1818; Stat. 34, tit. 6, cl. 1, sec. 6 (Ed. 1808)." Iowa: McDonald v. Second Nat. Bank, 106 Iowa, 517, 523. Kentucky: Caufman v. Sayre, 2 B. Mon. (Ky.) 202; Owings v. Beall, 3 Litt. (Ky.) 103. New York: House v. Lockwood, 40 Hun (N. Y.), 532; Union Trust Co. v. Olmstead, 62 N. Y. 729. South Carolina: Trapier v. Waldo, 16 S. Car. 276, 283. Tennessee: Grace v. Hunt, Cooke (Tenn.), 341; Avery v. Holland, 2 Overt (Tenn.), 71.

[10] Caufman v. Sayre, 2 B. Mon. (Ky.) 202; Owings v. Beall, 3 Litt. (Ky.) 103; Broome v. Beers, 6 Conn. 198; Palmer v. Mead, 7 Conn. 157. *Cf.* Trapier v. Waldo, 16 S. Car. 276, 283.

[11] House v. Lockwood, 40 Hun (N. Y.), 532. This was a suit brought in New York for the strict foreclosure of a mortgage on land in Illinois. The court said: "The subject-matter of this controversy is capable of being wholly and completely disposed of by a decree between those parties. They were personally within the jurisdiction of the court when its process was served upon them, and the defendants have appeared and served their answers contesting the right of the plaintiff to maintain the action. They are personally, therefore, subject to the jurisdiction of the court. And where that is the fact, and such jurisdiction has been acquired, there it has been the practice of courts of equity to decree relief, disposing of the controversy, although the subject-matter itself may be situated in another state or county." See also Union Trust Co. v. Olmstead, 62 N. Y. 729.

[12] "Bills are often filed (in England) upon mortgages in the West Indies." Story, Equity Jurisprudence, sec. 1293. Thus Paget v. Ede, 18 Eq. Cas. 118, involved the foreclosure of a mortgage of an estate in Nevis, one of the Leeward islands.

[13] Toller v. Carteret, 2 Vern. 494 (1705). This was a suit to foreclose the defendant's equity of redemption in Sark, one of the Channel isles, the whole of which was subject to the mortgage. Neither the jurisdiction of the high court, nor the English mortgage laws extended to the island, but chancery entertained the bill by virtue of the service in England.

[14] Grace v. Hunt, Cooke (Tenn.), 341. *Cf.* Avery v. Holland. 2 Overt (Tenn.), 71; Owings v. Beall, 3 Litt. (Ky.) 103.

[15] House v. Lockwood, 40 Hun (N. Y.), 532.

[16] England: Grey v. Manitoba & N. W. R. Co., App. Cas. (Privy Council, 1897) 254, 66 L. J. P. C. (N. S.) 66, where Lord Hobhouse observes: "As regards the question of sale, the decisions, both English and transatlantic, which bear on the jurisdiction of courts of justice to deal with foreign land, have been very carefully discussed in the courts below. It is hardly necessary to go into that discussion again here. The thing asked for by the bill is a judicial sale of land partly within and partly out of the jurisdiction, as an entire thing, and with specific directions by the court. It is impossible to do that." "The courts of our state will not recognize the right of courts in other states to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner, and recognize as valid titles so acquired. We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of court by authority of law in another jurisdiction. The rule seems to be that the courts of each state have exclusive jurisdiction to settle the title to lands within its own limits." Farmers' Loan & Trust Co. v. Postal Tel. Co., 55 Conn. 324. Indiana: Eaton, etc. R. Co. v. Hunt, 20 Ind. 457, 465. Kansas: Lichty v. Martin, 11 Kan. 565; Union Trust Co. v. Olmstead, 62 N. Y. 729.

[17] "As a sale of mortgaged land operates *in rem*, cognizance over a bill for a sale may be exercised by the court of equity of the county in which the land lies, and would, upon common-law principles, be restricted to that local court, if the prayer for a sale

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arose the rule that a suit for both foreclosure and sale might be brought either in the county where the defendant resided or in that in which the land was situated.[18]

The Same Continued—Rule Made Statutory.—This doctrine which gave a dual venue to the foreclosure suit has been enacted into statutes in several of the states,[19] and in these the mortgagee may elect to institute proceedings in the county either of the mortgagor's residence or of the *situs* of the land. The same rule has been applied in the foreclosure of a vendor's lien[20] which has been treated as an equitable mortgage.[21] In Texas the district court of the county where the note, secured by the mortgage, is payable, has jurisdiction of the foreclosure suit,[22] and such was formerly the law in Iowa.[23] But where the mortgagor was not joined and the defendant, who was an assuming purchaser, resided in another county than that in which the land lay, it was held that the action could not be brought in the latter county,[24] and the same was decided where the mortgaged property included both real estate and chattels.[25] On the other hand, where the service was by publication only, the suit was required to be instituted in the county which was the *situs* of the mortgaged premises.[26] In Kentucky the statute making the venue local excepts decedents' mortgages, but this will not permit the institution of the suit in another county than that in which the land lies, unless there is also an administration suit pending there.[27]

The Same Continued—Venue made Local, but not Jurisdictional.—In some states the effect of legislation has been to render the foreclosure suit nominally local but also to permit the venue to be changed,[28] or the suit to proceed in another county than that of the *res*, unless such change is applied for.[29] Under statutes of this class the venue is not,

were the only grounds of jurisdiction." Caufman v. Sayre, 2 B. Mon. (Ky.) 202. *Cf.* Owings v. Beall, 3 Litt. (Ky) 103, 107.

[18] Caufman v. Sayre, 2 B. Mon. (Ky.) 202, the court saying: "A bill for ascertaining and settling the amount due, and for both foreclosure and sale, is personal as well as local; and, therefore, in our opinion, either the person of a necessary defendant or the locality of the mortgaged premises may give jurisdiction in such a suit. It cannot be known until the final decree, whether the suit may not produce the debt without a sale of the mortgaged estate."

[19] Alabama: Code, sec. 3421, construed in Reeves v. Brown, 108 Ala. 35 South. Rep. 824, where the court says: "When a bill is filed for the foreclosure of a mortgage on real estate, which is situated in one county, and the mortgagor resides in another, under section 3431 of the Code, the chancery court of either district or county,—the one where the mortgagor resides, or the one where the real estate or a material portion thereof is situated,—has jurisdiction, and the complainant may elect, at his pleasure in which of the two districts or counties he will file his bill. Ashurst v. Gibson, 57 Ala. 586; Harwell v. Lehman, 72 Ala. 345." Iowa: Cole v. Conner, 10 Iowa, 399; Finnagan v. Manchester, 12 Iowa, 521. The statutes has been changed since these cases were decided so that the action is now purely local. See *post*, p. Tennessee: Code (1884), sec. 3515. This section permits the action to be brought in the county where the land lies, but it does not repeal the chancery rule which authorized the proceeding where the mortgagor could be found. Texas: Sayles' Civil Stat. vol. 1, sec. 1196, subdiv. 11; Kinney v. McLeod, 9 Tex. 78. It seems that in Texas foreclosure may also be brought in the county where the note is payable. Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S. W. Rep. 358.

[20] Joiner v. Perkins, 5 Tex. 300.

[21] See, however, Edminster v. Higgins, 6 Neb. 365, distinguishing this from an equitable mortgage.

[22] Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S. W. Rep. 358.

[23] Iowa, L. & T. Co. v. Day, 63 Iowa, 459; Equitable Life Ins. Co. v. Gleason, 56 Iowa, 47. *Cf.* Breckenridge v. Brown, 9 Iowa, 396. A statute authorizing the action to be brought where the note is payable governs though when the mortgage was executed the venue was local only; since the change does not substantially affect the rights of parties. Equitable Life Ins. Co. v. Gleason, 56 Iowa, 47.

[24] Higgins v. Frederick, 32 Tex. 283.

[25] Ashurst v. Gibson, 57 Ala. 584.

[26] Iowa L. & T. Co. v. Day, 63 Iowa, 459.

[27] Shield v. Yellman, 100 Ky. 655, the court saying: "It is manifest that if an action was pending to settle the estate of a deceased person, and mortgage liens were set up, the court, where the personal representative was qualified, alone having jurisdiction of such action, must also have jurisdiction to decree a sale of the mortgaged property, although it may be situated in another county. Hence the necessity for an exception to the general rule. In this case there was no personal representative and no suit to settle the estate. Moreover, it was a suit to sell the husband's interest as well as that of his wife's, and for his debt, and we do not see how in a suit in Fayette county his interest could have been sold, the action as to him being clearly local."

[28] Colorado: Fletcher v. Stowell, 17 Colo. 94, construing Colorado Code, secs. 25, 29. Missouri: Chouteau v. Allen, 70 Mo. 290, 354. New Hampshire: Tucker v. Lake (N. H.), 29 Atl. Rep. 406. New York: Code Civil Procedure, sec. 987.

[29] Colorado: Fletcher v. Stowell, 17 Colo. 94. New York: March v. Lowry, 26 Barb. (N. Y.) 197, 16 How. Pr. 41, construing Old New York Code, sec. 126. North Carolina: Falls of Neuse Mfg. Co. v. Brower, 105 N. Car. 440, construing Code, secs. 190 and 195. North Dakota: Code, sec. 5244. So in old Dakota territory. See Territory v. Judge, 5 Dak. 375. South Carolina: Trapier v. Waldo, 16 S. Car. 276, construing Code, sec. 149. Wisconsin: Pereles v. Albert, 12 Wis. 666. The foreclosure suit is now purely local in Wisconsin.

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of course, jurisdictional.[30] Even though the proceeding be brought in another county than that specified in the statute the defect will be waived by the mortgagor's default,[31] or, in case he appear, by pleading to the merits,[32] or even by failing to ask for a transfer of the cause to the proper county,[33] and if such transfer is made the defect is likewise cured.[34] Some of the statutes, while providing for a local venue, employ language that s permissive only.[35]

Transfer of Cause to Another County.—Under a statute providing for a change of venue upon the application of the mortgagor, the fact that other points are involved than those relating to the land itself will not authorize a denial of the request;[36] and even where the venue is fixed and jurisdictional but the land lies in several counties, and it is shown that one of them would afford the most convenient place for the hearing, it is reversible error to refuse a change to such country.[37] It is likewise proper to grant a change of venue where it is shown by an undisputed affidavit that the judge to whom the application is made is a material witness for the applicant.[38] Under the former Iowa statute, which authorized the action to be brought either in the county where the land lay or in that where the note was payable, it was held that a suit in the latter county could not be transferred to the former unless the mortgagee should elect to proceed for a foreclosure only.[39] So the fact that a contract embodies a mortgage will not entitle the defendant in action on such contract, but not seeking foreclosure, to a transfer to the county where the mortgaged land is located.[40] The transfer of a foreclosure suit to another county is not authorized by a statute providing that special terms may be adjourned to the chambers of any justice of the district, and such transfer is erroneous though by a further adjournment the hearing finally takes place in the proper county.[41] While the denial of a change of venue is not always discretionary[42] the granting of an application therefore is, in some jurisdictions at least, not subject to review by an appellate court.[43] But the intention of the trial court to make

[30] Fletcher v. Stowell, 17 Colo. 94.

[31] Colorado: Fletcher v. Stowell, 17 Colo. 94. Dakota: Territory v. Judge, 5 Dak. 275. Iowa: McDonald v. Second Nat. Bank, 106 Iowa, 517.

[32] Chouteau v. Allen, 70 Mo. 290, the court saying: "After a court, which has general jurisdiction over a certain class of causes, proceeds without objection to the hearing and determination of a cause belonging to that class, it is quite too late in this court to raise objections to the irregular exercise of such jurisdiction; such objections, even if originally valid, lose their force when waived by pleading to the merits."

[33] Trapier v. Waldo, 16 S. Car. 276; March v. Lowry, 16 How. Pr. (N. Y.) 71; Pereles v. Albert, 12 Wis. 666; Lane v. Burdick, 17 Wis. 92; O'Neil v. O'Neil, 54 Cal. 187; Gill v. Bradley, 21 Minn. 15; Beardsley v. Dickerson, 4 How. Pr. (N. Y.) 81.

[34] Tucker v. Lake (N. H.), 29 Atl. Rep. 406.

[35] Missouri: 2 Wagner's Stat. sec. 4, p. 1005, construed in Chouteau v. Allen, 70 Mo. 290, 354. Tennessee: Code (1884), sec. 3515. Texas: Sayles' Tex. Civ. Stat. sec. 1181, subdiv. 11.

[36] Falls of Neuse Mfg. Co. v. Brower, 105 N. Car., 440.

[37] Thompson v. Brandt, 98 Cal. 155.

[38] Spencer v. Iowa Mortg. Co. (Kan. App.), 50 Pac. Rep. 1094, the court saying: "The action was begun in Decatur county, and on application of not be sustained. The showing made for the change of venue was much stronger than in the case of Gray v. Crockett, 35 Kan. 66, 10 Pac. Rep. 452, relied on by counsel for plaintiff in error, and the order changing the venue was sustained by the supreme court in that case. That affidavit did disclose the facts that the plaintiff expected to prove by the district judge; and, while it is true that the examination of the judge as a witness did disclose that he was not possessed of knowledge of all of the facts set forth in the application for the change, yet he did testify to some facts material to the plaintiff in the trial of the case."

[39] "It will be observed that the note was payable, and therefore suable, in Linn county, whilst a suit for the foreclosure of the mortgage, might, at least, be brought in Jones. Passing the questions upon the petition, as to whether it is in law or equity, and the two causes of action set forth, with a reference to the case of Kramer v. Rebman, *ante*, 114, we think there was no error in overruling the motion for a change of venue. Both causes of action did not belong to Jones county any more than to Linn, even admitting that the second belonged to Jones. The motion should have been that the plaintiff elect upon which to proceed, and if she elected the bill to foreclose a motion for a change would have been proper. The court could not send both to Jones." Breckinridge v. Brown, 9 Iowa, 396.

[40] Max v. Harris (N. Car.), 34 S. E. Rep. 437.

[41] Gould v. Bennett, 59 N. Y. 324.

[42] Thompson v. Brandt, 98 Cal. 155; Falls of Neuse Mfg. Co. v. Brower, 105 N. Car. 440.

[43] Tucker v. Lake (N. H.), 29 Atl. Rep. 406,

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such an order will not be inferred from mere terms of the order of reference to one who resides in another county.[44]

Venue made Local and Jurisdictional.—The tendency of legislation in the United States has been steadily towards restricting the venue of the foreclosure suit to the county which forms the *situs* of the mortgaged land, and such is now the law in a majority of our jurisdictions,[45] and the rule has been so extended as to include the foreclosure of a vendor's lien[46] and a land contract;[47] indeed, so complete has been the change from its original character in this regard that a New York judge, losing sight apparently of its history, declared of the foreclosure action as early as 1855 that "it is in its nature local."[48] As we have already seen,[49] such was not its nature once, and so far as this is now the case it has become so by statutes,[50] which generally specify the county where the mortgaged property or "a part thereof" is located, as the only proper place for bringing the suit.[51]

The Same Continued.—The result of such enactments has been to render the venue of foreclosure not only local but jurisdictional.[52] The pendency of the suit in any other county than that in which the land lies is forbidden,[53] and the courts of such other county are without jurisdiction to render a decree therein,[54] or even to order a purchaser at the sale in the proper county to show cause why he has failed to comply with his bid.[55] Usually an exception is made where the property is located in different counties but this will be discussed in a subsequent section.[56] The objection that the venue is laid in the wrong county is available by way of a motion to dismiss or demurrer,[57] since it should appear on the face of the bill;[58] when not so appearing, however, it may, under the chancery practice, be raised by a plea in abatement[59] and in the Georgia system of foreclosure by rule *nisi* the objection is not too late when first urged at the trial.[60]

Venue of Suit Involving Mortgages in More Than One County.—It has already been shown[61] that the statutes making the foreclosure suit local frequently require it to be brought in the county where the mortgaged land, "or a part thereof," is located. This alternative clause is intended to govern cases where the property is situated in different counties, and as to such the venue may usually be laid in any of them. The same rule has been applied in the foreclosure of deeds intended as a mortgage and relating to parcels of land in more than one county.[62] A bill showing such diverse location does not on its face disclose want of jurisdiction though it fail to distinguish between the parts of lands in the respective counties,[63] nor is it material that not all of the defendants are residents of the county where the suit is pending.[64] In California not only the hearing but the

[44] Wheeler v. Maitland, 12 How. Prac. (N. Y.) 35.

[45] So also in Ontario. See Rules of Practice, 529; Hunter on Foreclosure (1899), p. 17, changing the doctrine of Seymour v. DeMarsh, 11 Ont. Pr. Rep. 472.

[46] Southern Pac. R. Co. v. Pixley, 103 Cal. 118.

[47] Fraley v. March, 68 N. Car. 160.

[48] Wheeler v. Maitland, 12 How. Pr. (N. Y.) 35, *per* Peabody, J.

[49] See *ante*, paragraph first of this article.

[50] McDonald v. Second Nat. Bank, 106 Iowa, 517, 523.

[51] See Wagener v. Swygert, 30 S. Car. 296, 302; Falls of Neuse Mfg. Co. v. Brower, 105 N. Car. 440; cases cited in note 1 *supra*.

[52] California: Rogers v. Cady, 104 Cal. 288; Fritts v. Camp, 94 Cal. 393; Campbell v. West, 86 Cal. 197. The early case of Vallejo v. Randall, 5 Cal. 461, to the same effect was overruled in Watts v. White, 13 Cal. 321, which latter was decided, however, before the adoption of the constitutional clause requiring the suit to be brought at the *situs* of the land. Iowa: See Chadbourne v. Gilman, 29 Iowa 181. But *Cf. contra*, McDonald v. Second Nat. Bank, 106 Iowa, 517. New York: Gould v. Bennett, 59 N. Y. 124. South Carolina: Kaminisky v. Trantham, 45 S. Car. 8, 22 S. E. Rep. 746. Wisconsin: Beach v. Summer, 20 Wis. 274.

[53] "This language is too clear and precise to admit of any doubt as to the intention of the legislature. That intention indubitable was, to prohibit the bringing of an action to foreclose a mortgage in any county other than the one where the mortgaged property, or some portion of it, was situated." Beach v. Sumner, 20 Wis. 274.

[54] Rogers v. Cady, 104 Cal. 288.

[55] Kaminisky v. Trantham, 45 S. Car. 8, 22 S.E. Rep 746. This conclusion was reached notwithstanding a statute which authorized foreclosure action to be heard and determined in chambers and process to be issued therein.

[56] See next section.

[57] Hartwell v. Lehman, 72 Ala. 344.

[58] "It was necessary to give the court jurisdiction to enter this decree of foreclosure, that the plaintiff should prove that the land was situated in the county of Orange; and, in the absence of an allegation of the fact in his complaint he was not entitled to prove it. Campbell v. West, 86 Cal. 197."

[59] Harwell v. Lehman, 72 Ala. 344.

[60] Hackenhill v. Westbrook, 58 Ga. 285.

[61] See *ante*.

[62] Lomax v. Smyth, 50 Iowa, 223.

[63] Bolling v. Munchus, 65 Ala. 558.

[64] Wagener v. Swygert, 30 S. Car. 296; Hendrix v. Nesbitt, 96 Ky. 652.

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sale and issuance of the sheriff's deed may take place in one of the several counties containing the land,[65] though it clearly appears that another county would afford the witnesses a more convenient place of trial it is error to refuse a transfer of the cause to such county.[66] In Nova Scotia, also, the sheriff of either of two counties containing adjacent mortgaged lands may conduct the sale and execute the deed,[67] but under the Indiana statute, naming the door of the county court house as the place of sale, the lands in the other counties cannot be sold though included in the decree.[68]

The Same Continued.—Mortgage Must be Single, but Lands Need not be Adjacent.—The general rule above discussed applies where there is but one mortgage, though the property subject thereto is located in several counties. The rule is inapplicable, however, where the tract in each county is subject to a separate mortgage.[69] The court may be without jurisdiction to foreclose all such mortgages in a single suit[70] and the attempt to do so constitutes at least a misjoinder and the defendant may have all the matter relating to mortgages outside the county stricken from the pleadings.[71] But if there is only one mortgage the tracts covered by it need not usually be contiguous,[72] though by statute in Nova Scotia the rule appears to be different.[73] Again, the equitable mortgage created by several deeds of tracts in as many counties may be foreclosed in any one of them if there is but a single instrument containing the defeasance clause and relating to all of the deeds.[74]

Mortgages of Railway and Similar Property.—The doctrine that a decree of equitable foreclosure and sale is inoperative beyond the territorial boundaries of the jurisdiction wherein the court sits finds an exception in the case of mortgages on interstate railways and bridges. The exception is based on public policy and considerations derived from the argument *ab inconveniente*,[75] and while there is some early authority to the contrary[76] it is now the prevailing American rule that a mortgage of a line of railway constructed through two or more states may generally be foreclosed in a court where a jurisdiction is limited to one of them[77] and a sale of the entire line decreed.[78] So a federal circuit court has jurisdiction of a suit to foreclose a mortgage of a bridge connecting with a foreign country[79] or state[80] the state where the court sits. In order to avoid compli-

[65] Goldtree v. McAlister, 86 Cal. 93.

[66] Thompson v. Brandt, 98 Cal. 156.

[67] Revised Stats. of Nova Scotia (5th Ser. 1884) ch. 123, § 12.

[68] Holmes v. Taylor, 48 Ind. 169.

[69] McDonald v. Second Nat. Bank, 106 Iowa, 517; Chadbourne v. Gilman, 29 Iowa, 181.

[70] Chadbourne v. Gilman, 29 Iowa, 181.

[71] McDonald v. Second Nat. Bank, 106 Iowa, 517.

[72] "In the argument it is admitted that a district court under this statute might in one suit decree a sale of land situated partly in two counties, if the premises be in compact form, as a single 40 acre tract, or any number of legal subdivisions adjoining each other, but not if the lands in different counties are separate tracts. By this rule of construction a mortgage upon a strip of land like the right of way of the Northern Pacific Railroad, for instance, extending across the entire territory, and embracing land in twelve counties, might be subject to sale under a decree in a single suit brought in either of the counties; and the court authorized to render such a decree would be without jurisdiction to order a sale under a mortgage of a single acre situated in an adjoining county, unless the acre touched other land covered by the same mortgage in the county wherein the court was held. The authorities cited do not require me to recognize any such distinction." Hamford, J., in Stevens v. Ferry, 48 Fed. Rep. 7. *Cf* Prospect Bldg. etc. Assn. v. Russell, W. N. Cas. (Pa.) 360."

[73] Rev. Stats. of Nova Scotia (5th Ser. 1884). ch. 123, § 12.

[74] Lomax v. Smyth, 50 Iowa, 223. See this case explained in McDonald v. Second Nat. Bank, 106 Iowa, 517.

[75] Muller v. Don, 94 U. S. 444.

[76] Eaton, etc. R. Co. v. Hunt, 20 Ind. 457.

[77] *Federal Cases:* Muller v. Dow, 94 U. S. 444; Central Trust Co. v. Wabash, etc. R. Co., 29 Fed. Rep. 618. Illinois: Craft v. Indiana, etc. R. Co., 166 Ill. 580. Pennsylvania: McElrath v. Pittsburg, etc. R. Co., 55 Pa. St. 189, the court saying: "The plaintiff excepts to the report of the master, on the ground that he ommitted to incorporate into the form of a decree submitted by him a provision ordering the trustee in the mortgage to sell the estate and title of the Steubenville Railroad Company in that portion of the railroad situate in the state of West Virginia. Without deciding what estate would pass by the trustee's sale under the mortgage, we are of the opinion that we can, by our decree operating upon the trustee himself, authorize and compel him to sell and convey whatever interest of the railroad company will pass under the terms of the mortgage."

[78] Craft v. Indiana, etc. R. Co., 166 Ill. 580.

[79] International Bridge & Tramway Co. v. Holland Trust Co., 81 Fed. Rep. 422. *Cf.* Muller v. Dow, 94 U. S. 444.

[80] "Multitudes of bridges span navigable streams in the United States,—streams that are boundaries of two states. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors?" Strong, J., in Muller v. Dow, 94 U. S. 444.

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cations of title, ancillary proceedings are often instituted in the other jurisdictions to which the line extends,[81] but the bill filed in such a proceeding must be sufficient in itself to constitute a basis for the decree therein, and it is not enough to refer to or incorporate a copy of the bill in the main suit.[82] A decree of foreclosure in one state cannot, however, make valid a mortgage on the entire line which fails to conform to the laws of another state through which the line runs.[83] In Canada the courts of one province are without power to decree the sale, as a whole, of a section of railway partly in another province.[84]

CHARLES SUMNER LOBINGIER.

Omaha, Neb.

[81] Central Trust Co v. Wabash, etc. R. Co., 29 Fed. Rep. 618; Central Trust Co. v. East Tennessee, etc. R. Co., 60 Fed. Rep. 895; Farmers' Loan & Trust Co. v. Chicago, etc. R. Co., 27 Fed. Rep. 148.

[82] Mercantile Trust Co. v. Kanawha, etc. R. Co., 39 Fed. Rep. 337.

[83] Pittsburgh & State Line R. Co.'s Appeal, 1 Pa. Sup. Ct. Digest (1886), 146, 4 Atl. Rep. 385.

[84] Grey v. Manitoba & N. W. R. Co., App. Cas. (1897) Privy Council, 254, 66 L. J. P. C. (N. S.) 66.

NATIONAL BANKS—PENALTY FOR TAKING USURY—ACCRUAL OF CAUSE OF ACTION.

CITIZENS' NATIONAL BANK OF DANVILLE v. FORMAN'S ASSIGNEE.

Court of Appeals of Kentucky, July 7, 1901.

1. The discounting by a national bank of a note at a usurious rate of interest is merely the "charging" or "reserving" of usury, and not the "taking" or "receiving" of usury; and the debtor's right of action under Rev. St. U. S. § 5198, to recover twice the amount of usurious interest paid, does not accrue when the note is discounted.

2. Where a national bank contracts for interest at a usurious rate, it at once forfeits all interest, and unappropriated payments subsequently made by the debtor must be first applied to the principal, so that while any part of the principal remains unpaid there is no payment of usurious interest, and no right to recover the penalty for taking usury accrues, unless payments made by the debtor are specifically applied by him to usurious interest.

DU RELLE J.: This was an action brought by appellee, as assignee for the benefit of the creditors of W. M. Forman, under section 5198 of the Revised Statutes of the United States, to recover of appellant bank double the amount of certain payments claimed to have been made of usurious interest by Forman to the bank upon a loan by the bank to Forman of $3,117.84 on January 29, 1895.

It appears that on January 29, 1895, Forman executed his note for $3.250, payable to the order of J. M. Farris six months after date, and negotiable and payable at appellant bank. Farris was the president of the bank, and in this manner was acting for the bank, using the bank's money. He indorsed the note to the bank, and $3,117.84 was placed to his credit, for which sum Farris gave Forman his check, and that amount was placed to Forman's credit. Considerable argument is devoted by appellant to the question of whether the note was discounted at the bank. It may be conceded that it was. We are unable to see that the question whether the note was discounted cuts any particular figure in determining the questions involved.

The Revised Statutes of the United States provide:

"Sec. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state or territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt is to run. * * *

"Sec. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid the person by whom it has been paid or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association, taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. * * *"

The first question is whether the discounting of the note, and the deduction from its face of 8 per cent. for six months, was a payment by Forman on January 29, 1895, of that amount of interest to the bank. On behalf of the bank it is earnestly insisted that it was a payment. As matter of course, there was no physical payment of money by Forman to the bank. What he did was to execute and deliver his note for $3,250 to the order of Farris, and to receive or have placed to his credit the sum of $3,117.84. If this constitutes an actual payment by him of interest, as such, at 8 per cent., in advance, he was entitled to bring suit the next day for twice the amount of interest thus paid, and consequently his right of action was barred when he brought the suit on September 3, 1897. On the other hand, if, as contended

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by appellee, the transaction was a loan of $3,117.-84, for which a note was then executed for $3.250, it follows that interest at 8 per cent. was carried in the note at least until September 4, 1895, when, according to the bank's calculation, the amount of the note was $3.273.S5, $23.85 of which was interest on the $3.250 at 8 per cent. from August 1st to September 4th. Under the statute, we are unable to conclude that the original transaction was a payment of interest to the bank, or a payment at all. Upon the bank books it is treated as a loan of $3,250, or a discount of a $3.250 note, upon which the books show a profit placed to the credit of the discount account of $132.16. The statute makes no distinction between a reservation of interest by way of discount and the accomplishment of the same thing by any other mode. The bank could not lawfully reserve a greater rate by way of discount deducted in advance than it could as interest at the end of the loan period. And when we consider the distinction recognized by the statute between reserving and charging interest, on the one side, and actually paying interest, on the other, it becomes plain that there was in the initial transaction no actual payment of interest to the bank; for there was then no payment to the bank of anything. Interest was reserved and charged on the loan, or "discount," in the language of the statute. but was not "taken or received." Nor does this construction conflict with that part of the statute which authorizes interest to "be taken in advance, reckoning the days for which the note, bill or other evidence of debt is to run." That language would apply to a case where, upon a renewal of a note for the face of an existing debt, the debtor paid in cash or by check, in advance, the amount of the discount upon the renewal. What was done in the original transaction was this: Forman gave the bank his note for $3,250, and that was all he gave the bank. He received from the bank $3,117.84, and he kept it all. Harvey v. Insurance Co., 60 Vt. 209, 14 Atl. Rep. 7. Moreover, to hold that discounting a note for $3,250, and giving credit to the maker for $3,117.-84, was an actual payment to the bank of $132.16, would give the maker or his assignee the right immediately to bring an action for twice the amount of the usurious interest, when in fact nothing had been paid to the bank at all. And until the interest at the usurious rate was actually paid, as such, the bank had the right to elect to remit it, and it could not then be said that usurious interest was paid on it. Brown v. Bank, 169 U. S. 420, 18 Sup. Ct. Rep. 390, 42 L. Ed. 801; McBroom v. Investment Co.. 153 U. S. 328, 14 Sup. Rep. Ct. 852, 38 L. Ed. 729; Stevens v. Lincoln, 7 Metc. (Mass.) 528; Saunders v. Lambert, 7 Gray, 486; Stedman Bland, 26 N. Car. 299. The law will not construe that to be a payment of illegal interest which is not in fact such payment, in order to subject the lender to the penalty denounced for the illegal receiving of interest, when he is guilty of an illegal bargain only, and has subjected himself only to the forfeiture imposed by law for that violation.

There was no payment of interest on January 29, 1895. On September 4, 1895, the bank claimed there was due it $3,273.85; being the face of the note, with interest thereon from maturity at 8 per cent. Forman on that day paid the bank $800. We may assume it was intended as a payment on the note. The bank credited it to his account. He executed a new note for $2.500, which was discounted, and the proceeds, $2.431.-66, placed to the credit of his account; and the amount of the original note, according to the bank's calculation, was charged to his account. Was this a payment of interest upon Forman's debt? Clearly, it was not specifically so appropriated by him. It seems equally clear that no part of it was appropriated by the bank, specifically, to the payment of interest at the usurious rate. For appellee it is claimed that it was appropriated, or must by the law be appropriated first to the extinguishment of the interest on the note, at the 8 per cent. rate, and was then a payment of interest at an illegal rate, from which a right of action then accrued for twice the amount of the interest thus paid, which was not barred by the two-years limitation provided in section 5198, Rev. St. U. S., when this suit was brought one day less than two years thereafter. For the bank it is insisted that if the interest was not paid in advance, as claimed by it, it has never been paid, and that as the petition does not allege that the final renewal note has ever been paid in full, but, in so far as it shows anything, shows there was still a large amount unpaid, at the time this suit was brought, the whole interest must be considered as still carried in the note,—so far, at least, as the $800 payment is concerned. This statute forbids the taking, receiving, or charging a rate of interest greater than that allowed by section 5197. When the statute is knowingly violated, the violation is deemed a forfeiture of the entire interest which the obligation carries with it, or which has been agreed to be paid thereon. In case a greater rate has been actually paid, the person by whom it has been paid may recover a penalty of double the amount of interest so paid. The construction which the language of the section naturally bears, and which has been given it by the supreme court and numerous other courts, is that it provides for two contingencies: First, when the usurious rate is reserved or charged, the whole agreement to pay any interest is void; second, if the usurious rate is actually paid, double the amount so paid may be recovered within two years by the debtor. Said Mr. Justice Harlan in the case of Brown v. Bank, *supra:* "The last section [5198] clearly makes a difference between interest which a note, bill, or other evidence of debt held by a national bank 'carries with it or which has been agreed to be paid thereon,' and interest which has been 'paid.' Interest included in a renewal note or evidenced by a separate note

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does not thereby cease to be interest, within the meaning of section 5198, and become principal. If a bank which violates that section sues upon the note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation, and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit." And again: "The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the laws allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of court, lose the entire interest which the note carries or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill, or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid. * * * Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. But that, as we have said, was not payment, within the meaning of the statute."

There being no appropriation of any part of this payment by the debtor to the payment of interest, as such, the law will not presume an application of it to an illegal and void obligation; nor will it permit the creditor to make such an application. So the principle of law which applies such unappropriated payments to first discharge the interest due, and then reduce the principal, cannot operate in this case; for all interest upon the note was forfeited, *eo instanti*, by the agreement to pay interest at the illegal rate, and payments will not be applied by operation of law to the discharge of unlawful obligations in preference to debts justly due. The great weight of authority, including the rulings of the supreme court, is to this effect, and this is in full accord with the rulings in this state upon similar transactions where other than national banks are concerned. Unapplied payments are applied first to the extinguishment of interest, and then to reduce the principal. If a part of the interest is usurious, but, although it was contracted for at an illegal rate, legal interest is still recoverable, the payment is applied first to the extinguishment of so much of the interest as is legal, and then to the principal; the usury being retained in the debt to the last, no matter how many renewals are made. Kendall v. Crouch, 88 Ky. 202, 11 S. W. Rep. 587; Smith v. Robinson, 10 Allen, 132; Hawkins v. Welch, 8 Mo. 492; Hall v. Bank, 30 Neb. 102, 46 N. W. Rep. 150; Jackson v. Garner, 79 Ga. 415, 7 S. E. Rep. 213. So where, as in this case, the nature of the contract is such that the collection of all interest is prohibited, because contracted for at an illegal rate, a payment without direction by the payor as to its application must be applied first to the payment of that part of the debt which is legal, and to the illegal part only in the event of there being nothing else to which it can be applied. In the supreme court decisions it seems to be recognized that usurious interest may be paid, as such, without the discharge of the entire obligation, including principal and interest, and that, if so paid, a cause of action will then arise for the penalty imposed for the actual taking of interest at the illegal rate. For example, in the Marion National Bank Case, *supra*, it is said: "If at any time the obligee actually pays usurious interest, as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter."

Upon the proposition that, in the absence of a specific application by the debtor, the law will not apply, and the creditor has no right to apply, payments to an unlawful purpose to the discharge of usurious interest, which was forfeited by the statute the instant it was agreed on, the authorities are numerous. In McBroom v. Investment Co., 153 U. S. 328, 14 Sup. Ct. Rep. 862, 38 L. Ed. 321, the question arose under the statute of New Mexico, by which the collection of interest at a higher rate than 12 per cent. was made a misdemeanor, and a right of action given to the debtor to collect double the amount so paid within three years after the cause of action accrued. Interest notes were given upon a loan of $65.000, and a commission of 10 per cent. upon the entire loan was paid to the creditor at the time of the transaction. After the first interest note was paid, the debtor brought suit to recover double the amount of the commission. In this case it will be observed that the statute does not make the contract for the entire interest void, but that the contract for the excessive interest is rendered void by the contract for a higher rate being made a misdemeanor. Said the supreme court: "The contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. We are of opinion that this question must be answered in the negative. While, under the statute, the mere charging of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest cannot be said to have been collected or received, in excess of what may lawfully be collected and received, until the lender has in fact, after giving credit for all payments, collected or received more than

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the sum loaned, with legal interest." In Duncan v. Bank, Fed. Cas. No. 4135, in the district court of the United States for the western district of Pennsylvania, it was said: "From the origin of the loan,—from the retaining of the first discount through all the renewals up to the time of final payment of the principal or up to the time of entering judgment, — there is a *locus penitentiæ* for the party taking excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. * * * Up to that time he may take this election. When payment is actually made or judgment entered, the election is made; and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete." Thomp. Nat. Bank Cas. 360, 362. In Stevens v. Lincoln, 7 Metc. (Mass.) 528, the court said, "* * * that while the usurious interest is unpaid there remains the *locus penitentiæ;* that the party may relinquish it, and recover for the balance of his debt, the contract not being rendered void by the statute. And, in the absence of proof as to any appropriation of any partial payment, the law will apply a payment to the valid demand rather than to the illegal one; and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury; so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation on his part that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the avails of his illegal contract, and, when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due." See, also, Saunders v. Lambert, 7 Gray, 486. So, in Harvey v. Insurance Co., 60 Vt. 211, 14 Atl. Rep. 7, it was said: "All the payments made by her, as well as those made by the plaintiff, up to the final payment, were, in law, to be applied towards the liquidation of the legal portion of the note." And in Wright v. Laing, 3 Barn. & C. 169, an action to recover penalties for usury, the court said: "If the law ought now to make such an appropriation as the pleader has supposed in this court, the count will be sustained by the proof, otherwise not. We think the law ought now to make such an appropriation. * * * And such an appropriation works no prejudice to the party. It leaves him only where by his own conduct he placed himself. And in the case I have put, of the payment of one bill and non-payment of the other, if an action for the penalties of the statute should be brought, the same principle of law would protect the defendant, by applying the payment of the first bill to the legal demand, and not permitting the then plaintiff to apply it to the illegal demand,—that is, to the loan and interest, although it be precisely of the same amount,—because, peradventure, the lender might repent the illegal bargain, and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of usurious interest, without clear evidence that he had not only bargained to receive, but had actually received, such interest. And if the law will make this appropriation of the payment in the two cases that I have put,—in the one instance against the lender, and to prevent him from enforcing an illegal bargain, and in the other instance in favor of the lender, and to protect him from being subject to a penalty for an illegal bargain only,—it seems very plainly to follow that a similar appropriation ought to be made by law in the case before the court. * * * And this, in effect, is only saying that where a person has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits." It has been frequently held that: "Payments may be applied by a creditor to demands not recoverable at law, when no statute prohibits the contract, but simply denies a remedy to enforce them. In such cases the contract is not illegal, and the money, if voluntarily paid, cannot be recovered back. But the right does not extend to contracts which are 'prohibited by law, under heavy penal forfeitures and payments, which may at once be recovered back, because illegal.' So held where a payment had been applied to a grossly-usurious contract, which could have been enforced, and the law gave the debtor a right to recover back three times the amount paid for usurious interest." Marye v. Strouse, 6 Sawy. 204, 5 Fed. Rep. 493, citing Rohan v. Hanson, 11 Cush. 44. In Stout v. Bank, 69 Tex. 384, 8 S. W. Rep. 808, it was held that when partial payment is made to a national bank under a contract to pay usurious interest in the absence of a stipulation as to how the payment shall be appropriated the law will apply it to that part of the contract which is legal. And in Stanley v. Westrop, 16 Tex. 206, it was held that "the law will not make the application, nor authorize the creditor to make it, without the consent of the debtor to the payment of usury." And see Burrows v. Prettyman, 17 Iowa, 436. In Bank v. Slemmons, 34 Ohio St. 142, 32 Am. Rep. 366, it was said: "Where interest at a rate exceeding that allowed by law is retained or stipulated for, the contract is, under the laws of the state, invalid only as to the excess, while under the thirtieth section of the national banking act 'the statute operates on the instrument given for the loan, and, in effect, declares it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principal.' Bank v. Garlinghouse, 22 Ohio St. 492, 502, 10 Am. Rep. 751; Shunk v. Bank, 22 Ohio St. 508, 10 Am. Rep. 762;

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Hade v. McVay, 31 Ohio St. 231." The conclusion we have reached is in full accord with the reasoning of the opinion by Judge Paynter in Bank v. Thompson (Ky.), 40 S. W. Rep. 903. It is true that in that case the interest was on several occasions added in the renewal notes, but the court found as a fact that the interest was subsequently actually paid. It was said by the court that "it appears that the interest thus added in the note was paid at dates subsequent to the time the interest was added in the note. At one time $620 was paid. At another time a note for $316.25 was given for the interest which had been embraced in the note."

A careful examination of the evidence in this case shows that none of the payments were appropriated by the debtor to the discharge of the interest. It follows, therefore, that the trial court erred in adjudging a recovery of double the amount claimed by the bank to be due at the time of such payments. The note was not discharged at the date when this suit was brought, and no payment of interest at the usurious rate had then been made. The remedy of the debtor was by the application of the payments made in reduction of the principal of the final renewal note. For the reasons given, the judgment is reversed, with directions to dismiss the petition.

NOTE.—*Application of Payment Under Usury Laws.*—It is a well settled rule of law that if the debtor fails to make the appropriation the creditor may apply the money in payment of any demand he may choose even one not enforceable at law. Sanborn v. Stark, 31 Fed. Rep. 18; Armstead v. Brooke, 18 Ark. 521; Bancroft v. Dumas, 21 Vt. 456; Livermore v. Rand, 26 N. H. 85; Treadwell v. Moore, 34 Me. 112. One important exception well sustained by authority is laid down in the principal case that the creditor cannot apply a payment to a demand absolutely unlawful, as a claim for usurious interest. Prickett v. Bank, 32 Ark. 346; Phillips v. Moses, 65 Me. 70; McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781; Fowler v. Trust Co., 12 S. Ct. 1, 141 U. S. 384, 408. So even in so me cases, where the debtor makes direct payment of the usurious interest, the application will be diverted to the principal. Thus in the case of Missouri, etc. Insurance Co. v. Kittle, 2 Fed. Rep. 113, it was held that under an agreement whereby a party, in order to secure a loan of money, contracts to pay 12 per cent. per annum interest, the maximum rate allowed by law, and also, as a part of the same transaction and in consideration of such loan, agrees to take from the party loaning the money an insurance policy and pay the premium thereon, the payments made in such case, under the name of premiums, must be regarded as paid on the loan; the insurance contract, made as it was to cover usury, being void. See also Turner v. Turner, 80 Va. 379, where the court says: "There is a well recognized exception to the rule that the creditor may apply where the debtor does not, that the creditor has no right to apply the money paid to him to the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payment." The following are the latest authorities on this point and show the tendency of the decision on this question under a variety of circumstances. Thus interest in excess of the legal rate should be credited on the principal as of the time of payment. Day's Admr. v. Davis (Ky. 1898), 47 S. W. Rep. 769. Since so much of a note as provides for usurious interest is void, the maker is not confined to this statutory remedy for the recovery of double interest paid, but is entitled to have it applied in extinguishment of the principal debt. People's Building Loan & Savings Assn. v. Bessonette (Tex. 1898), 48 S. W. Rep. 52. Where a mortgage, to secure a loan made by a broker as the agent of the lender, was allowed to be used to secure usurious compensation to the broker, who subsequently became the owner of the mortgage, the payments illegally received must be applied on the principal of the mortgage debt. Hughson v. Loan Co. (N. J. 1898), 41 Atl. Rep. 492. In Atlanta Savings Bank v. Spencer (Ga. 1899), 33 S. E. Rep. 878, payments made on a usurious debt, when not otherwise directed by the debtor, will be first applied to the payment of the legal interest due at the date of the payment, and any balance remaining after such interest is discharged will go in reduction of the principal. In a suit on a note given to obtain a credit actually indorsed on a note which included usurious interest, the credit was deemed to be on the principal rather than in extinguishment of the usurious interest, so as not to render the note sued on invalid. Tomblin v. Higgins, 72 N. W. Rep. 620, reversing same case (on rehearing) 53 Neb. 92. Where a note drawing lawful interest is extended in consideration of payments of usurious interest, the portion of such payments in excess of the interest, due at the stipulated rate should be credited on the principal, and the amount remaining due draw interest at such rate. Quinlan's Estate v. Smye (Tex. 1899), 50 S. W. Rep. 1068. The law applies partial payments upon a promissory note infected with usury first to the extinguishment of the lawful interest, and then to the reduction of the principal; and a plea setting up such payment is good, though filed more than twelve months after the making of the same. Haskin v. Bank, 100 Ga. 216, 27 S. E. Rep. 985. In Faulkner v. Bank (Ky. 1897), 43 S. W. Rep. 249, the law as to application of payments was construed in reference to statutes of the United States. In that case it was held that under Rev. St. U. S. § 5198, providing for the forfeiture of the interest where usury is taken by a national bank, and giving to the person by whom it is paid the right to recover twice the amount of interest paid, a surety, when sued on the last of several renewals of a note, is not entitled to credit by the usurious interest paid by the principal at the time of the several renewals, but only by the amount withheld by the bank when the original note was executed, where the right of the principal to recover the penalty is barred by a judgment dismissing, as settled, an action brought by him to recover the penalty. See also as to application of payments in cases of usury: Arnold v. Macdonald, 22 Tex. Civ. App. 487 55 S. W. Rep. 529; Nunn v. Bird (Oreg. 1900), 59 Pac. Rep. 808; Flannery v. Bank (Ky 1899), 52 S. W. Rep. 847; Fretz v. Murray, 76 N. W. Rep. 495.

National Banks—Usurious Transactions.—The "usurious transaction" from which limitations run against an action to recover twice the amount of usurious interest paid to a national bank (Rev. St. U. S. § 5198) occurs only when an amount greater than the principal and legal interest has been paid, or judgment recovered for such an amount, as the creditor can until that time purge the usury by crediting the excessive interest on the principal. First National Bank v. Denson (Ala. 1897), 22 South.

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Rep. 518. In the case of Marion National Bank v. Thompson (Ky. 1897), it was held that under Rev. St. U. S. § 5198, the penalty for reserving usurious interest by the contract is the forfeiture of the entire interest, while the penalty where the interest has been actually paid is the liability in a separate action for twice the amount thus paid. It was also held in this case that the penalty prescribed for actually receiving usurious interest can be recovered only in a separate action brought for that purpose, and cannot be set off against the principal. Jurisdiction of actions under U. S. Stat. § 5198 against national banks for taking greater interest than allowed by the laws of the state in which the bank is located, is vested in state as well as federal courts. Endres v. Bank (Minn. 1896), 68 N. W. Rep. 1092. In the case of Colgin v. Bank (Tex. 1897), 40 S. W. Rep. 634. it was held that Rev. St. U. S. § 5198, providing that the taking by a national bank of a greater rate of interest than that allowed by law shall work a forfeiture of all the interest, and one paying such greater rate may recover back "twice the amount of the interest thus paid," authorizes a recovery of twice the amount actually paid and not twice the difference between the legal rate and that actually paid. See also as to measure of damages in such cases, Boerner v. Bank (Tex. 1897), 39 S. W. Rep. 285.

BOOK REVIEWS.

AMERICAN STATE REPORTS.

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BOOKS RECEIVED.

The American Digest Annotated, Continuing without Omission or Duplication the Century Edition of the American Digest, 1658 to 1896. 1901A. A Digest of all Current Decisions of all the American Courts, as Reported in the National Reporter System, the Official Reports, and Elsewhere, Together with Leading English and Canadian Cases, from October, 1, 1900, to March 31, 1901. Prepared and Edited by the Editorial Staff of the American Digest System. St. Paul, Minn. West Publishing Co., 1901. Review will follow.

HUMORS OF THE LAW.

An attorney, on the marriage of his son, gave him £500, and handed him over a chancery suit, with some common-law actions. About two years afterwards the son asked his father for more business. "Why, I gave you that capital chancery suit," replied the father, "and then you have got a great many new clients; what more can you want?" "Yes, sir," replied the son, "but I have wound up the chancery suit, and given my client great satisfaction, and he is in possession of the estate." "What, you improvident fool," rejoined the father indignantly, "that suit was in my family for twenty five years, and would have continued so as much longer if I had kept it. I shall not encourage such a fellow."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

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10. ATTACHMENT—Attachment Bond.—On application for increase of bond in attachment, the question to be determined is whether the action must be tried in order to obtain dissolution of attachment.—Ives v. Ellis, N. Y., 71 N. Y. Supp. 971.

11. ATTACHMENT — Attorney's Fees. — Under the Florida statutes and decisions, reasonable attorney's fees incurred by a defendant in obtaining the dissolution of an attachment are recoverable as an element of damages in an action on the attachment bond.—L. Buckl & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 888.

12. ATTORNEY AND CLIENT—Fees.—Attorney held not entitled to recover more than the amount fixed by a contract for fees.—Reynolds v. Sorosis Fruit Co., Cal., 66 Pac. Rep. 21.

13. BANKRUPTCY—Adjustment of Liens.—A court of bankruptcy will not undertake to determine or adjust liens upon property of the bankrupt, unless it appears that the trustee has at least a probable interest in it for the creditors.—*In re* Gibbs, U. S. D. C., D. (Vt.), 109 Fed. Rep. 627.

14. BANKRUPTCY—Alimony.—Discharge of bankrupt held not to affect his liability to pay alimony.—Young v. Young, N. Y., 71 N. Y. Supp. 944.

15 BANKRUPTCY—Breach of Promise Judgment.—Judgment for breach of marriage promise held not canceled by a discharge in bankruptcy.—Disler v. McCauley, N. Y., 71, N. Y. Supp. 949.

16. BANKRUPTCY—Breach of Promise Judgment.—A claim for breach of promise of marriage, reduced to judgment before a bankrupt's discharge, may be proved against his estate in bankruptcy.—*In re* Fife, U. S. D. C., W. D (Pa.), 109 Fed. Rep. 880.

17. BANKRUPTCY—Compensation of Trustee.—A court of bankruptcy is without authority to allow compensation to a trustee in excess of that fixed by Bankr. Act 1898, § 48a.—*In re* Epstein, U. S. D. C., W. D. (Ark.), 109 Fed. Rep. 878.

18. BANKRUPTCY—Conditional Sales to Bankrupt—Title in Trustee.—Conditional sales of merchandise by which the seller retained title, the trustee became subrogated to the rights of the creditors as to such property, and took title thereto free from the claim of the seller under his contract.—*In re* Howland, U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 869.

19. BANKRUPTCY—Corporations — Voluntary Bankruptcy. — A coal mining corporation cannot be adjudged an involuntary bankrupt.—*In re* Keystone Coal Co., U. S. D. C., W. D. (Pa.), 109 Fed. Rep. 872.

20. BANKRUPTCY—Discharge—False Bookkeeping.—The fraud of one partner in so keeping firm books as to conceal withdrawals of money by himself from his co partner, cannot be imputed to the innocent partner to defeat his right to a discharge.—*In re* Schultz, U. S. D. C., S. D. (N. Y.), 109 Fed. Rep. 264.

21. BANKRUPTCY—Discharge—False Oath.—A voluntary bankrupt held not entitled to a discharge, where he made a false oath to his schedule.—*In re* Gammon, U. S. D. C., N. D. (Iowa), 109 Fed. Rep. 812.

22. BANKRUPTCY—Discharge—Fraud in Schedule.—The failure of a bankrupt to include in his schedule property held by another on a secret trust for his benefit will defeat his right to a discharge.—*In re* Wilcox, U. S. C. C. of App., Second Circuit, 109 Fed. Rep. 628.

23. BANKRUPTCY—Fictitious Name of Bankrupt—Exemptions.—The fact that a bankrupt conducted business under fictitious name, does not affect his right to exemptions under the state laws.—*In re* Carpenter, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 886.

24. BANKRUPTCY—Garnishment Within Four Months.—Under Bankr. Act 1898, § 67f, a debtor of the bankrupt, garnished within four months in a state court, may be permitted to pay the money into the district court and obtain such order for his protection as may be necessary.—*In re* McCartney, U. S. D. C., E. D. (Wis.), 109 Fed. Rep. 621.

25. BANKRUPTCY—Inaccurate Bookkeeping.—That bankrupt's books were not kept with reference to showing his financial condition held no bar to his discharge.—*In re* Lafleche, U. S. D. C., D. (Vt.), 109 Fed. Rep. 807.

26. BANKRUPTCY—Interlocutory Orders.—An interlocutory order entered by a court of bankruptcy, reversing a ruling of the referee, made during the examination of the bankrupt, refusing to require him to produce his books, is not appealable.—Goodman v. Brenner, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 481.

27. BANKRUPTCY—Judgment for Criminal Conversation.—A judgment for criminal conversation held not vacated by discharge in bankruptcy.—Colwell v. Tinker, N. Y., 71 N. Y. Supp. 952.

28. BANKRUPTCY—Margins as Probable Claim.—One who put up margins to a broker on purchases of marketable commodities for future delivery cannot prove his claim therefor against the estate of the broker in bankruptcy, where there is no evidence to show the result of the transactions or that any returns were received by the bankrupt therefrom.—*In re* Knott, U. S. D. C., D. (Vt.), 109 Fed. Rep. 626.

29. BANKRUPTCY—Reference—Mortgage to Firm.—Mortgage given by a firm held not affected by bankruptcy proceedings against one partner alone.—*In re* Sanderlin, U. S. D. C., E. D. (N. Car.), 109 Fed. Rep. 857.

30. BANKRUPTCY—Place of Business.—The principal place of business of a corporation engaged principally in manufacturing, to determine the district in which it may be adjudged bankrupt, is the place where its manufacturing plant is located.—*In re* Elmira Steel Co., U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 456.

31. BANKRUPTCY — Preference — Return.—Where a creditor of a bankrupt has received a payment from the estate after the date when all the parties owing the same were insolvent, he must repay the amount if he wishes to further share in the proceeds of the bankrupt estate.—*In re* Keller, U. S. D. C., N. D. (Iowa) 109 Fed. Rep. 806.

32. BANKRUPTCY—Preferences—Securities Taken as Collateral.—Mortgages taken by bank from insolvent merchant to secure money then loaned held not avoided by the bankruptcy of the borrower within four months thereafter.—*In re* Davidson, U. S. D. C., S. D. (Iowa), 109 Fed. Rep 882.

33. BANKRUPTCY—Priority of Jurisdiction.—As between courts in different districts, in each of which a petition in involuntary bankruptcy has been filed against a corporation, and either of which would have jurisdiction, priority of jurisdiction is determined by the date of the filing of the petitions, and not by the date of adjudication.—*In re* Elmira Steel Co., U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 456.

34. BANKRUPTCY—Sufficient Residence.—A bankrupt, who was never in North Carolina, except to board there a short time, is not a resident of that state or entitled to the exemption provided by its constitution.—*In re* Dinglehoef, U. S. D. C., E. D. (N. Car.), 109 Fed. Rep. 865.

35 BANKS AND BANKING—National Banks.—A national bank may make a binding oral agreement to pay notes it procures to be discounted.—Hanover Nat. Bank v. First Nat. Bank, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 421.

36. BENEFIT SOCIETIES—Insurance Laws.—The beneficiary fund of the Grand Lodge Ancient Order of

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United Workmen is not controlled by the insurance laws of the state.—Marshall v. Grand Lodge A. O. U. W. of California, Cal., 66 Pac. Rep. 25.

37. BENEFIT SOCIETIES—Membership—Eligibility.—Director in a brewing company held not ineligible to membership in a fraternal association.—People v. Supreme Tent of the Maccabees of the World, N. Y., 71 N. Y. Supp. 960.

38. BENEFIT SOCIETIES—Suspension.—The non-payment of assessments in a beneficial society will operate to suspend a member from participation in the beneficiary fund where the laws of the order so provide.—Marshall v. Grand Lodge A. O. U. W. of California, Cal., 66 Pac. Rep. 25.

39. BILLS AND NOTES—Bona Fide Purchaser.—*Bona fide* purchaser of negotiable paper held not bound by facts which might put a very cautious man on inquiry.—Ketchum v. Govin, N. Y., 71 N. Y. Supp. 991.

40. BROKERS—Commission.—Real-estate agent finding responsible purchaser accepted by principal, held entitled to his commission.—Miller v. Barth, N. Y., 71 N. Y. Supp. 989.

41. CARRIERS—Prorating Supply of Cars.—It is the duty of a railroad company, when supply of coal cars is short, to prorate the supply on hand, without unjust discrimination.- United States v. Norfolk & W. Ry. Co., U. S. C. C., D. (W. Va.), 109 Fed. Rep. 881.

42. CHATTEL MORTGAGES — Recording.—Under the Ohio statute the withholding of a chattel mortgage from record does not estop the mortgagee from enforcing the same after it has been filed.—*In re* Schmitt, U. S. D. C., N. D. (Ohio), 109 Fed. Rep. 267.

43. COLLISION—Negligent Speed.—Evidence held insufficient to sustain libel that the sinking of a canal boat at a dock by the force of the swell from a passing steamer was due to the negligent speed of the latter.—The New York, U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 909.

44. COLLISION—Rate of Demurrage.—In a suit for collision, where the injured vessel was delayed for repairs, the provision of her charter fixing the rate of demurrage is competent evidence of her actual damages by reason of such delay, and although it may not be conclusive, makes out a *prima facie* case in the absence of other proof.—The Columbia, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 660.

45. COLLISION—Tug and Tow—Warning of Danger.—A ship in tow cannot hold the tug responsible for her own failure to follow the tug's course, nor because it failed to warn her when she sheered, where the danger was as apparent to one as to the other.—The Columbia, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 660.

46. CONSTITUTIONAL LAW—Local Statutes.—The act of the legislature of March 22, 1901, entitled "An act to establish an excise department in cities of the first class," is not unconstitutional as a private, local or special law.—McArdle v. City of Jersey City, N. J., 49 Atl. Rep. 1018.

47. CONTEMPT—Alimony—Refusal to Pay.—It is no defense, on a motion for contempt in refusing to pay alimony, that respondent has no money.—Young v. Young, N. Y., 71 N. Y. Supp. 944.

48. CONTRACTS—Construction.—The situation of the parties to a contract when it is made, and its subject-matter and purpose, are material to determine the intention of the parties and the meaning of the terms they used, and when these are ascertained they must prevail over the dry words of the stipulations.—Fox v. Tyler, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 258.

49. CONTRACTS—Illegal Consideration.—A contract whose consideration is not illegal may be enforced, though it may incidentally aid one in violating the law.—Hanover Nat. Bank v. First Nat. Bank, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 421.

50. CONTRACTS—Rescission.—A party cannot rescind a contract unless he restores what he had received under it.—Brady v. Edwards, N. Y., 71 N. Y. Supp. 972.

51. CORPORATIONS—Charter—Construction.—Charter of corporation organized to publish a journal connected with the interest of the jewelry trade held authorized to publish a directory of such trade.—Jewelers' Circular Pub. Co. v. Jacobs, U. S. C. C., D (N. J.), 109 Fed. Rep. 599.

52. CORPORATIONS—Director's Contract—Voidable.—In order to avoid a contract which is merely voidable, made by a director with his corporation, some injury must be shown.—Copsey v. Sacramento Bank, Cal., 66 Pac. Rep. 7.

53. CORPORATIONS—Pleading.—In an action against the directors of an incorporated ball club to recover a debt of the corporation, plaintiff need not allege that defendant is not a political corporation.—Acker, Merrall & Condit v. Richards, N. Y., 71 N. Y. Supp. 929.

54. COSTS—Poor Person—Recover in Suit.—A plaintiff who brings an action *in forma pauperis* under the statute and recovers, but without costs, is not entitled to withdraw the money paid in satisfaction of the judgment from the registry of the court until he pays the clerk's fees properly taxed against him.—Davis v. Adams, U. S. D. C., N. D. (Cal.), 109 Fed Rep. 271.

55. COSTS — Two Defendants — Recovery. — Where plaintiff fails to recover against one of two defendants, he cannot recover costs against both.—Benson v. Braun, Cal., 66 Pac. Rep. 1.

56. COSTS—Verdict of Jury—Separate Proceeding.—The return and verdict of the jury in a criminal case is a separate proceeding which the clerk is entitled to record and to charge for as such.—Marsh v. United States, U. S. D. C., N. D. (Fla.), 109 Fed. Rep. 236.

57. COURTS—Decisions—Reasons.—On rendering decision in equity for plaintiff, the court is not compelled to state reasons why defenses in the answer were not sustained, nor write an opinion.—Brady v. Edwards, N. Y., 71 N. Y. Supp., 972.

58. DAMAGES—Lowering Water.—Measure of damages for injury to land by lowering water level by pumping system of city held the difference in value with and without such water.—Reifert v. City of New York, N. Y., 71 N. Y. Supp. 965.

59. DEATH -Presumption.—Evidence held to create presumption of death after the lapse of seven years.—Morrow v. McMahon, N. Y., 71 N. Y. Supp. 961.

60. DEATH—Right of Action Under Foreign Statute.—A cause of action founded on a statute of one state, conferring a right of action to recover damages for wrongful death, may be enforced in a court of the United States, sitting in another state, when it is not inconsistent with the statutes or public policy of the state in which the action is brought.—Burrell v. Fleming, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 489.

61. DEEDS—School Purposes—Abandonment.—Where land is conveyed for school purposes only, on the abandonment of the land for such use all rights thereto revert to the grantor.—Papst v. Hamilton, Cal., 66 Pac. Rep. 10.

62. DISCOVERY—Producing Books.—Direction to defendant to produce books in order that plaintiff may prepare his complaint held erroneous.—Clark v. Ennis, N. Y., 71 N. Y. Supp. 948.

63. DISCOVERY — Producing Document — Order of Court.—A defendant cannot be held in default for a failure to produce documents until after the court has made an order for such production on due notice, which has been disobeyed.—Owyhee Land & Irrigation Co. v. Tautphaus, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 547.

64. DIVORCE—Vacating Judgment.—Motion to vacate judgment in divorce after death of plaintiff held too late.—Groh v. Groh, N. Y., 71 N. Y. Supp. 985.

65. EASEMENTS - Prescription.—To maintain an easement by prescription to pass over the lot of another

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the user must be by claim of right, of which the owner has notice.—Clarke v. Clarke, Cal., 66 Pac. Rep. 10.

66. ELECTIONS—Officers.—The members of the excise board by the act of the legislature are officers.—McArdle v. City of Jersey City, N. J., 49 Atl. Rep. 1013.

67. EMINENT DOMAIN—Condemnation Ordinance.—The passage of a condemnation ordinance by a city, declaring its election to take certain land for public use under the eminent domain statutes of the state, amounts to a present appropriation of such land, and entitles the owner to institute proceedings to recover compensation therefor.—*In re* Delafield, U. S. C. C., W. D. (Pa.), 109 Fed. Rep. 577.

68. EMINENT DOMAIN — Damages — Assessment.—In condemnation proceedings, assessment of fee damages must be of the date of the award.—Manhattan Ry. Co. v. Comstock, N. Y., 71 N. Y. Supp. 941.

69. EQUITY—Bill of Review.—A federal court of equity cannot entertain a petition in the nature of a bill of review, not filed until after the time has expired for taking an appeal from the decree sought to be reviewed.—Halstead v. Forest Hill Co., U. S. C. C., D. (W. Va.), 109 Fed. Rep. 880.

70. EQUITY—Master's Findings—Presumptions.—Findings of fact by a master are supported by a strong presumption of correctness, and will not be set aside or modified, in the absence of clear evidence of mistake or error.—Columbus, S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

71. EQUITY—Opening Decree.—A motion to open a decree must not only be filed, but entertained or brought to the attention of the court, as shown by its records, during the term at which the decree was entered; otherwise, the court has no power to grant it at a subsequent term.—Graham v. Swayne, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 866.

72. EQUITY—Service of Process.—A bill will not be dismissed for lack of a party, who was made a defendant but has not been served, until complainant has had a reasonable time to obtain service; and he will be allowed longer than six months where such defendant resides in another state.—Blanchard v. Bigelow, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 275.

73. ESTOPPEL—Acquiescence.—Acquiescence of riparian owner to pollution of stream by a sewer held not to estop him from objecting to an increase of such use.—Gale v. City of Syracuse, N. Y., 71 N. Y. Supp. 966.

74. ESTOPPEL—In Pais—Silence.—An estoppel *in pais* does not arise from the conduct of silence of one party to a transaction, where the other party was not misled and suffered no injury therefrom.—Columbus, S. & H. R. Co. Appeals, Sixth Circuit, 109 Fed. Rep. 177.

75. EVIDENCE—Municipal Documents.—Where documents connected with street assessments are introduced in evidence, the burden is on defendant to show invalidity or irregularity.—San Francisco Pav. Co. v. Bates, Cal., 66 Pac. Rep. 2.

76. EVIDENCE—Private Memorandum Book.—Entries in deceased's private memorandum book of moneys paid to plaintiff are not admissible against him.—Thompson v. Ruiz, Cal., 66 Pac. Rep. 24.

77. EVIDENCE—Written Contract—Parol Identification.—Where a contract is to furnish peaches from sundry orchards, parol evidence is admissible to identify the orchards referred to.—Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit-Packing Co., Cal., 66 Pac. Rep. 28.

78. EXECUTION—Executrix.—Executrix of deceased partner may join in application to issue execution on judgment in favor of the firm.—*In re* Armstrong, N. Y., 71 N. Y. Supp. 961.

79. EXECUTORS AND ADMINISTRATORS—Absent Heirs—Appointment of Attorney.—The court cannot appoint an attorney to represent absent heirs in the settlement of an estate, except where such heirs have failed to employ their own attorney.—*In re* Lux's Estate, Cal., 66 Pac. Rep. 80.

80. EXECUTORS AND ADMINISTRATORS—Partial Distribution.—An administrator has no authority to petition for a partial distribution of the estate, and a decree on his petition is void.—Alcorn v. Buschke, Cal., 66 Pac. Rep. 15.

81. EXECUTORS AND ADMINISTRATORS—Services Rendered Deceased.—Where a claim against an estate is for services rendered to deceased, to be paid when she sold certain land, which she had not sold, the claim filed need not describe the land.—Thompson v. Ruiz, Cal., 66 Pac. Rep. 24.

82. FEDERAL COURTS—Circuit Court of Appeals—Decisions.—An orderly administration of the law requires that the circuit court should follow a decision of a circuit court of appeals of another circuit, in the absence of conflicting authority and when the question is presented on precisely the same state of facts.—Hale v. Hilliker, U. S. C. C., N. D. (N. Y.), 109 Fed. Rep. 278.

83. FEDERAL COURTS—Mandate by Court of Appeals. An order entered by a circuit court in compliance with a mandate from the circuit court of appeals cannot be taken to that court for review by a second appeal or writ of error.—White v. Bruce, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 855.

84. FEDERAL COURTS—Nonsuit—Laws of State.—The right of a plaintiff in a federal court to take a nonsuit is governed by the state statutes.—Drummond v. Louisville & N. R. Co., U. S. C. C., S. D. (Ill.), 109 Fed. Rep. 581.

85. FEDERAL JURISDICTION—Diverse Citizenship—Partnership.—A federal court is without jurisdiction of a suit brought by plaintiff as a member of a partnership and as assignee of his partner, unless it is shown by the bill that the citizenship of the assignor is such that the suit could have been brought in that court by the partnership.—Ban v. Columbia Southern Ry. Co., U. S. C. C., D. (Oreg.), 109 Fed. Rep. 499.

86. FEDERAL JURISDICTION—Estates of Deceased Persons.—A federal court is without jurisdiction of a suit, the purpose of which is to control, through a receivership, the management of an estate which is in process of administration in a probate court of the state.—Johnson v. Ford, U. S. C. C., D. (Oreg.), 109 Fed. Rep. 501.

87. FEDERAL JURISDICTION—Suit on Contractor's Bond.—An action on contractor's bond for government work held within the jurisdiction of the circuit court.—Mullin v. United States, U. S. C. C. of App., Second Circuit, 109 Fed. Rep. 817.

88. FISH—Oyster Beds.—Claimant of oyster bed by license held not entitled to enjoin possession of such bed by the legal owner, who took possession after abandonment of same by plaintiff.—Riddell v. Brown, Wash., 65 Pac. Rep. 758.

89. FORGERIES—Evidence.—Evidence held sufficient to show that certain alleged bills and receipts of payments on mortgages were forgeries.—Levy v. Rust, N. J., 49 Atl. Rep. 1017.

90. FRAUD — Incorrect Statements.—Statement of party to contract as to his legal rights in a play, if incorrect, held not actionable fraud.—Brady v. Edwards, N. Y., 71 N. Y. Supp. 972.

91. FRAUDS, STATUTE OF—Option on Real Estate.—Under the Idaho statute of frauds, a written contract giving an option to purchase real estate cannot be legally extended after its expiration by a verbal agreement.—Lawyer v. Post, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 512.

92. FRAUDULENT CONVEYANCES—Reservation of Title. — Reservation of title by seller until paid for is void as against creditors of the purchaser.—*In re* Howland, U. S. D. C., N. D. (N. Y.), 109 Fed. Rep 869.

93. GUARANTY—Firm Purchases—Dissolution.—Person guarantying purchases of firm held bound by such guaranty after dissolution of the firm, where vendors of goods and guarantor had no knowledge of such

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dissolution.—*In re* Cinque, U. S. D. C., E. D. (N. Y.), 109 Fed. Rep. 455.

94. HIGHWAYS—Street Assessment—Front Foot Rule. —Street assessment law is not repugnant to Const. U. S., because expense is to be assessed in proportion to the frontage of the lots.—San Francisco Pav. Co. v. Bates, Cal., 66 Pac. Rep. 2.

95. HOSPITAL—Liability for Negligence.—A patient in a public hospital, chartered as a charitable corporation, although under private management, cannot recover from such corporation for injuries resulting from the negligence of a nurse employed in its hospital. — Powers v. Massachusetts Homeopathic Hospital, U. S. C. C. of App., First Circuit, 109 Fed. Rep. 294.

96. HUSBAND AND WIFE—Lands of Wife.—Under the laws of Vermont, lands of a wife held under a deed containing no limitation as to their use and farmed by her husband, are not the wife's separate property, and their products are assets of the husband's estate in bankruptcy.—*In re* Rooney, U. S. D. C., D. (Vt.), 109 Fed. Rep. 601.

97. INDICTMENT AND INFORMATION—Demurrer.—The truth of specific averments of fact made in criminal information cannot be put in issue and determined on demurrer, unless the evidence necessary to such determination appears from the record.—United States v. Morrison, U. S. D. C., S. D. (Iowa), 109 Fed. Rep. 891.

98. INJUNCTION—Interlocutory Appeal.—On an appeal from an interlocutory order granting a preliminary injunction, the court will not enter upon the merits of the suit, except to determine whether or not there was an abuse of legal discretion.—Murray v. Bender, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 585.

99. INJUNCTION—No Irreparable Injury.—A preliminary injunction will not be granted where its denial will involve no risk of irreparable injury to complainant.—Miller v. Mutual Reserve Fund Life Assn., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 278.

100. INSANE PERSONS—Final Settlement of Guardian. —The administrator of the estate of a deceased incompetent may contest the final account of the guardian of such incompetent.—*In re* Averill's Estate, Cal., 66 Pac. Rep. 14.

101. INSANE PERSONS—Guardian—Loaning Money.— Where a guardian loans the money of his ward on the sole credit of the borrower, he must show that he acted in good faith and with due prudence.—*In re* Averill's Estate, Cal., 66 Pac. Rep. 14.

102. INSURANCE—Acceptance of Risk.—The action of a clerk in the office of an insurance company, in filling up a slip reporting a risk to be indorsed under a marine policy and checking the same for entry as a matter of routine, held not to be an acceptance of the risk by the company.—Delaware Ins. Co. of Philadelphia v. S. S. White Dental M'g. Co., U. S. C. C. of App., Third Circuit, 109 Fed. Rep. 834.

103. INSURANCE—Misrepresentations — Constitutionality of Statutory Regulation.—Statute providing that misrepresentation by an insured shall not invalidate his policy, unless made with actual intent to deceive, or unless the matter misrepresented increases the risk of loss, is not unconstitutional, as special legislation, because it exempts from its operation contracts for mutual insurance.—Fidelity & Casualty Co. of New York v. Freeman, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 847.

104. INTEREST—Coupons.—Interest is not recoverable on coupons attached to railroad bonds payable in New York, and which remain in the hands of the holder of the bonds and attached thereto.—Columbus S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

105. JUDGMENT—Conclusiveness.—A judgment rendered in an action on coupons from municipal bonds, adjudging the bonds void, is conclusive against a subsequent purchaser of such bonds, unless it is shown that he bought before maturity and without notice of the judgment.—Corliss v. Pulaski County, U. S. C. C., N. D. (Cal.), 109 Fed. Rep. 842.

106 JUDGMENT—Dismissal—Adjudication on Merits. —A judgment dismissing an action on the sole ground that the court has no jurisdiction is not an adjudication on the merits, and is no bar to another action for the same cause.—Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 504.

107. LIBEL AND SLANDER—Charging Insanity.—A publication falsely charging that plaintiff was of unsound mind, who in consequence was removed from a position as professor in a scientific school, will support an action for libel.—Totten v. Sun Printing & Publishing Assn., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 289.

108. LIBEL AND SLANDER—Retraction—Damages.—In action for libel against a New Jersey corporation, Laws N. J. 1898, ch. 204, limiting for recovering to actual damages where no demand for retraction has been made, held not harmful.—Foye v. Guardian Printing & Pub. Co., U. S. C. C., E. D. (N. Y.), 109 Fed. Rep. 868.

109. MARRIAGE—Uncle and Niece.—Marriage between uncle and niece, though valid in Russia, where celebrated, held invalid in Pennsylvania.—United States v. Rogers, U. S. D. C., E. D. (Pa.), 109 Fed. Rep. 886.

110. MASTER AND SERVANT—Assumption of Risk.—A minor held to have assumed the risk of injury from the use of a certain kind of tamping bar furnished by his employer, and which he used without objection, where, if such bar was more dangerous than others in use, he was fully qualified to understand and appreciate such fact.—King v. Morgan, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 446.

111. MASTER AND SERVANT—Assumption of Risk.—A servant cannot be required to assume the risk from a danger which arises from the failure of the master to perform the duty imposed on him by law to exercise ordinary care in supplying reasonable safe tools or appliances or a reasonably safe place to work.—Southern Pac. Co. v. Yeargin, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 436.

112. MASTER AND SERVANT—Fellow-Servant—Foreman.—A foreman, engaged in the actual work of directing the operations of a pile driver, is a fellow-servant with the other members of the pile driver gang, for whose negligence, resulting in injury to another workman, the master is not responsible; and it is immaterial that he is also general foreman of the work, with power to hire and discharge the other employees.—McDonald v. Buckley, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 290.

113. MASTER AND SERVANT—Safe Place to Work.—The death of a servant held to have been due to the failure of the master to exercise due care to provide him with a reasonable safe place in which to work.—Beattie v. Edge Moor Bridge Works, U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 283.

114. MECHANICS' LIENS—Priority of Mortgage.—The mechanic's lien statute of Arkansas construed as to priority of a mortgage given for money to be used in the construction of a building over mechanics' liens filed against the property for labor and materials furnished for such building.—*In re* Matthews, U. S. D. C., W. D. (Ark.), 109 Fed. Rep. 603.

115. MINES—Minerals—Discovery of Gold on Public Land.—Where plaintiff found gold while working for defendants in excavating a mill site on public land, defendants have no claims to the gold under Civil Code, § 1985.—Burns v. Clark, Cal., 66 Pac. Rep. 12.

116. MINES AND MINERALS—Patent—Presumptions.— A patent for a mining claim is conclusive that the location upon which it was issued was prior to every other location.—Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & De-

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veloping Co., U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 538.

117. MORTGAGES—Bona Fide Purchaser.—A mortgage securing negotiable notes, although its delivery was procured by fraud, and the acknowledgment filled out and certified by a notary when it was never in fact acknowledged, is enforceable in the hands of a *bona fide* purchaser of the notes for value and before maturity.—O'Rourke v. Wahl, U. S. C. C. of App., Seventh Circuit, 109 Fed. Rep. 276.

118. MORTGAGES — Foreclosure — Renewal Notes.—Where a note for one year provides for renewal from year to year at the option of the holder, it may be declared due, and the security foreclosed, at the beginning of any year after the first.—Sacramento Bank v. Copsey, Cal., 66 Pac. Rep. 8.

119. MORTGAGES—Interest.—In determining amount due on modification of decree in foreclosure after appeal, held error to charge interest on total amount of debt, without crediting proceeds on foreclosure.—Taylor v. Ellenberger, Cal., 656 Pac. Rep. 4.

120. MORTGAGES—Purchase by Trustee.—A sale of property by trustees in a trust deed to a bank, of which such trustees were stockholders and directors, is not a sale to themselves; the bank being essentially an entity acting for itself.—Copsey v. Sacramento Bank, Cal., 66 Pac. Rep. 7.

121. MORTGAGES—Redemption—Tender.—To redeem from mortgage foreclosure, unless mortgagee is a non resident or mortgage is fraudulent, plaintiff must allege a tender of payment, or show that defendant, by default, has prevented plaintiff from performing.—Munro v. Barton, Me., 49 Atl. Rep 1069.

122. MORTGAGES—Unpaid Balance.—When a note is secured by trust deed, on foreclosure, any unpaid balance may be recovered from the maker by action.—Sacramento Bank v. Copsey, Cal., 66 Pac. Rep. 8.

123. MUNICIPAL CORPORATIONS—Sale of Bonds Without Advertising.—A contract by the trustees of the sinking fund of Cincinnati for the sale to a banking company of refunding bonds of the city, without advertising or receiving bids therefor, is void.—Roberts & Co. v. Taft, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 825.

124. MUNICIPAL CORPORATIONS—Unreasonable Ordinance.—An ordinance limiting speed to six miles an hour held void.—United Traction Co. v. City of Watervliet, N. Y., 71 N. Y. Supp. 977.

125. NEGLIGENCE—Explosion of Soda Water.—Vendor of seltzer water siphon held not liable to purchaser injured by its explosion.—Glazer v. Seltz, N. Y., 71 N. Y. Supp. 942.

126. NEW TRIAL—Surprise.—In action against railroad company for injuries received at accident, verdict for plaintiff set aside because of surprise at evidence as to the serious nature of the injuries received.—Dixon v. Brooklyn Heights R. Co., N. Y., 71 N. Y. Supp. 969.

127. NEW TRIAL—Two Findings of Jury Conclusive.—After two findings by juries the same way on a question of fact, the verdict will not be disturbed because the weight of evidence seems to the court to be against such findings.—Clark v. Barney Dumping Co., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 235.

128. PLEADING—Demurrer.—As against a demurrer, a pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendments.—Acker, Merrall & Condit v. Richards, N. Y., 71 N. Y. Supp. 929.

129. PLEADING—Motion and Answer—Issues.—Where motion to set aside summons for insufficient service has been overruled, such issue cannot be again raised by answer.—Foye v. Guardian Printing & Publishing Co., U. S. C. C., E. D. (N. Y.), 109 Fed. Rep. 268.

130. POST OFFICE — Defrauding by Use of Mails.—An indictment for defrauding by use of mails held insufficient under Rev. St. § 5480, as amended by Act March 2, 1889, where it does not show or charge a scheme by which the person name would be defrauded.—Milby v. United States, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 688.

131. PRINCIPAL AND AGENT—Discretion of Agent.—In a power of attorney to sell land for such price as the agent may deem best, a provision that the sale must be subject to the approval of the principal is not repugnant.—Alcorn v. Buschke, Cal., 66 Pac. Rep. 15.

132. PUBLIC LANDS—Connecting Survey.—Where the United States plats and patents land by a lake on the theory that the land is bounded by the lake, it cannot thereafter correct its survey and revoke its grants as against innocent purchasers from its patentees.—Kirwan v. Murphy, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 354.

133. PUBLIC LANDS — Timber Rights.—Under Act March 3, 1875, giving a right to cut timber on adjacent public lands for use in the construction of a railroad over such lands, a railroad company is authorized to cut timber on lands adjacent to any part of its completed main line for use in the subsequent construction of a branch line authorized by its charter.—United States v. Price Trading Co., U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 289.

134. QUIETING TITLE — School Lands.—Where the grantee in a deed conveying land for school purposes only abandon the land, and the grantor enters, he may sue to cancel deed and quiet title.—Papst v. Hamilton, Cal., 66 Pac. Rep. 10.

135. RAILROADS — Bondholders — Reorganization. — Bondholders who joined in a reorganization agreement, under which a new company was organized which purchased the property of the old at a foreclosure sale, and who exchanged their bonds for those of the new company, held not entitled to a rescission of such agreement after the new company became insolvent.—Columbus, S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

136. RAILROADS — Subcontractor's Liens.—Act Feb. 25, 1889 (Laws Oreg. 1889, p. 75), providing for lien upon railroads in favor of subcontractors and laborers, supersedes, and, by implication, repeals, the prior mechanic's lien law of the state as applied to railroads.—Ban v. Columbia Southern Ry. Co., U. S. C. C., D. (Oreg.), 109 Fed. Rep. 499.

137. RECEIVERS—Agreement to Redeem Mileage.—An agreement by a railroad receiver to pay the amount of mileage previously sold by the company over the road of another company which shall be redeemed by such company does not make the claim therefor a debt of the receivership.—Monsarrat v. Mercantile Trust Co. U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 280.

138. RECEIVERS—Certificates—Liens.—Receivers' certificates issued by authority of an order made in a railroad foreclosure suit held not to constitute a lien on the property after sale under the terms of the order and decree of sale.—Columbus, S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

139. RECEIVER — Suing Outside of Jurisdiction.—A Minnesota receiver appointed to collect from the stockholders of an insolvent corporation the amount of their statutory liability for the benefit of all the creditors, may maintain an action at law in a federal court in another state against a stockholder residing therein.—Hale v. Hilliker, U. S. C. C., N. D. (N. Y.) 109 Fed. Rep. 278.

140. REFORMATION OF INSTRUMENT — Parties.— Reformation of deed denied, suit not being between the parties to the deed.—Cole v. Fickett, Me., 49 Atl. Rep. 1066.

141. REPLEVIN—Attorney's Fees and Expenses.—In replevin by corporation, counsel fees and traveling expenses of president are not recoverable as damages.—Hampton & B. R. & Lumber Co. v. Sizer, N. Y. 71 N. Y. Supp. 990.

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142. SALES—Breach of Warranty.—Defects.—An answer, pleading as a partial defense to an action for the price of machinery defects in the workmanship and material in violation of the contract of sale, held sufficient.—Florence Oil & Refining Co. v. Farrar, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 254.

143. SALES—Crop—Failure.—Where a contract for a specified crop cannot be filled because of failure of the crop without fault of the vendor, the vendee cannot recover damages for such failure.—Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co., Cal., 66 Pac. Rep. 28.

144. SALES—Installments.—A contract for the sale of a large quantity of logs, to be delivered in installments each month during a period of eight years, and to be paid for in installments as delivered, construed, and held to be an entire contract for the sale of the full quantity required to be delivered thereunder.—L. Bucki & Son Lumber Co v. Atlantic Lumber Co., U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 411.

145. SALVAGE—Measure.—Award of $200 salvage allowed for hauling ferryboat out of slip at the time of apparent danger from fire held proper.—The John I. Brady, U. S. D. C., E. D. (Pa.), 109 Fed. Rep. 912.

146. SCHOOLS AND SCHOOL DISTRICTS—Orphan Asylum—Salaries.—Board of education of city held authorized under constitution and statutes to pay salaries to teachers in a local orphan asylum.—Sargent v. Board of Education of City of Rochester, N. Y., 71 N. Y. Supp. 954.

147. SPECIFIC PERFORMANCE—Tender of Payment.—A purchaser of real estate, who is required to make payment by a day certain, time being of the essence of the contract, is bound to make or tender such payment within the time to entitle him to a specific performance.—Kentucky Distilleries & Warehouse Co. v. Warwick Co., U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 280.

148. STATUTES—Construction.—In construing a statute, the intent of the legislature is always a proper matter to be considered.—*In re* Matthews, U. S. D. C., W. D. (Ark.), 109 Fed. Rep. 603.

149. TOWAGE—Degree of Skill.—The owner of a tug is not an insurer against marine perils, and is liable only for the want of reasonable diligence and skill in the towing service; nor is an error of judgment on the part of the master equivalent to negligence.—The E. Luckenback, U. S. D. C., S. D. (N. Y.), 109 Fed. Rep. 487.

150. TRADE-MARKS AND TRADE-NAMES — Color and Shape of Label.—While no one can have a trade-mark monopoly in color of paper or shape of label, in color of ink or in one or another detail, a general collocation of such details will be protected against an imitation, the natural result of which is to deceive purchasers, and which must therefore be presumed to have been adopted with that purpose.—Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 317.

151. TRADE-MARKS AND TRADE-NAMES — "Omega" Oil.—Soap manufacturers enjoined from using the words "Omega Oil," belonging as a trade-mark to manufacturers of a liniment.—Omega Oil Co. v. Weschler, N. Y., 71 N. Y. Supp. 988.

152. TRADE-MARKS AND TRADE-NAMES.—Right of Retailer.—A purchaser of an article at wholesale has a right to retail the same under the name by which it is designated by the manufacturer, but not to designate it by a name used by the manufacturer, and which has become known to the public, as denoting a grade superior to that sold.—Russia Cement Co. v. Katzenstien, U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 314.

153. TRADE-MARKS AND TRADE-NAMES—Similarity.—Trade-mark "Grape-Nuts" held not infringed by the name "Grain-Hearts," under which a similar cereal food is sold.—Postum Cereal Co. v. American Health-Food Co., U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 896.

154. TRIAL—Instructions.—Where each side submits a number of instructions, and those given on the whole are fair, the verdict should not be set aside, though some are subject to criticism.—*In re* Keithley's Estate, Cal., 66 Pac. Rep. 5.

155. TRUSTS—Legal and Equitable Titles.—Where a person, through mistake, obtains legal title to property belonging to another, it is impressed with a trust in favor of the equitable owner.—Cole v. Fickett, Me., 49 Atl. Rep. 1066.

156. TRUST—Separable Trusts.—Where land was conveyed to the daughter of the grantor in trust for her use during life, and on her death for the use of her children, the trust to her is valid and separable from the trust to the children.—Nellis v. Rickard, Cal., 66 Pac. Rep. 32.

157. TRUST—Trustee and Cestui Que Trust Identical.—A *cestui que trust* may be appointed the trustee without affecting the validity of the trust.—Nellis v. Rickard, Cal., 66 Pac. Rep. 32.

158. TRUSTS—Voluntary Trust.—Publisher of paper, receiving contributions for support of families of dead firemen in response to his solicitation, held to be a voluntary trustee of the funds.—Hallinan v. Hearst, Cal., 66 Pac. Rep. 17.

159. TRUSTS—Voluntary Trust.—Publisher of paper, receiving certain contributions for support of families of dead firemen, held to have the determination of the question of who composed such families.—Hallinan v. Hearst, Cal., 66 Pac. Rep. 17.

160. UNITED STATES—Claims—Attorney's Fees.—Administrator *de bonis non* of fund derived under French spoliation act should be reimbursed for expenses and attorney's fees incurred in a suit to determine the question of distribution.—Healey v. Cole, Me., 49 Atl. Rep. 1065.

161. UNITED STATES—French Spoliation Claims.—On appropriation of money by congress for payment of French spoliation claims, it had the right to make the gift on its own terms.—Healey v. Cole, Me., 49 Atl. Rep. 1065.

162. VENDOR AND PURCHASER — Worthless Mining Claim.—Where a mining claim is worthless, defendant, who has an option to purchase, is not damaged by plaintiff's inability to convey.—Benson v. Braun, Cal., 66 Pac. Rep. 1.

163. VENUE—Accessibility of Court.—In determining motion for change of place of trial for convenience of witnesses, the accessibility of the court to all the witnesses may be considered.—O'Beirne v. Miller, N. Y., 71 N. Y. Supp. 946.

164. WATER AND WATER COURSES—Melting Snow.—Owner of lot on side of hill held not liable to owner of lot lower down on the hill for melted ice and snow running down on such lower owner's lot.—Garrett v Wood, N. Y., 71 N. Y. Supp. 987.

165. WILLS—Charging Real Estate.—Will construed, and held, that deficiencies in money legacies were a charge on the real estate.—Wellbrook v. Otten, N. Y., 71 N. Y. Supp. 927.

166. WILLS—Evidence as to Sanity.—It is not error to permit an intimate acquaintance of a testator to state his opinion as to testator's sanity.—*In re* Keithley's Estate, Cal., 66 Pac. Rep. 5.

167. WITNESSES—Chinese—Truthfulness.—The fact, alone, that a trial court refuses to accept as true the testimony of Chinese witnesses is not ground for reversal.—Woey Ho v. United States, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 888.

168. WITNESSES — Evidence of Good Character.—A court may refuse to permit a party to introduce evidence of the general good character of his own witnesses, who are Chinese, where there has been no attempt to impeach their character.—Woey Ho v. United States, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 888.

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Central Law Journal.

ST. LOUIS, MO., NOVEMBER 29, 1901

Governor Durbin of Indiana has again raised that most serious and unsettled question of constitutional law,—the extradition of fugitives from justice—in his direct refusal to honor the requisition of Gov. Beckham of Kentucky for the rendition of Ex-Gov. Taylor. Gov. Durbin gives as his reason for refusing to extradite Mr. Taylor that he doubts whether he would secure a fair trial in the State of Kentucky, under whose laws he has been indicted. That this presents a question most vital to the interests of all American commonwealths cannot be denied after careful investigation. If two rival governors, with deep personal or political prejudices, can open the doors of their respective commonwealths as an asylum for those charged with crime in the other jurisdiction, and thus invite the commission of crime by insuring to the criminal immunity from punishment, a condition is presented that calls for prompt and vigorous action.

Interstate extradition is based on section 2 of article 4 of the constitution providing that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on *demand* of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." In 1793 congress passed an act, now §§ 5278 and 5279 of the Rev. Stat. U. S., providing that when a demand for the requisition of a fugitive from justice from any state shall have been made by the governor of said state, accompanied by a copy of the indictment found against the alleged criminal, "it shall be the duty of the executive authority" of the state, to which said criminal has fled, to deliver over the fugitive to the demanding state for trial. This provision of the constitution was construed by the Supreme Court of the United States in the case of Kentucky v. Dennison, 65 U. S. 161, which, also, is the only case directly in point with the controversy over the extradition of Gov. Taylor. In this case a certain free negro was indicted in Kentucky for enticing away a slave from his owner, an indictable offense in that state. The alleged criminal fled to Ohio. The governor of Kentucky, after complying with the act of congress, demanded the rendition of the fugitive. The governor of Ohio refused to grant the requisition on the ground that his state did not recognize the crime for which the alleged fugitive from justice had been indicted. The State of Kentucky *mandamused* the governor of Ohio in the United States Supreme Court. The Supreme Court condemned the action of the governor of Ohio in very severe terms, stating that the constitution gave him no discretion whatever in granting the requisition; that it was purely a ministerial duty on his part to be performed without regard to the character of the crime charged or of the laws of procedure of the demanding state. The constitution bound him to return the fugitive "on demand," and the court intimated that his refusal to grant the requisition was a breach of his oath to support the constitution. The court held, however, that although this was a solemn obligation imposed upon the governor by the constitution, yet if he persisted in his refusal the federal government under the act of congress had no power to coerce him.

It would seem that when this law was passed the belief was that a sense of justice and of mutual interest would insure the faithful execution of its provisions. "For," says Chief Justice Taney, "it is manifest that the government must fail unless the states mutually supported each other and the general government; and nothing would be more likely to disturb its peace and end in discord than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state, to repeat the offense as soon as another opportunity offered."

For a number of years, however, there has been a strong tendency among governors to refuse the rendition of fugitives for certain political crimes or for offenses charged to enforce financial obligations and on various other grounds which they have alleged as "ulterior." In taking this position they have undoubtedly uncovered themselves to the charge of acting in the face of the constitution and of the

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decision of the supreme court, denying them any discretion in such matters; and certain state courts, expressly relying on the fact that the federal government under the present act is powerless to enforce that provision of the constitution, have held that the governor had practically an absolute discretion in the matter which neither state nor federal power could coerce. State v. Toole, 69 Minn. 104; Work v. Coerington, 34 Ohio, St. 64. That this is a dangerous precedent and a breach of the constitution have been pointed out, not only by the supreme court in the case we have just noted, but also in a strong opinion in the case of *In re* Voorhees, 32 N. J. L. 141. In all text books and digests the duty of the governor to extradite a prisoner on demand, relying on the authorities which have granted the executive a discretion in the matter or else have held to the belief that his discretion could not be controlled, has been constantly spoken of as one of "imperfect obligation," whatever that might signify. Chief Justice Beasley, of New Jersey, in the case we have just cited, denies that there is any such weakness in the constitution. He says: "I think it indisputable that the constitution has made the surrender of a fugitive from justice, which by the law of nations depended on the concessions of comity, a rule of law of *perfect* obligation and entirely imperative in character." He recognizes the limitation, however, on the federal government, suggested by the case of Kentucky v. Dennison, but states that this results entirely from the fact that the act of congress which regulates these proceedings directs the demand to be made upon the governor, and, since the governor is not a federal officer, the federal government cannot compel the performance of a function which it has no right to annex to the office. "But," says Chief Justice Beasley, "I cannot entertain any doubt of the power of congress to vest in any national officer the authority to cause the arrest, in any state, of a fugitive from the justice of another state, and to surrender such fugitive on the requisition of the executive of the latter state. The national right to require the surrender, under the terms of the constitution, seems to me to be clear, and all that is necessary to render such right enforceable, in every case, is the necessary organ of the federal government."

We believe the suggestion of Chief Justice Beasley is worthy of earnest consideration as the most effective solution of these unhappy and serious clashes of authority between the governors of sister commonwealths over the extradition of fugitives from justice. While in most cases we may confidently rely on the character of the men elected to such high places it is not to be denied that unscrupulous and hot-headed men, wielding the executive power of a state, have the right in the exercise of this extraordinary power to throw open the doors of a sister commonwealth to a flood of crime and disorder by granting an asylum to criminals or political free-booters within its borders.

NOTES OF IMPORTANT DECISIONS.

WARRANTIES—MEASURE OF DAMAGES FOR BREACH — ACETYLENE GAS. — An interesting case on the subject of the proper measure of damages for breach of warranty recently arose in the case of Tyler v. Moody (Ky.), 63 S. W. Rep. 433. In this case the appellant brought this action to recover for damages for personal injuries caused by an explosion of gas generator for the manufacture of acetylene gas, sold by appellees Hall & Son, and manufactured by appellees Moody & Offutt. Appellent avers in his petition that appellees "guarantied and represented to him at the time of said sale, and as a part of said contract, that the said machine, and the use thereof in generating acetylene gas, was and would be entirely safe, and that no damages or injury would or could result therefrom. The court held that the damages recoverable for such a breach of warranty include damages for personal injury to the buyer from an explosion of the machine, such damages being the natural and probable result of a breach of the warranty, and, therefore, within the contemplation of the parties. The court said: "It is argued that in no state of case can a recovery be had for the injuries to appellant, because they are too remote. A leading case upon the criterion of recovery for breach of warranty is Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. Rep. 696, 30 L. Ed. 810. The supreme court there said: 'The damages recoverable for a breach of warranty or for false representation include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act.' In Suth. Dam. (2d Ed.) p. 1523, § 675, it is said, after a review of many cases: 'A buyer may recover damages for personal injuries which result from selling property with a false warranty. * * * A dealer will be liable for like injuries from the explosion of illuminating oils sold with warranty, express or im-

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plied, which is untrue. And so will any vendor be held answerable for such injuries from vicious animals sold with warranty of gentle and docile nature.' In this case the warranty was against explosion,—the very thing shown to have happened. Upon this showing by appellant, uncontradicted, we think he would be entitled to recover for his personal injury, as this evidently was in contemplation of the parties, or, according to the natural or usual course of things, might result from a breach of the warranty that the machine would not explode. An explosion of a machine of this sort would usually and ordinarily be attended with damage other than to the machine itself, and might injure persons,—being near a dwelling, would probably do so,—and so it must be held that personal injury was contemplated as a probable result of an explosion, and that was what appellant was assured would not happen."

LIABILITY OF WAREHOUSEMAN FOR GOODS HELD IN CUSTODIA LEGIS UNDER WRIT OF REPLEVIN.—A most vexed question of law arising in actions of replevin is, whether chattels, the subject of replevin which are in possession of a bailee, are to be considered as *in custodia legis* so as to charge the latter with conversion if he returns the goods to the bailor during the progress of the suit. This question arose recently in the case of Mohr v. Langan, 63 S. W. Rep. 409, where the Supreme Court of Missouri held that where chattels were deposited with a regularly licensed warehouseman, and subsequently he was called as a witness as to the value of the chattels in a replevin suit for the chattels between the bailor and another, and thereafter, at the instance of the bailor, he delivered the goods to an auctioneer, who sold them during the pendency of the suit, and judgment was rendered against the bailor in the replevin suit, the warehouseman could not escape liability for the conversion on the ground that, being a regularly licensed warehouseman, he could not question the right of his bailor to demand a return of the goods, inasmuch as the circumstances were such as to put him on notice of the fact that his bailor might not have title. It was also held that it was proper to instruct that, if the warehouseman caused the goods to be hauled to the auction house, knowing they were to be sold, he was guilty of conversion, though he did not at that time know of the ownership of the goods by the successful defendant in replevin. There is an irreconcilable conflict of authority on this question. The court reviews the cases as follows:

"Of the cases which hold that the property does not remain *in custodia legis* after it has been delivered to the plaintiff in the replevin suit, and that such plaintiff may sell it and pass a good title to a *bona fide* purchaser, being liable to the defendant in the replevin suit for the value of the property, if he ultimately loses his suit, are fairly illustrated by the cases of Gimble v. Ackley, 12 Iowa, 27, White v. Dolliver, 113 Mass. 400, Davies v. Gambert, 57 Iowa, 239, 10 N. W. Rep. 658, Smith v. McGregor, 10 Ohio St. 461, and Ilsley v. Stubbs, 5 Mass. 280; but in no case is the proposition more clearly stated or more ably maintained than in Coen v. Watkins, 62 Mo. App. 502. One of the reasons given for holding that the property is *in custodia legis* is that, if it can be levied upon by a third party, the plaintiff in replevin is disabled from returning it to the defendant in replevin, if the plaintiff fails in his suit, and hence would have to pay the defendant in replevin the assessed value of the property, and still would not have the property, for it would have been taken away from him by the third party under the second replevin, or by attachment or under execution, and in this way the same property might be utilized to discharge an indefinite number of debts of the same debtor." The court after reviewing the statutory provision on the subject in Missouri, says: "These statutory provisions manifestly treat the property as *in custodia legis* pending the litigation, so far as the parties to the replevin suit are concerned, and exclude the right of the party in possession to sell the property during the pendency of the suit, and further preserve the right of the winning party to follow the property in the hands of any person who purchased it from the party in possession pending the litigation. But, while this is true, it does not follow that the property is *in custodia legis* as to third persons, so that it cannot be levied upon by any other kind of a judicial process. Of course, it cannot be seized under any other kind of judicial process by either party to the replevin suit or their grantees or privies. But the weight of authority, amply supported by logic and reason, is that it may be seized by a third person, under any appropriate judicial process, who claims hostile to both parties to the replevin suit. It is ably and strenuously argued, however, that defendant Langan is a regularly licensed warehouseman, and, as he received the goods from Mrs. Smith, he could not question her right to demand their return, nor set up a paramount title in any one else, and that no demand was made on him for the goods by Mrs. Mohr before this suit was begun, and hence he is not liable in this ac-

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bailor in wrongfully converting the goods. Nanson v. Jacob, 93 Mo. 331, 6 S. W. Rep. 246; Koch v. Branch, 44 Mo. 542; Williams v. Wall, 60 Mo. *loc. cit.* 321; Dusky v. Rudder, 80 Mo. 400. Having reached the conclusion that the property, as to Mrs. Smith and Mrs. Mohr, was *in custodia legis*, and that Mrs. Smith had no right to sell it, it follows that, as Langan knew of the replevin suit, he knew that Mrs. Smith had no power to sell it, and, as he aided her in doing so, he thereby became a party to the conversion, and his general exemption as a warehouseman is no protection to him, for he acted outside of his duties as such warehouseman."

RETROSPECTIVE PRESUMPTIONS.

In the last edition of Lawson on Presumptive Evidence, in the chapter on "The Presumption of Continuance," it is laid down "*A presumption is not retrospective* (Rule 37)." The illustrative cases cited by the author support this proposition. In one, proof that a woman was married in 1860 was held not to be evidence that she was married in 1854.[1] In another, proof that a person held the office of a justice of the peace on June 25, was held not to be evidence that he held the office on June 5.[2] In another, proof that a person was insane in 1864 did not raise the presumption that he was insane in 1860.[3]

The rule as stated by the author in the first edition has been expressly approved in two recent cases. In *Jarvis v. Vanderford*[4] it is said: "It was not shown that Alexander Evans was clerk, or that Richard Evans was deputy clerk, of the court of pleas and quarter sessions in 1808. And although there was evidence tending to show that Alexander Evans was clerk, and Richard Evans was deputy clerk, in 1818, this did not create a presumption that they were such officers in 1808, 10 years before that time. Lawson, Pres. Ev. 190." In *Martin v. Curtis*[5] it is said: "It is now contended by the always used for that purpose, water is so essential to a pasture that it is probable that the 10 acres described in that deed of 1806 included a part of the brook. The words 'has long been used' are indefinite in respect to the time in the past from which it is claimed that this land has been used as a pasture, but it is not claimed that the offer is to be construed as showing such use at the time the deed was executed, in 1806. The existence of a thing permanent in its character, once established, is presumed to continue hereafter until the contrary is shown, but the use of land as a pasture is not of such a character. Again, 'a presumption is not retrospective.' Lawson, Pres. Ev. 190, Rule 37. Hence, no such inferences as those for which the plaintiff contends can legally be drawn from the evidence excluded."

But on page 239[6] the author says: "In maritime law a different rule seems to prevail. Thus a ship soon after leaving port becomes so leaky and disabled as to be unable to proceed. There is no evidence that she encountered any great storm or peril of the seas. The presumption is that she was unseaworthy when she sailed."

The admiralty rule seems to be meeting with favor in actions for personal injuries, and has been adopted in several very recent cases. Thus, in a case decided this year in Illinois, it is held that evidence of the condition of an appliance, both before, as well as after, an accident, is admissible to show its condition at the time of the accident.[7] In *La Plante v. Warren Cotton Mills*,[8] a personal injury case, to quote from the opinion of the court, by Holmes, J.: "A witness was allowed to testify that the ladder on which the plaintiff stood was of home manufacture, made of two pieces of wood with strips nailed across, and one leg longer than another. He did not see the ladder until

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It is said that presumptions do not run backwards. But that depends on the case. Todd v. Rowley, 8 Allen, 51." The court held that there was no error committed. In *McCulloch v. Dobson*,[9] in an action upon a covenant to keep in repair, contained in a lease of a silk mill and machinery, the court say: "Evidence as to the condition of machinery in a mill at a particular date is competent, ordinarily, to show what its condition was at a date shortly before. It is not necessary that the witnesses should have seen the machinery at or before the time when its condition is to be ascertained. The fact that they did not examine or see the machinery at the very day, nor until some days or even months subsequent to the time in question, may affect the value, but not, ordinarily, the competency of the testimony." In *Toland v. Paine Furniture Co.*,[10] the court say: "One, McKenzie, testified as to the condition of the stairs and the mats on the day of the accident at 4 o'clock, and on the Monday morning following. He testified that the condition was the same on Monday as on Saturday. The question then, is, whether a defective condition of things found four hours after an accident, there being no evidence of any change in the meantime, as admissible to show the condition at the time of the accident. We have no doubt that the evidence was admissible."

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[9] 133 N. Y. 114, 124, 30 N. E. Rep. 641 (1892).
[10] 61 N. E. Rep. 52 (1901) (Mass).

LEGAL EFFECT OF CHANGE OR ATTEMPTED CHANGE IN CONTRACT OF INSURANCE BETWEEN A MUTUAL INSURANCE SOCIETY OR ASSOCIATION AND A MEMBER.

I. When Change is Binding on Members and Beneficiaries.
(a.) In Respect to Decrease in Disability Benefits.
(b.) In Respect to Decrease of Death Benefits.
(c.) In Respect to Increase in Assessments.
(d.) In Respect to Occupation of Member or Increase of Risk.
(e.) In Respect to Suicide of Member.
(f.) Generally.

I. When Change is Binding on Members and Beneficiaries.—(*a.*) *In Respect to Decrease in Disability Benefits.*—The right to sick benefits in a mutual society, under a contract reserving the right to make change therein, is not a vested right even after sickness has taken place and the member is actually drawing the benefits provided by the contract, and the society may, in the manner provided by its laws for changing the contract, reduce the amount recoverable by the member either to a stipulated sum as its total liability or by a flat reduction of the sum named as weekly disability benefits.[1]

(*b.*) *In Respect to Decrease of Death Benefits.*—The right of the beneficiary of a member of a mutual society to a death benefit, under a contract reserving the right to make changes therein, is not a vested right to the maximum sum promised to be paid, and the society may, in the manner provided by its laws for changing the contract, reduce the amount recoverable by the member's beneficiary before the same has become a claim by the death of the member, either by changing the classification of its members, which would result in a depletion of a certain class and a consequent inability of the society to collect a sufficient amount by assessment upon the depleted class to make up the maximum sum promised to be paid, or by a law which simply makes the maximum sum payable less than the original maximum sum promised.[2]

(*c.*) *In Respect to Increase in Assessments.*—The right of a mutual insurance society or association to increase the rate of assessments in force at the time the membership of a certificate-holder commenced has been upheld, where the society reserved the

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right to change the contract of insurance existing between it and the member.[3]

(*d.*) *In Respect to Occupation of Member or Increase of Risk.*—The right of a mutual insurance society or association to change the contract between it and a member, so as to relieve the society from liability for a loss that would have been covered by the original compact, is enforceable, where the member agreed in his application to observe and be governed by all the conditions of the charter and by-laws of the society as they then existed, and any change that might thereafter be made in the same, and a copy of such by-law, changing the society's liability, was immediately after its passage given to the member, who made no objection, but continued his membership, and attended the annual meeting of the society at which the by-law was read; and an association or society, so reserving a right to change the contract, may defeat a beneficiary's right to recover on a certificate by changing its by-laws so that an occupation in which the member was engaged at the time of obtaining his membership is prohibited by a subsequent by-law.[4]

(*e.*) *In Respect to Suicide of Member.*—A mutual insurance society or association, reserving the right to change the contract existing between it and a member, may defeat the beneficiary's action to recover on the certificate, where the member committed suicide, though under the original contract the suicide of a member was not made a cause for forfeiture.[5]

(*f.*) *Generally.*—The right of fraternal benefit insurance orders and assessment associations to change the contract existing between themselves and their members has been sustained in numerous adjudications.[6] But the denial of the right meets with greater favor in the courts, and they have sought out and upheld constructions, estoppels and waivers which have prevented the enforcement of changes, or attempted changes, in such contracts detrimental to the right of recovery by the insured or beneficiary. The tendency of the courts is clearly shown to be to prevent changes in contracts which affect the pecuniary rights of policy holders.[7]

II. When Change is not Binding on Members and Beneficiaries.—(*a.*) *In Respect to Decrease of Disability Benefits.*—The right to sick benefits in a mutual society, under a contract not shown to have contained a reservation of power in the society to change the same, becomes vested upon the sickness of the member entitling him to benefits under the original by-law,

[3] Fullenwider v. Supreme Council Royal League, 180 Ill. 621, 54 N. E. Rep. 485; Haydel v. Mutual Reserve Fund Life Assn., 98 Fed. 200 (U. S. D. C., E. D. Mo.), affirmed 104 Fed. Rep. 718.

[4] Bogards v. Farmers' Mutual Ins. Co., 79 Mich. 440, 44 N. W. Rep. 856; Schmidt v. Supreme Tent of the Knights of the Maccabees, 97 Wis. 528, 73 N. W. Rep. 22; Ellerbe v. Faust, 119 Mo. 653, 25 L. R. A. 149; People v. Grand Lodge A. O. U. W., 67 N. Y. Supp. 330; Moerschbaecher v. Supreme Council Royal League (Ill.), 59 N. E. Rep. 17.

[5] Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 449; Supreme Lodge Knights of Pythias v. Kutscher, 179 Ill. 340, 53 N. E. Rep. 620; Supreme Lodge Knight of Pythias v. Trebbe, 179 Ill. 348, 53 N. E. Rep. 730; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 20 S. W. Rep. 712; Supreme Lodge K. of P. v. La Malta, 95 Tenn. (11 Pick.) 157, 31 S. W. Rep. 493, 30 L. R. A. 838; Reynolds v. Supreme Council, etc., 18 Lanc. L. R. 125, 10 Pa. Dist. Rep. 528.

[6] Bogards v. Farmers' Mut. Ins. Co., 79 Mich. 440 44 N. W. Rep. 856; Bollman v. Supreme Lodge K. of H. (Tex.), 53 S. W. Rep. 722; Bowie v. Grand Lodge, etc., 99 Cal. 392, 34 Pac. Rep. 108; Brower v. Supreme Lodge N. R. A., 74 Mo. App. 490; Brundin v. Supreme Council O. C. F., 42 N. Y. Supp. 1043, 13 App. Div. 147; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38; Daughtry v. Supreme Lodge K. of P., 48 La. Ann. 1203; Duer v. Supreme Council, O. C. F., 21 Tex. Civ. App. 493, 52 S. W. Rep. 109; Ellerbe v. Faust, 119 Mo. 653, 25 S. W. Rep. 390; French v. Society Select Guardians, 51 N. Y. Supp. 675; Fugure v. Mutual Society St. Joseph, 46 Vt. 362; Fullenwider v. Supreme Council Royal League, 180 Ill. 621, 54 N. E. Rep. 485; Hadley v. O. F. B. A. (Mass.), 54 N. E. Rep. 345; Hass v. Mutual Relief Assn., 118 Cal. 6, 49 Pac. Rep. 1056; Haydel v. Mutual Reserve Fund Life Assn., 98 Fed. Rep. 200; Hughes v. Wisconsin O. F. M. L. I. Co., 98 Wis. 292; *In re* Supreme Legion Select Knights of Canada, 18 Can. L. T. 380; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. Rep. 1012; McCabe v. Father Matthew T. A. Society, 24 Hun, 149; McKean v. Riddle, 181 Pa. 361, 37 Atl. Rep. 52; MacDowell v. Ackley, 93 Pa. 277; Masonic M B. A. v. Severson, 71 Conn. 719, 43 Atl. Rep. 192; Montgomery County F. M. I. Co. v. Milner, 90 Iowa, 685, 57 N. W. Rep. 612; Pain v. Societe St. Jean Baptiste, 172 Mass. 319, 52 N. E. Rep. 502; Poultney v. Bachman, 31 Hun, 49; Robinson v. Templar Lodge No. 17, I. O. O. F., 117 Cal. 370, 49 Pac. Rep. 170; Schmidt v. Supreme Tent Knights of Maccabees, 97 Wis. 528, 73 N. W. Rep. 22; Smith v. Galloway (1898), 1 Q. B. 71; State v. Grand Lodge, 70 Mo. App. 456; Stohr v. San Francisco Musical Fund Society, 82 Cal. 557, 22 Pac. Rep. 1125; Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 449; Supreme Lodge K. of P. v. Knight, 117 Ind. 489, 20 N. E. Rep. 479; Supreme Lodge K. of P. v. Kutscher, 170 Ill. 340, 53 N. E. Rep. 620; Supreme Lodge K. of P. v. Trebbe, 179 Ill. 348; West v. Grand Lodge, 14 Tex. Civ. App. 471.

[7] The following cases, illustrate the construction the courts will adopt of an amended by-

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and an amendment to the by-laws after his sickness and after the society had paid the members benefits therefor is invalid, such action of the society being declared to be repudiation of debts and will not be allowed by the courts, the member, in such case, having become a creditor of the society whose rights cannot be swept away by such a scheme.[8]

(*b.*) *In Respect to the Decrease of Death Benefits.*—The right of a mutual insurance society to change its by-laws so that $1,500 will be the limit of its liability on the death of a member cannot be enforced where, under the original by-law, the beneficiary would be entitled to recover five dollars for each member, though such society had the right, under the act under which it was organized to adopt by-laws, by its trustees, "who may change them at pleasure," it appearing in such case that more than a majority of all the members of the society protested in writing against the change, and that among those protesting was plaintiff's decedent, nor is such change valid where it is not shown that the members assented thereto.[9]

(*c.*) *In Respect to Increase in Assessments.*—The right of a mutual insurance association, reserved in the contracts between it and its members, to change the same, including a special provision that the board of trustees shall have the right to fix the number and amount of assessments, will not enable such an association to so arrange its rates of assessments that a larger proportional burden falls upon a part of its membership than upon the others, as where the association places its membership into two classes upon one of which the assessments are made at the "attained age" of that class and at the "age at entry" of the other class.[10]

(*d.*) *In Respect to Occupation of Member or Increase of Risk.*—The right of a mutual insurance society, reserved in the contract between it and its members, to change the

law or change in a contract to avoid a forfeiture of the whole or any part of a benefit. Becker v. Berlin Benefit Society, 144 Pa. 232; Benton v. Brotherhood of Ry. Brakemen, 146 Ill. 570, 34 N. E. Rep. 938; Carnes v. Iowa Traveling Men's Assn., 106 Iowa, 281, 76 N. W. Rep. 683; Chadwick v. Order of T. A., 56 Mo. App. 468; Cohen v. Supreme Sitting O. I. H., 105 Mich. 283; Courtney v. U. S. Masonic Ben. Assn. (Iowa), 53 N. W. Rep. 238; Coyle v. Father Matthew Soc., 29 Hun, 674, 17 N. Y. Wk. Dig. 17; Ebert v. Mutual Reserve Fund Life Assn. (Minn.), 83 N. W. Rep. 506; Farmers' Loan & T. Co. v. Aberle, 19 App. Div. 79, 46 N. Y. Supp. 10; Fire Ins. Co. v. Connor, 17 Pa. 136; Graftstrom v. Frost Council No. 21, O. C. F., 19 Misc. Rep. 180, 43 N. Y. Supp. 266; Grand Lodge A. O. U. W. v. Reneau, 75 Mo. App. 402; Grand Lodge A. O. U. W. v. Sater, 44 Mo. App. 445; Gundlach v. German Mechanics' Assn., 4 Hun, 341, 49 How. Pr. 190; Hale v. Equitable Aid Union, 168 Pa. 377; Hirsch v. U. S. Grand Lodge, O. B. A., 78 Mo. App. 358; Hobbs v. Iowa Mutual Ben. Assn., 82 Iowa, 107, 11 L. R. A. 299; Hogan v. League, 99 Cal. 248, 33 Pac. Rep. 924; Hussey v. Gallagher, 61 Ga. 86; Hutchinson v. Supreme Tent, 22 N. Y. Supp. 801; Hysinger v. Supreme Lodge K. & L. of H., 42 Mo. App. 627; Illinois Com. Men's Assn. v. Wahl, 68 Ill. App. 411; Jarman v. Knights Templars & M. L. I. Co., 95 Fed. Rep. 70, 28 Ins. L. J. 874; Langdon v. Mass. Ben. Assn., 166 Mass. 316, 44 N. E. Rep. 226; McNeil v. Southern Tier Mas. Relief Assn., 40 App. Div. 581, 58 N. Y. Supp. 119; Margesson v. Mass. Ben. Assn., 165 Mass. 262, 42 N. E. Rep. 1132; Maynard v. Locomotive Eng. M. L. & A. Ins. Assn., 16 Utah, 145, 51 Pac. Rep. 259; Metropolitan Safety Fund Acc. Soc. v. Windover, 137 Ill. 417, 27 N. E. Rep. 538; Morris v. Farmers' Mutual F. Ins. Co., 63 Minn. 420, 65 N. W. Rep. 655; Morrison v. Wisconsin Odd Fellows M. L. Ins. Co., 59 Wis. 162; Mutual Aid & I. Soc. v. Monti, 59 N. J. L. (30 Vrom.), 341, 36 Atl. Rep. 666; Mutual Endowment Assessment Assn. v. Essenden, 59 Md. 463; Northwestern Ben. & Mut. Aid Assn. v. Warner, 24 Ill. App. 357; Pellazzone v. Society, 16 Cin. Law Bull. 27; Pokrefky v. Detroit Firemen's Fund Assn. (Mich.), 80 N. W. Rep. 240; St. Patrick's Male Ben. Soc. v. McVey, 92 Pa. 510; Seiverts v. National Ben. Assn., 95 Iowa, 710, 64 N. W. Rep. 671; Starling v. Supreme Council R. T. of T., 108 Mich. 440, 66 N. W. Rep. 393; Stewart v. Lee Mutual, etc. Assn., 64 Miss. 499, 1 South. Rep. 743; Strauss v. Mutual Reserve Fund Life Assn. (N. Car.), 36 S. E. Rep. 352; Street v. Mutual Reserve Fund Life Assn. (N. Car.), 36 S. E. Rep. 1024; Supreme Lodge K. of P. v. La Malta, 95 Tenn. 157, 30 L. R. A. 838; Supreme Lodge K. of P. v. McLennan, 171 Ill. 417, 49 N. E. Rep. 530; Supreme Lodge K. of P. v. Stein, 75 Miss. 107, 21 South. Rep. 559; Supreme Tent Knights of Maccabees v. Volkert (Ind.), 57 N. E. Rep. 203; Weiler v. Equitable Aid Union, 92 Hun, 277; Wheeler v. Supreme Sitting O. I. H., 110 Mich. 437, 68 N. W. Rep. 229; Wist v. Grand Lodge. A. O. U. W., 22 Oreg. 271, 29 Pac. Rep. 610; Yelland v. Yelland, 25 Ont. pp. 91.

[8] Becker v. Berlin Benefit Society, 144 Pa. 232; Berlin v. Eureka Lodge (Cal.), 64 Pac. Rep. 254.

[9] Pokrefky, v. Detroit Firemens' Fund Assn. (Mich.), 80 N. W. Rep. 240; Getz v. Supreme Council A. L. of H. (C. C.), 109 Fed. Rep. 261; Langan v. Supreme Council A. L. of H., 70 N. Y. Supp. 663; Hipple v. Supreme Ruling Fraternal Mystic Circle, 10 Pa. Dist. Rep. 317.

[10] Ebert v. Mutual Reserve Fund Life Assn. (Minn.), 83 N. W. Rep. 506; Strauss v. Mutual Reserve Fund Life Assn. (N. Car.), 36 S. E. Rep. 352; Hill v. Mutual Reserve Fund Life Assn. (N. Car.), 36 S. E. Rep. 1023; Street v. Mutual Reserve Fund Life Assn. (N. Car.), 36 S. E. Rep. 1024. Rehearings in each of above cases have resulted in a reaffirmance of the opinions cited. Also see Covenant Mutual Life Assn. v. Kentner (Ill.), 58 N. E. Rep. 966; Covenant Mutual Ben. Assn. v. Baldwin, 49 Ill. App. 203; Rowell v. Covenant Mutual Life Assn., 84 Ill. App. 304.

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same, will not permit it to enforce a forfeiture of a member's certificate as against the beneficiary on account of a by-law subsequently passed or previously in force prohibiting its members from engaging in a certain occupation, where the society had knowledge of the member having engaged in the prohibited occupation and collected dues and assessments from him, but took no action toward suspending him therefor, though the by-laws provide that the engaging in such occupation shall *ipso facto* cause a suspension of membership.[11]

(*e.*) *In Respect to Suicide of Member.*—The right of a mutual insurance society, reserved in the contract between it and its members, to change the same, will not permit it to enforce a forfeiture of a member's certificate as against the beneficiary on account of a rule or by-law adopted by a body known as its board of control, but not authorized by the contract to make a change in it, declaring that the suicide of a member, whether sane or insane, shall forfeit the right of the beneficiary to recover on the certificate,—prior to the adoption of such by-law by the body of the society empowered to change the by-laws or contract, nor will every change in this respect by an authorized body be enforced by the courts.[12]

(*f.*) *Generally.*—The denial of the right of fraternal insurance orders and assessment associations to change the contract existing between themselves and their members meets with greater favor in the courts than the upholding of it, especially where pecuniary rights are involved.

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[11] Supreme Tent Knights of Maccabees v. Volkert, 25 Ind. App. 627, 57 N. E. Rep. 203; Hobbs v. Iowa Mutual Benefit Assn., 82 Iowa, 107, 47 N. W. Rep. 983, 11 L. R. A. 299

[12] Supreme Lodge Knights of Pythias v. Stein, 57 Miss. 107, 21 South. Rep. 559; Supreme Lodge Knights of Pythias v. McLennan, 171 Ill. 417, 49 N. E. Rep. 417; Supreme Lodge Knights of Pythias v. LaMalta, 95 Tenn. 157, 30 L. R. A. 838; Northwestern, etc. Assn. v. Wanner, 24 Ill. App. 357; Knights Templars, etc. Co. v. Jarman, 104 Fed. Rep. 638; Sovereign Camp v. Fraley (Tex.), 59 S. W. Rep. 879.

LOAN FOR GAMBLING—RECOVERY.

APPLETON v. MAXWELL.

action thus promoted by his act, such party becomes *particeps criminis*, and cannot recover in a suit for the money loaned or advanced under such circumstaces.

MCFIE, J.: Appellee brought suit in the court below for the sum of $105, and interest at 6 per centum, alleged to be due thereon. Jury being waived, trial was had before the court, May 25, 1900, and judgment was rendered for the plaintiff for the sum of $105 and costs. From this judgment an appeal was taken to this court by the defendant. The complaint is in the usual form, and alleges money loaned to the defendant, and the answer is general issue. The court below made no findings of fact, so far as the record discloses, but the judgment recites that the court found the issues for the plaintiff. The facts disclosed by the record wholly fail to sustain the judgment of the court below in this case. The plaintiff below, appellee in this case, seeks to recover from the defendant $105 and interest, upon the ground that he loaned the defendant that amount to pay an existing indebtedness to other parties, and while upon direct examination, he testified to this effect, upon cross-examination he admits that this was the amount found due him upon a settlement at the close of a night's gambling at cards, in which plaintiff, defendant, and two others participated. He also admits that the money advanced by him was used in the game, thus destroying his claim that the money was used to pay a pre-existing indebtedness to third parties. These are admissions against interest, which bind the appellee, so that his own testimony destroys his claim that the transaction was a loan, and sustains the defense that it was a gambling transaction, in violation of the statute, and for which there could be no recovery. There were only two additional witnesses who testified in the cause, both of which testified that the money was used in the game, and the money sued for was the amount found due on settlement, at the end of the game. The defendant denied that he borrowed the money, but admits that when he and the plaintiff settled at the end of the game the amount sued for was the balance due the plaintiff. Upon these facts, it is idle to call the transaction a loan, in a legal sense. It was nothing more nor less than a gambling transaction, in violation of the statute, and any implied contract or obligation to pay was not a legal obligation, enforceable in the courts of this territory. To call this matter a loan is clearly a device to avoid the provisions of the statute concerning gambling, and the law will not tolerate subterfuges for this purpose. As was said in 14 Am. & Eng. Enc. Law (2d Ed.), p. 642: "This loaning must not be a device of one of the parties to the contract to enable the winner to sue the loser for his own loses, for the law pierces disguises of

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erred in rendering judgment in favor of the plaintiff, Appleton, and against the defendant, Maxwell." As to the law of this case there is little, if any, controversy between counsel for appellant and appellee. At common law certain wagering contracts were held valid, and the early English precedents sustained such contracts, with few exceptions. Some of the American courts followed the early English precedents, but while these early English precedents were in many instances followed, regret was expressed on the part of some of the judges that they felt constrained, out of respect for precedent, to sustain such a doctrine. After the enactments of the statute of Car. II. and 9 Anne, the doctrine announced by the English courts based upon these statutes was entirely different from that announced in the early cases, and gaming, gambling, and wagering contracts were held void by these courts. Owing to the regret expressed by different courts that they felt constrained to sustain the doctrine of the early English decisions in deference to precedent, many years ago, and prior to the enactment of statutes by the different states, the courts began to repudiate the doctrine of the common law as to gambling and wagering contracts; and upon examination it will be found that the New England states, Pennsylvania, South Carolina, Massachusetts, Vermont, Minnesota, and other states, repudiated the common-law doctrine. In the case of Amory v. Gilman, 2 Mass. 6, the court said: "It would seem a disgraceful occupation for the courts of any country to sit in judgment between two gamblers, in order to determine which was the best calculator of chances, or which had the most cunning of the two." A leading case, and one which gives the reason for the repudiation of the common-law rule more fully than the others, is the case of Wilkinson v. Tonsley, 16 Minn. 299 (Gil. 263), 10 Am. Rep. 139, in which case the authorities are collated and examined, which states the case as follows: "From the foregoing citations from the statutes which of late years have been enacted in England against bets and wagers, as well as from common knowledge of the prevailing public sentiment on this subject, we think the remark found in 2 Smith, Lead. Cas. (6th Am. Ed.) 343, that 'the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interests of the community, and at variance with the laws of morality,' is abundantly satisfied. * * * In determining, then, what is the law upon this subject here, we are free to lay down such rules as are most in accordance with general principles, and with the best-considered and most wholesome views which have been expressed by other tribunals. * * * In announcing a rule where none has been before announced, the question is whether we shall blindly adopt a doctrine which is admitted to have been originally wrong, both in morals and in laws, and from which the courts of England would gladly escape were they not hampered by precedents, or whether we shall give full scope to the broad principle that contracts contrary to good morals and sound public policy are invalid, and that, therefore, wagers and contracts of that character are not to be sustained. We have no hesitance in adopting the latter course." Numerous other cases might be cited to the same effect, but it is not deemed advisable to multiply them here. In 1876 this court was called upon to consider this subject in the case of Joseph v. Miller, 1 N. M. 621. This was a suit to collect a note, the consideration of which was a bet upon a horse race. The court, in an elaborate opinion by Associate Justice Bristol, sustained the lower court in holding that the wager was not a valid consideration for a contract, and, referring to the case of Wilkinson v. Tousley, held that the collection of the note could not be enforced in the courts of this territory. "Being untrammeled by precedents, this being the first adjudication of the question in this territory, we do not hesitate to lay down the same rule as to wagering contracts here. Not only do we hold that wagering contracts are void on sound principles of law, as being opposed to public policy and good morals, but we hold, also, that contracts of this kind are void under the statute. Section 4 of chapter 36 (page 246), of the Compiled Laws of New Mexico, provides that 'all judgments, securities, bonds, bills, notes, or conveyances, when the consideration is money or property won at gambling, or at any game or gambling device, shall be void,' etc. The word 'gambling' is a word of very general application, and is not restricted to wagering upon the result of any particular game or games of chance. In the adjudicated cases on the subject, we find that judges often have applied this word indiscriminately to wagering of all kinds. We are unable to discover any distinction, in general principles, between the various methods that may be adopted for determining by chance who is the winner and who is the loser of a bet, —whether it be by throwing dice, flipping a copper, turning a card, or running a horse race. In either case, it is gambling. This is the popular understanding of the term 'gambling device,' and does not exclude any scheme, plan, or contrivance for determining by chance which of the parties has won and which has lost a valuable stake. That a horse race, when adopted for such a purpose, is a 'gambling device,' there can be no doubt."

It will thus be seen that this court, as early as 1876, announced the doctrine that contracts originating in gambling devices of all kinds were contrary to public policy, and would not be enforced by the courts. But the court in the same case also declares that the same are void under the statute of this territory which was in force at the time this decision was rendered. In addition to the provisions of the statute quoted by the court in the case of Joseph v. Miller, we find that numerous provisions have been added to the statute, all tending to destroy contracts or obli-

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gations tainted or in any way connected with gambling devices. Section 3199 provides that any person who shall lose money or property at any game at cards or any other gambling device may recover the same back by an action at law. Not only may the person himself recover money or property lost by him through gambling devices, but section 3201 provides that the wife, children, executors, administrators, and creditors of the person losing may also recover back money or property lost at gambling. Section 3203 provides that the assignment of any bond, bill, note, judgment, conveyance, or other security shall not affect the defense of the person executing the same. And there are numerous other provisions of the statutes of this territory which show conclusively that gambling devices are illegal, and that the courts will not aid the winner in the enforcement of contracts, or in the recovery of money or property won through gambling devices or wagers, in violation of the statute. The section of the statute construed by this court in the case of Joseph v. Miller was enacted in 1857, and, although the section does not specifically mention horse racing, the court held that money won in betting upon a horse race placed the transaction in the category of gambling. The case of Joseph v. Miller was not as strong as the case at bar, in this: that gambling, such as the evidence shows in this case, is expressly within the terms of the statute. The statute of this territory just referred to is almost identical with the statute of Missouri, which was construed by the supreme court of that state in the case of Shropshire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189. About the only material difference between these statutes was the insertion of the word "gambling" in two places by our statute in the section, instead of one, as in the Missouri statute, so that the statute of this territory is more forcible in its terms than that of Missouri. Betting upon a horse race was not specifically mentioned in the Missouri statute, but the court held it to be equally prohibited with other forms of gambling, such as the cards, dice, etc., and that the terms "other game or games" was sufficiently broad to include horse racing, and was intended to prohibit all kinds and modes of gambling.

Counsel for appellee did not seriously question the law as contended for by the counsel for appellant, but insisted upon two propositions, which, he contended, were supported by the facts: First, that money loaned to pay a loss already incurred at gambling can be recovered by the lender in the absence of a special statute to the contrary; and, second, that the mere knowledge of the lender that the money is to be used for gambling purposes does not prevent him from recovering, in the absence of a special statute; and counsel refers the court to 14 Am. & Eng. Enc. Law (2d Ed.), pp. 640-642, and the cases there cited. The facts do not sustain the first proposition of counsel for appellee, that this money was loaned to pay a loss already incurred. Therefore the first proposition of counsel is not in point. It is true, as stated in the second proposition, that the mere knowledge of the lender that the money is to be used for gambling purposes does not prevent a recovery, in the absence of special statute. This proposition is supported by the very respectable authority, but it is not supported nor is it applicable to the facts in this case, as we have arrived at the conclusion that the money advanced to the appellant in this case was not a loan, nor was it so understood at the time. But where money is loaned or advanced with the understanding and agreement between the parties that it shall be used in gambling, or where the party advancing, or even loaning, the money participates and shares in the gambling transaction thus promoted by his act, he thereby becomes a *particeps criminis*, and cannot recover for money loaned or advanced under such circumstances. In the case of Oliphant v. Markham, 79 Tex. 543, 15 S. W. Rep. 569, 23 Am. St. Rep. 363, the court held that, while simple knowledge of what the borrower was going to do with the money would not defeat the lender's right to recover, he could not recover if he had taken any active part in the gambling contract, such as depositing the loan as margins, bringing the parties together, etc. In the case of Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. Rep. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23, the court upon this subject says: "In order to invalidate a note or other security in the hands of one who advanced money which the borrower intended to and did employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and the borrower that the money furnished should be used in aid of and to promote the unlawful enterprise, as by that the former became *particeps criminis*." See, also, Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160, 28 L. Ed. 225; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. Rep. 776, 33 L. Ed. 172. In the case at bar the proof shows that the money advanced by the appellee was put up from time to time during the progress of a gambling game, in which he participated as one of the principals; the testimony of all the witnesses being to the effect that the money advanced was used during the progress of the game. It will not do for the appellee in this case to say that he did not know that this money was to be used for gambling purposes, because he participated in the game, and in its use for that very purpose; and, while possibly the simple knowledge that it was to be used for gambling purposes might not be sufficient to defeat a recovery, the participation of the appellee in the unlawful purpose for which the money was advanced, and to be used in his pres-

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ence, is quite sufficient to make him *particeps criminis* in law, and as such he cannot recover. Indeed, he participated in another way. It is reasonable to believe that the production of this money by the appellee, after the appellant's money was exhausted, had the effect of continuing and prompting the gambling being carried on at the time, and the continued participation of the appellant in the game; and in this way, also, while it may not be said that the appellee was instrumental in bringing the parties together for the unlawful purpose of gambling, it is undoubtedly true that his participation had the effect of continuing the illegal transaction in which the parties were engaged at the time. The appellant admits in his own testimony that he was a winner to some extent during the game, the exact amount he does not state. Undoubtedly, however, the money won by him during the progress of the game constituted at least part, if not all, of the balance which he claimed to be due him from the appellant. Therefore the entire indebtedness claimed arose out of a gambling transaction, in violation of the statutes of this territory, and the courts will not lend aid to a winner whose alleged claim arose out of a gambling transaction in which the creditor participated. From the views above expressed, it follows that the assignments of error numbered 1 and 2, above quoted in this opinion, were well assigned, and that the court below erred in rendering judgment for appellee, and the judgment of the court below will therefore be reversed, and judgment for appellant for costs.

NOTE.—*Validity of Loans for Gambling Purposes.* All gambling contracts are illegal and unenforceable and all contracts tainted with this kind of illegality are alike void and without effect. Whether contracts for the loan of money to be used in gambling or to pay a gambling debt already incurred come within this latter designation is not always an easy matter to determine. And the authorities themselves are not a little confusing. It is very clear, on the one hand, that the mere loaning of money which was intended to be used and was afterwards used for the purpose of gambling, but without any knowledge on the part of the lender, is not void for illegality and the lender can recover his loan. This is too well established to require the citation of authority. On the other hand, where money is loaned on the distinct condition that it is to be used for gambling purposes and the lender shares in the profits of the scheme, such lender becomes *particeps criminis* to the transaction, and he cannot recover his loan nor demand an accounting. Shaffner v. Pinchback, 133 Ill. 410, 23 Am. St. Rep. 624. Between these two extremes the law in any given case must depend on the particular case. The whole question depends upon the knowledge of the lender and the extent of his participation in the gambling transactions. It is held by one line of authorities that a mere knowledge on the part of the lender of the proposed use of the money by the borrower does not impair the loan nor defeat recovery thereon. Corbin v. Wachhorst, 73 Cal. 411; Oliphant v. Markham, 79 Tex. 543; Plank v. Jackson, 128 Ind. 424; White v. Yarbrough, 16 Ala. 109; Osgood v. Westphelling, 72 Mo. App. 45; Krake v. Alexander, 86 Va. 206; Waugh v. Beck, 114 Pa. St. 422; Jackson v. Bank, 125 Ind. 347; Longnecker v. Shilds, 1 Colo. App. 284, 28 Pac. Rep. 659; Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. Rep. 450; Tyler v. Carlisle, 79 Me. 210, 9 Atl. Rep. 306. Where, however, there is some understanding, over and above mere knowledge, that the money to be loaned was to be used for gambling purposes, there can be no recovery by the lender. Williamson v. Baley, 78 Mo. 636; Shaffner v. Pinchback, 30 Ill. App. 355, affirmed 133 Ill. 410; Tyler v. Carlisle, 79 Me. 210; Cutler v. Welsh, 43 N. H. 497; Mordecai v. Dawkins, 9 Rich. L. (S. Car.) 262; Carney v. Plimmer, 66 L. J. Q. B. 415; Long v. Jones, 69 Ill. App. 615; Levy v. Perkins, 7 Ky. (4 Bibb) 505; Alfriend v. Hughes, 67 Ky. (4 Bush) 40; Emerson v. Townsend, 73 Md. 224, 20 Atl. Rep. 984; White v. Wilson, 100 Ky. 367; Machir v. Moore, 2 Gratt. (Va.) 258; Bates v. Watson, 33 Tenn. 376; Terrell v. Adams, 23 Miss. 570; Raymond v. Leavitt, 46 Mich. 447. The line of distinction between these authorities is sometimes very dimly discernible. A glance at the best considered cases will, however, serve to show that the distinction is not altogether shadowy and is well founded in principle. Thus, in Tyler v. Carlisle, 79 Me. 210, the court charged the jury that if the plaintiff loaned the money with an express understanding, intention and purpose that it was to be used in gambling, and it was so used, the debt so created cannot be recovered; but otherwise if the plaintiff had merely knowledge that the money was to be so used. In the case of Waugh v. Beck, 114 Pa. St. 422, the plaintiff furnished money to the defendant, knowingly and with the purpose of furthering a gambling transaction but without any gain to himself. The court said: "Where a man lends money for the express purpose of enabling him to commit a specific unlawful act, and such act be afterward committed by means of the aid so received, the lender is a *particeps criminis*." The court, however, reversed the decision of the trial court because of an instruction permitting the jury to find for the defendant on the "mere knowledge" of plaintiff of the purpose for which the defendant wanted the money. The court held that to invalidate a loan for a gambling transaction, the lender must not only have known the use intended, but must have been implicated as a confederate though not necessarily for gain. So, also, in Cannon v. Bryer, 3 B. & Ald. 254, it was held that money lent and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back. The court said: "It being unlawful for one man to pay, it cannot be lawful for another to furnish him the means of paying." That was a case where the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. The case of Jackson v. Bank, 125 Ind. 347, is just on the other side of the line and serves well to make clear the distinction between the two lines of authorities. In this case the plaintiff loaned the defendant a certain sum of money fully knowing the purpose and intent of defendant to invest it in gambling contracts, plaintiff being told by the defendant at the time said loan was made that he wanted the money for the express purpose of making wagering contracts. The defendant used the money for the purpose he intended, the plaintiff, knowing at the same time that the money was so used. The court held on demurrer to answer that the plaintiff could recover. The court said: "It is not

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alleged and it does not appear that appellee had any interest in such gambling contracts, or that it took any part in the making of them, or that it in any way took part in furthering the deals, except to loan the money with the knowledge that he intended to use it in making illegal contracts generally." In this case it will be observed that the loan was not for any express or definite transaction but to be used generally for gambling in grain futures altogether at the option of the defendant, who was at liberty to change the mind and use it for any other purpose he chose. The plaintiff was not interested in what he did with the money. In the case of Raymondv. Leavitt, 46 Mich. 447, involved a loan for the express purpose of assisting in "running a corner" on wheat and by the terms of the contract the lender had a proportionate share in the profits. Such a loan was, of course, tainted with the illegality for which its proceeds were to be used, and no recovery could be had thereon. So, also, in the case of Shaffner v. Pinchback, plaintiff advanced money to defendant to be used by them as partners in the business of betting on horse races. It was held he could not recover the money so advanced, being *in pari delicto* with the defendant. The following cases are very similar to the principal case in being loans made for the purpose of gambling at cards while the game is going on. Thus, in Williamson v. Baley, 78 Mo. 636, A loaned B one hundred and fifty dollars' worth of poker chips to be used in a game then going on. It was held that A could not recover the face value in money of the chips loaned. But a loan at a place of gambling is not necessarily a loan for the purpose of gambling. Roberts v. Blair, 11 Colo. 64. In the recent case of Schoenberg v. Aldler, 105 Wis. 645, 81 N. W. Rep. 1055, defendant lost at poker and requested plaintiff, who was present at the games, to pay his losses, which he did. An action was brought to recover the amount so advanced. Held, that the agreement sued on was void and that plaintiff was not entitled to recover. So, also, in the recent case of White v. Wilson's Administrator, 100 Ky. 367, it was held that one who is a member of a club at which gaming is indulged in, and at which there is a "take-out" to pay expenses of the club, and for meals, drinks, and cigars of the members and guests, has such an interest in the game as will prevent his recovering money loaned to one to pay losses, although he was not actually engaged in the games in which the losses were sustained. The clearest statement of the law is probably that of Peters, C. J., in the case of Tyler v. Carlisle, 79 Me. 210, as follows: "It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man, and not to his purpose. He may at the same time disapprove this purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower,—a union of purposes. The lender must in the same manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man."

JETSAM AND FLOTSAM.

THE LAW OF CHINA.

In an address given some time ago before the New York State Bar Association, Mr. Wu Ting fang, Chinese Minister to the United States, gave the following succinct statement of Chinese law.

"The law of China may be treated under three heads—common law, statute law and case law. By common law I mean that which consists of those principles and rules sanctioned by usage and custom from time immemorial. Another source of common law is to be found in the wise maxims and injunctions of ancient emperors scattered through the classics. Some of these are forty centuries old, and are still scrupulously observed. In the trial of cases for murder and other serious crimes Chinese judges are particularly careful and cautious. If there is any point can be stretched in favor of the accused they will give him the benefit of it. The consequence of wrongly convicting an innocent person is most serious. Suppose a person were convicted and sentenced to death for the crime of murder, of which he was innocent, and an appeal to Pekin resulted in the reversal of the decision. All the officials who had anything to do with the trial of the case, from the governor of the province down to the submagistrate of the district, would be degraded and subjected to the severest punishment.

"The statute law of China is the most important result of legislation. Its foundation was laid over twenty centuries ago, and since then successive dynasties have built upon it by addition, amendment, abrogation and amalgamation, as circumstances required. The standard work, which is now in use over the whole Empire of China, is called Ta Ching Luli generally known as the penal code. It contains not only the fundamental statute, but also the supplemental laws. It is arranged under seven headings, viz.: general, civil, fiscal, ritual, military, criminal and that relating to public works, and is subdivided into four hundred and thirty-six sections. It also contains a collection of important cases which have been decided by the proper authorities and approved by the emperor, with notes and comments illustrating the practice and theory of the law appended. The first edition was published in 1647, only three years after the accession of the present dynasty. A new edition is generally issued every five or ten years, with summary reports of important cases that deserve notice.

"The law provides various degrees of punishment for a man or woman who marries through the legal period of mourning for a deceased parent, and for a widow who marries again within the legal period of mourning for her deceased husband, the period of mourning in each case being twenty-seven months. Whoever marries a wife or husband having a father, mother, grandfather or grandmother at the same time under confinement in prison for a capital offense shall be punished with eighty blows. Nevertheless, if any such person enters into the marriage state at such period by the expressed command of his or her parent or grandparent in prison, no punishment shall ensue, provided the usual feast and entertainment is omitted; otherwise a punishment of sixty blows shall be still inflicted. The prohibition as to marriage between persons on account of consanguinity and other relationship are more numerous and general than those in this country or in Europe. There is a provision against the marriage of priests. If a Buddhist or Taoist priest shall marry he shall be punished with

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eighty blows and be expelled from the order to which he belongs, and the marriage shall be null and void. The law sanctioning divorce gives seven justifying causes, namely: Barrenness, lasciviousness, disobedience to her husband's parents, talkativeness, thievery, jealousy and leprosy. This is, however, almost annulled by the other part of the same section, which declares that, although one of the seven above causes of divorce can be chargeable on the wife, yet if any of the three reasons against a divorce shall exist, namely: (1) the wife having mourned three years for her husband's parents; (2) the family having become rich after having been poor at the time of the marriage, and (3) the wife having no parents living to receive her back again, then none of the seven aforementioned causes will justify a divorce, and if the husband should put away his wife upon such grounds he shall be punished and obliged to take her back.

"The sixth and seventh books deal with usury, license of commercial agents and false weights and measures. It may be noted that the legal rate of interest is three per cent. per mensem, but in practice it is considerably lower. There is a provision against monopolist and unfair traders which is worth quoting. Section 154 reads: 'When the parties to a purchase or sale of goods do not amicably agree respecting the terms, and one of them, by monopolizing or otherwise using undue influence in the market, obliges the other to allow him an exorbitant profit, or if artful speculators in trade, by entering into a private understanding with the commercial agent and by employing other unwarrantable contrivances, raise the price of their own goods, although of low value, in all such cases the offending parties shall be severally punished with eighty blows, each for his own misconduct. When a trader, observing the nature of the commercial business carried on by another, contrives to suit or manage the disposal or appreciation of his own goods in such manner as to derange and excite distrust against the proceedings of the other, and thereby draws unfairly a greater proportion of profit to himself than usual, he shall be punished with forty blows.'

"There are no trusts in China yet, but if there should be such I fear the local authorities will put them down under the law.

"The system of procedure for the administration of the law is peculiar and essentially different in many respect from that which prevails in America and Europe. In the first place, we have no such thing as a jury. The judge or magistrate, as the case may be, tries the case alone, and has to decide it according to law and equity. No sentence can be passed without the confession of the accused. Hence, the cruel practice of extorting confession by torture, I am sorry to say, is often resorted to. But the consequence of convicting the wrong person is very serious. In some cases the magistrate has to suffer the same punishment that has been inflicted upon the innocent victim. This has the effect of causing all magistrates and judges to be extremely careful in the investigation of cases.

"The laws and practices of China has now been enforced for many centuries. Generations of Chinese have lived, moved, worked and died under them. The Penal Code has now been in force for more than two hundred and fifty years. Many of its provisions are taken from the codes of preceding dynasties and embodied in it. At the time of its adoption it was, no doubt, suited to the circumstances of that period, for the Empire of China was then practically shut out from commerce and intercourse with the western nations. There were no ports open to foreign trade, where hundreds and thousands of foreigners could reside and transact business with the natives, as they are now. There were no treaties with other nations then in force, conferring extra territorial rights and special privileges upon foreigners in the country as they are now. What is needed, in my humble opinion, is to recast and revise the code to suit the requirements and circumstances of the present day. Many of its sections should be retained, while many others, which are not in keeping with the present state of society, should be considerably modified, if not entirely changed. I may say that efforts have been made in this direction on my part, but so far without success. In view of the many thousands of foreigners residing in various parts of China and the vast trade that is being daily carried on by millions of natives with them, it seems to me that there is an urgent necessity for the compilation of a commercial code giving the laws relating to patents, copyrights, corporations, shipping and other kindred subjects, and also a code of procedure for the trial of mixed cases, both criminal and civil. The want of such codes is severely felt. It seems to me that now is just the time for such a useful work. The power which, through its advice and influence, is instrumental in bringing about so beneficient an undertaking as this will confer a great boon on foreigners and natives alike in China.

"We have just passed out of an old century and entered the threshold of a new one. The nineteenth century has furnished many examples of noble achievements of men and nations for our admiration and emulation—such as the abolition of slavery, the emancipation of serfs, the extention of intercourse and commerce between peoples, the mitigation of the horrors of war, and the gradual recognition of the principal of arbitration in the settlement of international disputes. Now we are at the beginning of the twentieth century. He would be a bold man, indeed, who should predict that during the century the millennium would surely come. But I think it is not too sanguine to hope that the opening of the new century will be signalized by the erection of a grand monument of humane legislation, which, while providing just punishments for evildoers, shall secure equal rights and liberty to both foreigners and natives in China without distinction or discrimination. In this noble work I trust this great nation, with the advice and assistance of the eminent lawyers of the Empire State, will take a prominent part. Happy will be the day when uniform principles of law, based on justice and equity shall prevail throughout the world."

BOOK REVIEWS.

AMERICAN DIGEST.

Volume A of the American Digest of 1901 is just from the press. As a digest it covers all the current decisions of all the American courts, as reported in the National Reporter System, the official reports, and elsewhere, together with leading English and Canadian cases, from October 1, 1900, to March 31, 1901, prepared and edited by the editorial staff of the American Digest System. The promptness with which this digest is issued is not the least of the many excellencies of this incomparable system of digesting. If there is anything more to be desired in the way of a digest, a most fertile and fantastic imagination would be necessary to discover it. Indeed, this system has become the final depositary of Amer-

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ican law and is rapidly displacing all other digests, local or general. Published in one volume by the West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

A Brief on the Modes of Proving the Facts Most Frequently in Issue or Collaterally in Question, on the Trial of Civil or Criminal Cases. By Austin Abbott. Second and Enlarged Edition, by the Publisher's Editorial Staff. The Lawyers' Co-operative Publishing Company, Rochester, N. Y., 1901. Sheep, pp. 653. Price, $1.50. Review will follow.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

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2. ACTION—Against State—Refunding Taxes.—An action against a state insurance superintendent to compel the refunding of taxes to, and enjoining the further collection of the taxes from, foreign insurance companies, is not an action against the state, and can be maintained.—German Alliance Ins. Co. v. Van Cleave, Ill., 61 N. E. Rep. 94.

3. APPEAL AND ERROR—Amount Involved.—No appeal lies from order of appellate court sustaining a mechanic's lien involving less than $1,000, in the absence of a certificate of importance.—Davis v. Upham, Ill., 61 N. E. Rep. 76.

4. APPEAL AND ERROR—Former Decision Conclusive on Second Trial.—A decision by the supreme court that the damages recovered for a personal injury are excessive is conclusive on a subsequent trial of the cause.—Collins v. City of Janesville, Wis., 87 N. W. Rep. 241.

5. APPEAL AND ERROR—Misconduct of Counsel.—Where there is no record of misconduct of counsel in argument, save statement of court on denying new trial, statement must be accepted as true.—Pinkerton Bros. v. Bromley, Mich., 87 N. W. Rep. 200.

6. APPEAL AND ERROR—Objection at Trial.—Where defendant fails to object to matter alleged by plaintiff in the trial court, an objection on appeal is not tenable.—Wilson v. Union Distilling Co., Colo., 66 Pac. Rep. 170.

7. APPEAL AND ERROR—Original Papers.—Original papers, not copied in the transcript, cannot be looked to by the supreme court in reviewing a cause on appeal.—Black v. Pate, Ala., 30 South. Rep. 434.

8. APPEAL AND ERROR—Res Adjudicata.—Where the court decided, on an appeal from an order overruling a demurrer, that the complaint did not state a cause of action, the same was *res adjudicata* on second appeal.—Finney v. Guy, Wis., 87 N. W. Rep. 255.

9. APPEAL AND ERROR—Taxation of Costs.—In the absence of a bill of exceptions or objection to the costs taxed on the trial, the taxation thereof is not reviewable on appeal.—Lauterbach v. Netzo, Wis., 87 N. W. Rep. 229.

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11. ASSIGNMENT—Judgment.—A judgment creditor, without the debtor's consent, cannot assign his interest in the judgment pending appeal, and, by reserving all rights arising out of the *supersedeas* bond, sue thereon.—Lewis v. Third St. & S. Ry. Co., Wash., 66 Pac. Rep. 150.

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13. ATTORNEY AND CLIENT—Rights of Attorneys to Contract with Adversary.—Attorney and client may contract as to subject-matter of employment or with adversary of client, where a suit is pending between him and the client.—Vanasse v. Reid, Wis., 87 N. W. Rep. 192.

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15. BANKRUPTCY — Preference.—One who, during insolvency of debtor and within four months of bankruptcy, has had claims paid, has received a preference within Bankr. Act 1898, § 57, cl. "g," and section 60, cl. "a."—*In re* Bashline, U. S. D. C., W. D. (Pa.), 109 Fed. Rep. 965.

16. BANKRUPTCY — Referee's Jurisdiction.— Under Bank. Act. § 38, par. 4, a referee cannot determine a question relating to confirmation of a composition, but may report the facts.—Adler v. Jones, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 967.

17. BANKRUPTCY—Term "Insolvency."—The term "insolvency," under bankrupt and insolvent laws, means inability to pay debts in the regular course of business.—Marvin v. Anderson, Wis., 87 N. W. Rep. 226.

18. BANKS AND BANKING— Petition to Recover on Certificate of Deposit.—Where depositor in insolvent bank received certificate of deposit, petition by him for order requiring receiver of the bank to pay over the deposit held insufficient for not offering to surrender the certificate of deposit.—Hyland v. Roe, Wis., 87 N. W. Rep. 252.

19. BILLS AND NOTES—Innocent Purchaser.—Where payee of notes sells the same to innocent purchaser, and repurchases, he has no better rights against maker than he had in the first instance.—Andrews v. Robertson, Wis., 87 N. W. Rep. 190.

20. BRIDGES — Construction.—Rev. St. 1898, § 1319, does not authorize the county board to contract jointly with a town board for the construction of a

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bridge.—Johnson v. Buffalo County, Wis., 87 N. W. Rep. 240.

21. CARRIERS—Passengers—Assault by Conductor.—Where a conductor assaults a passenger, the carrier is liable, though the assault is in retaliation of an assault committed upon the conducter because of abusive words.—Birmingham Ry. & Electric Co. v. Baird, Ala., 30 South. Rep. 456.

22. CERTIORARI—Enforcing Liens.—*Certiorari* held not an appropriate remedy to enforce the rights of a lessee of school lands whose lease had been canceled by the board of land commissioners.—State Board of Land Com'rs v. Carpenter, Colo., 66 Pac. Rep. 165.

23. CERTIORARI—Temporary Injunction.—*Certiorari* will not lie to review an error in the granting of a temporary injunction, as 2 Ballinger's Ann. Codes & St. § 6500, authorized an appeal therefrom.—Parker v. Superior Court of Snohomish County, Wash., 66 Pac. Rep. 154.

24. CHARITIES—Sectarian College.—A device of property for the establishment and maintenance of a sectarian college held to be for a charitable purpose, so as not to be included in the statute of uses.—*In re* Stewart's Estate, Wash., 66 Pac. Rep. 148.

25. CHATTEL MORTGAGES — Not Recorded — Inter Parties.—A chattel mortgage is valid as between the parties thereto, though it is not acknowledge or recorded.—Morse v. Morrison, Colo., 66 Pac. Rep. 169.

26. CONFLICT OF LAWS—Insolvence—Foreign Creditors.—Comity between states will not require the courts to give foreign creditors an advantage over resident creditors of insolvent.—Thum v. Pyke, Idaho, 66 Pac. Rep. 157.

27. CONSTITUTIONAL LAW—Delegation of Legislative Authority.—Act March 21, 1901, authorizing the governor to appoint a commission to district wards in cities, held an unlawful delegation of legislative power.—Gilhooly v. City of Elizabeth, N. J., 49 Atl. Rep. 1106.

28. CONTEMPT—Jurisdiction.—An appeal allowed by a judge of the circuit court of appeals held to have been perfected, so as to give that court jurisdiction to proceed for contempt against one who assisted in resisting the enforcement of its writ of *supersedeas*.—Anderson v. Comptois, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 971.

29. CONTRACTS—Evidence.—In an action on a contract for 25 car loads of boxes, held, that the defendant was precluded from objecting to the submission to the jury of the question of the number of boxes constituting car load.—Lowry v. Saginaw Specialty Co., Mich., 87 N. W. Rep. 194.

30. CONTRACTS—Executed Consideration.—A past consideration, which imposes no obligation at the time it was furnished, is sufficient to support any promise.—Davis v. Anderson, Va., 39 S. E. Rep. 588.

31. CONTRACTS—"Good" Consideration.—A contract founded on a good, but not on a valuable, consideration held voluntary, and void as to creditors.—Davis v. Anderson, Va., 39 S. E. Rep. 588.

32. CONTRACTS—Right to Terminate.—Party to a contract not in default held entitled to terminate it on failure of the other to comply in substantial matters.—Balance v. Vanuxem, Ill., 61 N. E. Rep. 85.

33. CONTRIBUTION — Redemption.—Where plaintiff redeemed two lots from sale under foreclosure of trust deed, only one of which he was entitled to redeem, and that one chargeable with payment of the entire loan for which the deed was given, he was not entitled to contribution from the other by reason of such redemption.—Huber v. Hess, Ill., 66 N. E. Rep. 61.

34. CORPORATIONS—Creditors Lien on Assets.—Creditors of a corporation has no equitable lien on the assets until the corporation is insolvent or has suspended business.—Marvin v. Anderson, Wis., 87 N. W. Rep. 226.

35. CORPORATIONS—Foreign Corporations.—Under Mills Ann. St. § 491, held, that a foreign corporation, which filed its certificate appointing a local agent on February 20, 1896, filed the required statement within the required time by a filing on February 18, 1897.—Fraser v. Mines Leasing Co., Colo., 66 Pac. Rep. 167.

36. CORPORATIONS—Right to Sell to Stockholders.—A solvent going corporation can sell its property in the regular course of business, though the vendee is a stockholder.—Marvin v. Anderson, Wis., 87 N. W. Rep. 226.

37. COURTS—Appeal Bond.—Money paid a surety company for furnishing an appeal bond on an appeal to the circuit court of appeals is not taxable as costs.—Lee Injector Mfg. Co. v. Penberthy Injector Co., U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 964.

38. COSTS — Printing Briefs.—Disbursement for printing briefs in the circuit court of appeals are not taxable as costs.—Lee Injector Mfg. Co. v. Penberthy Injector Co., U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 964.

39. COUNTIES — County Government Act.—County Government Act 1897, § 18, conferring powers co-ordinate with those conferred by Const. art. 11, held void.—*Ex parte* Anderson, Cal., 66 Pac. Rep. 194.

40. COUNTIES—County Treasurer — Interest.—Under Comp. Laws, §§ 1197-1200, a county treasurer held not entitled to the interest on tax moneys collected and deposited by him.—Board of Suprs. of Kent County v. Verkerke, Mich., 87 N. W. Rep. 217.

41. COUNTIES—Special Tax Levy.—Under Act Dec. 18, 1898, providing for the working of public roads in certain counties and authorizing the levy of a special tax, the commissioner's court of such a county held to have no authority to levy a special tax in addition to the regular county tax, if the latter is fixed at the rate of one-half of 1 per cent., which is the full constitutional limit.—Frederick v. Northern Alabama Ry. Co., Ala., 30 South. Rep. 426.

42. COURTS—Inferior Appellate Courts.—Hurd's Rev. St. 1899, p. 526, creating branch appellate courts, held constitutional, as within Const. 1870, art. 6, § 11, conferring on the legislature power to create inferior appellate courts.—Berkenfield v. People, Ill., 61 N. E. Rep. 96.

43. CRIMINAL EVIDENCE — Corroboration.—Evidence as to the trailing and baying of a bloodhound held inadmissible, in a larceny prosecution, to corroborate statements as to the guilt of defendants.—State v. Moore, N. Car., 39 S. E. Rep. 626.

44. CRIMINAL LAW — Grand Jury—Illegal Panel.—The objection that a grand jury was not drawn and impaneled as required by law is not saved for review by a motion to quash the indictment for insufficiency.—Berkenfield v. People, Ill., 61 N. E. Rep. 96.

45. CRIMINAL LAW—Trial — Postponement.—Where a week elapsed between the first arraignment and the preliminary examination, it was not error to refuse a further postponement that accused might procure an attorney.—People v. Figueroa, Cal., 66 Pac. Rep. 202.

46. CRIMINAL TRIAL — Conversation by Juror.—Conversation by juror with another person entirely foreign to the case on trial, in the presence and hearing of the sheriff and other jurors, held not to render verdict of conviction void.—State v. Cotts, W. Va., 39 S. E. Rep. 605.

47. CRIMINAL TRIAL—Cross-Examination of Accused.—Under Pen. Code, § 1323, held error, on criminal prosecution, to allow accused, who had offered himself as a witness, to be cross-examined as to matters not touched on in his examination in chief.—People v. Rodrigues, Cal., 66 Pac. Rep. 174.

48. CRIMINAL TRIAL—Diagram by Attorney.—Where the district attorney drew a diagram of the scene of the crime, and used it in the examination of the witnesses, no valid objection could be raised.—People v Figueroa, Cal., 66 Pac. Rep. 202.

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49. CRIMINAL TRIAL—Mistake in Name of Juror.—Mistake as to second initial in list of jurors handed defendant held immaterial.—Kimbrell v. State, Ala., 30 South. Rep. 454.

50. CRIMINAL TRIAL—Response of Jury to the Issue.—Where issue was joined in a criminal case on pleas of not guilty, former conviction, and former jeopardy, the conviction will not be reversed on appeal because of the jury's failure to respond only to the plea of not guilty.—Dannelley v. State, Ala., 30 South. Rep. 452.

51. DEATH BY WRONGFUL ACT—Excessive Damages.—In an action by parents against a railroad for the wrongful death of their son, defendant's employee, a verdict for $8,000 held excessive.—Atchison, etc. Ry. Co. v. Van Belle, Tex., 64 S. W. Rep. 397.

52. DIVORCE—Appeal.—The fact that a divorce suit is a suit in equity does not authorize an appeal under the rules allowing appeals in equity.—Martin v. Martin, Wis., 87 N. W. Rep. 252.

53. DIVORCE—Special Findings.—In an action for divorce, findings negativing the charge of cruelty held also to negative an allegation of desertion, and special findings are therefore unnecessary.—Kepfler v. Kepfler, Cal., 66 Pac. Rep. 206.

54. EJECTMENT—After-Acquired Title.—A plaintiff in ejectment can only recover on the title alleged in the declaration, and not on an after-acquired title.—Nowlen v. Hall, Mich., 87 N. W. Rep. 222.

55. ELECTION—Contest—Evidence.—On an election contest, held proper for the court to admit ballots to which there were attached a stub that should have remained in the books from which the ballots were taken.—Farnham v. Boland, Cal., 66 Pac. Rep. 200.

56. ELECTIONS—Evidence — Secrecy.—In an election contest, it is not competent to ask a witness for whom he voted, so long as the witness has not waived his right to secrecy.—Black v. Pate, Ala., 30 South. Rep. 434.

57. ELECTIONS — Qualifications of Voters.—Declarations of a voter, made after election, as to his qualifications, held not admissible in an election contest to show he was disqualified.—Black v. Pate, Ala., 30 South. Rep. 434.

58. ELECTIONS—Secrecy of the Ballot.—Secrecy required in elections held not applicable to one guilty of illegal voting.—Black v. Pate, Ala., 30 South. Rep. 434.

59. ELECTRICITY—Right to Use of Streets.—Until a borough council passes an ordinance regulating the use of streets, and electric light company, having obtained the consent of owners, may string its wires in the borough streets.—Point Pleasant Electric Light & Power Co. v. Borough of Bay Head, N. J., 49 Atl. Rep. 1108.

60. EMBEZZLEMENT — Defense.—Contention that accused, the secretary of a corporation, who had misappropriated its moneys, was not guilty because by-laws of corporation required treasurer to keep such moneys held without merit; it appearing the secretary actually had control of them in the business.—People v. Butts, Mich., 87 N. W. Rep. 224.

61. EMINENT DOMAIN—Compensation.—Where a railroad company has entered upon land and paid no compensation therefor, and there was a demand for compensation, the railroad company is not entitled to enjoin ejectment without being compelled to pay compensation for the land so taken.—McLure v. Alabama Midland Ry. Co., Ala., 30 South. Rep. 440.

62. EMINENT DOMAIN — Compensation—Conveyance.—Where, pending the hearing of exceptions to allowance of compensation in condemnation proceedings, the land was conveyed, the owners of the land when the report was confirmed were entitled to compensation.—Virginia-Carolina Ry. Co. v. Booker, Va., 39 S. E. Rep. 591.

63. EMINENT DOMAIN — Public Purpose—Demurrer.—The objection that the face of a petition to condemn land for public purpose shows that the alleged purpose is not public may be raised by demurrer.—Parker v. Superior Court of Skohomish Co., Wash., 66 Pac. Rep. 154.

64. EQUITY—Special Commissioner to Execute Decree of Sale.—In suit to enjoin a sale under trust deed, where defendants set up judgment liens, and asked for marshaling of assets and sale to pay liens, held proper to appoint a special commissioner to execute decree of sale.—Martin v. Kester, W. Va., 39 S. E. Rep. 599.

65. ESTOPPEL—Heirs Bound by Deed of Ancestor.—Heirs who assert the validity of certain deeds through which their ancestor acquired title, in ejectment therefor, cannot defend a suit on a mortgage given by the ancestor on the ground of the invalidity of such deeds.—Cline v. Wixson, Mich., 87 N. W. Rep. 207.

66. ESTOPPEL—Wife's Laches.—Evidence of a wife's laches, negligence, and silence held to estop her from claiming title to her property, which her husband had wrongfully conveyed to a *bona fide* purchaser.—Murphy v. Ganey, Utah, 66 Pac. Rep. 190.

67. EVIDENCE—Deposition.—Under Mill's Ann. St. §§ 4816, 4822, the deposition of plaintiff's agent in replevin against executor held admissible.—King Shoe Co. v. Chittenden, Colo., 66 Pac. Rep. 178.

68. EVIDENCE — Expert — Hypothetical Question.—A hypothetical question asked an expert held not subject to the objection that it was not based on the case shown by the evidence.—Collins v. City of Janesville, Wis., 87 N. W. Rep. 241.

69. EVIDENCE—Non-Expert—Manner of Walking.—A non-expert witness may testify in an action for personal injuries as to the manner in which plaintiff walked after recovering from the injury.—Collins v. City of Janesville, Wis., 87 N. W. Rep. 241.

70. EVIDENCE—Parol — Ambiguity.—Parol evidence held admissible to explain meaning of words which are ambiguous when applied to the subject-matter.—Andrews v. Robertson, Wis., 87 N. W. Rep. 190.

71. EVIDENCE—Photographs.—A photograph of the place of the accident held inadmissible, being taken a year after the accident occurred, and not shown to represent the situation as it was.—Iroquois Furnace Co. v. McCrea, Ill., 61 N. E. Rep. 79.

72. EXECUTORS AND ADMINISTRATORS — Appointment.—In a suit by an administrator against the administrator to collect, the appointment of the administrator, unless void, cannot be questioned.—Salomon v. People, Ill., 61 N. E. Rep. 88.

73. EXECUTORS AND ADMINISTRATORS — Presentment of Claims.—The fact that executors know a claim is made against the estate does not dispense with necessity of presenting it to the court under Administration Act, § 70.—Morse v. Pacific Ry. Co., Ill., 61 N. E. Rep. 104.

74. EXECUTORS AND ADMINISTRATORS — Removal.—An administrator who acquiesced in the conduct of his attorneys in being retained by one of the heirs, who claimed the entire estate, held to have violated the duties of his trust, and to be subject to removal.—*In re* Healy's Estate, Cal., 66 Pac. Rep. 175.

75. FALSE IMPRISONMENT — Evidence.—Evidence is admissible on behalf of the plaintiff, in an action for false imprisonment, that he was confined with criminals and was compelled to sleep without adequate clothing.—Miller v. Fano, Cal., 66 Pac. Rep. 183.

76. FALSE PRETENSES—Indictment.—An indictment charging the accused with having obtained credit by a false written statement of the credit of the firm of which accused was a member charges a criminal offense.—Berkenfield v. People, Ill., 61 N. E. Rep. 96.

77. FEDERAL COURTS—Jurisdiction of State Court.—The circuit court of the United States is without juris-

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diction to enjoin a state from enforcing its own laws.—State v. Chicago, R. I. & P. R. Co., Neb., 87 N. W. Rep. 188.

78. FINES—Imprisonment.—Where defendant was ordered to be imprisoned until a fine was satisfied at a certain rate per day, the failure to require defendant to work out the fine does not render the sentence void.—Berkenfield v. People, Ill., 61 N. E. Rep. 96.

79. FIXTURES—Leanto.—A leanto attached to a section house, which was constructed by the section foreman while occupying the house, held a fixture belonging to the realty, and not to the tenant.—Mueller v. Chicago, M. & St. P. Ry. Co., Wis., 87 N. W. Rep. 289.

80. FRAUDULENT CONVEYANCES—Reference to Master.—Where a debtor conveyed property as security for his debt, which was for several thousand dollars in items of from $5 to $20 each, another creditor is entitled to a statement of an account, and a reference to a master is proper.—Platt v. McClong, N. J., 49 Atl. Rep. 1125.

81. FRAUDULENT CONVEYANCES—"Solvency."—A vendor is solvent at the time of the sale if he possesses a substantial excess of assets on a cash basis over his liabilities.—Marvin v. Anderson, Wis., 87 N. W. Rep. 226.

82. GRAND JURY—Non-Attendance of Juror.—Under Code ch. 157, § 4, when grand jurors drawn according to law fail to attend, the court may summon any qualified persons, whether included in prepared list or not.—State v. Carter, W. Va., 39 S. E. Rep. 611.

83. GUARDIAN AND WARD.—Claim of guardian against ward's estate for money paid the latter's board held properly disallowed.—*In re* Ceas' Estate, Cal., 66 Pac. Rep. 187.

84. HABEAS CORPUS—Presumption.—Where there is no bill of exceptions, nor anything showing that the court's consideration of the case was restricted to the validity of the commitment by the mayor, it will be presumed that the order of the probate court was correct.—Pruitt v. State, Ala., 30 South. Rep. 451.

85. HIGHWAYS—Rule Where Two Vehicles Meet.—Pol. Code, § 2931, held to apply to a vehicle being driven on a street car track which turned to the left on meeting a car, thereby colliding with a wheelman on the right side of the road.—Diehl v. Roberts, Cal., 66 Pac. Rep. 202.

86. HIGHWAYS—Street Improvements—Cost.—Abutting property owners cannot be charged with the cost of constructing a street to the extent that such cost was increased by constructing the street under the tracks of a railroad.—Louisville Steam Forge Co. v. Mehler., Ky., 64 S. W. Rep. 396.

87. HIGHWAYS—Street Improvements—Damages.—In an action to enforce a lien for the cost of a street improvement, the fact that the defendant has been damaged by a change of the street, and that no steps were taken to fix the damage before the injury was done, constitutes no defense.—Louisville Steam Forge Co v. Mehler, Ky., 64 S. W. Rep. 396.

88. HOMICIDE—Declarations of Deceased.—Testimony of witness that before the killing he heard deceased say that the defendant was crazy is inadmissible.—Kimball v. State, Ala., 30 South. Rep. 454.

89. HOMICIDE—Evidence.—In prosecution for murder, evidence that a few hours before deceased had assaulted defendant with a gun, and that at that time a third person interfered with the deceased, who drew a gun and threatened to kill him, was not admissible.—Willingham v. State, Ala., 30 South. Rep. 429.

90. HUSBAND AND WIFE—Power of Wife to Sell Land.—Code, § 2528, authorizing a married woman to alienate lands where her husband is a non-resident, held to apply where wife and husband are both non-residents.—High v. Whitfield, Ala., 30 South. Rep. 449.

91. INJUNCTION—Adequate Remedy—Trespass.—A bill to restrain defendants from trespassing on complainant's land held not maintainable, where there an adequate remedy at law.—High v. Whitfield, Ala., 30 South. Rep. 449.

92. INJUNCTION—Electric Wires.—Injunction will lie to restrain borough officers from cutting electric wires rightfully erected in the borough streets, since damages would not afford an adequate remedy.—Point Pleasant Electric Light & Power Co. v. Burough of Bay Head, N. J., 49 Atl. Rep. 1108.

93. INSURANCE—Refunding Taxes on Unearned Premiums.—Equity will compel the state insurance superintendent to refund taxes collected on unearned premiums and enjoin their further collection.—German Alliance Ins. Co. v. Van Cleave, Ill., 61 N. E. Rep. 94.

94. INSURANCE—Unliquidated Losses.—Rule that payment in part of the amount due on a contract at or after maturity does not operate as a satisfaction of the whole, held not to apply to an unliquidated loss under an open insurance policy.—Riggs v. Home Mut. Fire Protection Assn., S. Car., 39 S. E. Rep. 614.

95. INTEREST—When Chargeable.—Where the duty of one person is to be always ready to pay over money whenever another is entitled to receive it, he is not generally chargeable with interest.—Mathewson v. Davis, Ill., 61 N. E. Rep. 68.

96. INTOXICATING LIQUORS—Liability of Agent.—Conviction cannot be had, under an indictment for the illegal sale of liquors, where the evidence shows that defendant was only the agent or a friend of the purchaser in procuring the liquors.—Maples v. State, Ala., 30 South. Rep. 428.

97. INTOXICATING LIQUORS—Liability of Agents of Seller.—Under an indictment for selling liquor without a license, a conviction cannot be had where the evidence shows that defendant acted only as the agent or a friend of the purchaser in procuring the liquor.—Bonds v. State, Ala., 30 South. Rep. 427.

98. INTOXICATING LIQUORS—Licenses—Unjust Discrimination.—An ordinance prohibiting the granting of licenses for the sale of liquor in quantities of less than four gallons in a single package, except at a regularly licensed saloon or dram shop, held not void for unjust discrimination.—People v. Harrison, Ill., 61 N. E. Rep. 99.

99. INTOXICATING LIQUORS—Selling to Minors.—Under Rev. St. 1898, § 1557, it is criminal for a saloon keeper to sell two drinks of liquor to an adult accompanied by a minor, and to give one drink thereof to the minor.—Nelson v. State, Wis., 87 N. W. Rep. 285.

100. JUDGES—De Facto Judge.—Act done by *de facto* judge by color of office is valid, though it may afterwards be decided that he was not lawfully elected, or was disqualified, or that his office had been vacated.—State v. Carter, W. Va., 39 S. E. Rep. 611.

101. JUDGES—Special Judge.—Absence of special judge or refusal to hold court vacates his continuance, and, in absence of the regular judge, justifies election of some other person to hold court.—State v. Carter, W. Va., 39 S. E. Rep. 611.

102. JUDGMENT—Foreign Judgments—Open to Inquiry.—Jurisdiction of a court of a foreign state held open to inquiry when its judgments are sought to be enforced.—Thum v. Pyke, Idaho, 66 Pac. Rep. 157.

103. JUDGMENT—Interlocutory Decrees.—Interlocutory decrees entered in a suit for an accounting between owners of real estate held not *res judicata* as to existence of partnership between such owners.—Houck's Admr. v. Kerfoot's Admr., Va., 39 S. E. Rep. 590.

104. JUDGMENT—Proof of Collateral Fact.—A judgment is admissible to prove a collateral fact as against parties who were not parties to such judgment.—Phillips v. Yon, S. Car., 39 S. E. Rep. 618.

105. JUDGMENT—Res Judicata—Under Code Civ. Proc. § 1911, judgment rendered in a vendor's action to quiet title against purchaser held not *res judicata*

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of the purchaser's action to recover purchase money paid.—Heilig v. Parlin, Cal., 66 Pac. Rep. 186.

106. JUDGMENT—Setting Aside Default.—The authority of the superior court, under Code Civ. Proc. § 473, to set aside default, is confined to the discretion of the court, and will not be disturbed on appeal unless abused.—Winchester v. Black, Cal., 66 Pac. Rep. 197.

107. JURY—Interest of Jurors.—Plaintiff, in action against employer for negligence, can question jurors as to their interest in the company which insured defendant against such liabilities.—Iroquois Furnace Co. v. McCrea, Ill., 61 N. E. Rep. 79.

108. JURY—Mistake in Names.—Mistake in name of jurors held to constitute no ground for quashing *venire*.—Kimbrell v. State, Ala., 30 South. Rep. 454.

109. LANDLORD AND TENANT—Lessee's Failure to Sign.—Failure of lessee of school lands to sign the lease held not to invalidate the same.—State Board of Land Comrs. v. Carpenter, Colo., 66 Pac. Rep. 165.

110. LANDLORD AND TENANT—Lien of Furniture.—Mills' Ann. St. § 2854, does not give the lessor of an office a lien on the furniture of his tenant for the rent thereof.—Morse v. Morrison, Colo., 66 Pac. Rep. 169.

111. LANDLORD AND TENANT—Statutory Lien.—Where tenant agrees to pay a fixed rent for certain mules, and to pay a certain sum if such mules die, the amount fixed as indemnity is a personal obligation for which there is no statutory lien.—Bush v. Willis, Ala., 30 South. Rep. 443.

112. LARCENY — Indictment.—Count of indictment charging larceny of goods held not defective for not stating the amount and quantity of the articles.—State v. Moore, N. Car., 39 S. E. Rep. 626.

113. LIBEL AND SLANDER—Damages.—Where a virtuous woman was subjected to repeated charges of whoredon, a verdict of $600 in an action for slander will not be deemed excessive.—Hacker v. Heiney, Wis., 87 N. W. Rep. 249.

114. LICENSES—Constitutionality.—Under Const. art. 10, §§ 1, 4, held that Acts 1895-96, p. 218, authorizing the city of L to levy a license tax on the business of manufacturing was void, and ordinances passed in pursuance of the power imposing a license tax on manufacturers were inoperative.—Thomas v. Snead, Va., 39 S. E. Rep. 586.

115. LIFE INSURANCE—Proper Party—Personal Representative.—The personal representative of one beneficiary held the proper party to bring an action on a life insurance policy.—Ives v. Mutual Life Ins. Co. of New York, N. Car., 39 S. E. Rep. 631.

116. MALICIOUS PROSECUTION—Inferring Malice.—In an action for malicious prosecution, malice may be inferred from the want of probable cause.—Lauterbach v. Netzo, Wis., 87 N. W. Rep. 280.

117. MANDAMUS—Appeal.—An order awarding a writ of *mandamus* in a proceeding in which issue is joined by the return is a judgment in a civil action, from which an appeal may be taken.—State v. Giljohann, Wis., 87 N. W. Rep. 245.

118. MANDAMUS—Motion to Quash.—A motion to quash cannot be properly interposed to return to a writ of *mandamus*.—State v. Giljohann, Wis., 87 N. W. Rep. 245.

119. MARRIAGE—Annulment for Incapacity.—In a proceeding by a wife for separate maintenance, held competent to entertain a cross-bill for a decree annulling the marriage on the ground of defendant's mental incapacity.—Pyott v. Pyott, Ill., 61 N. E. Rep. 88.

120. MECHANICS' LIENS—Completed Machines.—Under mechanic's lien act, a lien does not attach for the purchase price of completed machines, which are stayed in their places merely to make them steady and not to make them part of the realty.—Campbell v. John W. Taylor Mfg. Co., N. J., 49 Atl. Rep. 1119.

121. MORTGAGES—Assignee—Notice.—The rule that an assignee of a mortgage, to protect himself from payment to the mortgagee, must notify the mortgagor, does not apply to a grantee of the mortgagor who has covenanted to pay the debt.—Schultz v. Sroelowitz, Ill., 61 N. E. Rep. 92.

122. MORTGAGES — Description — Indefiniteness. — Mere indefiniteness in the discription of land conveyed in a mortgage will not necessarily invalidate it if certainty can be given the description by evidence of extrinsic facts showing the situation of the parties, etc.—Caston v. McCord, Ala., 30 South. Rep. 481.

123. MORTGAGES—Equity of Redemption.—Where a debtor deeds property to a creditor as security, he still has an equity of redemption in the property.—Platt v. McClong, N. J., 49 Atl. Rep. 1125.

124. MORTGAGES—Foreclosure—Satisfaction.—On foreclosure, where satisfaction of mortgage is alleged, it must be by direct payment, or agreement what the sum supposed to be set off should be received as payment.—Provident Life & Trust Co. v. Parrott, N. J., 49 Atl. Rep. 1131.

125. MORTGAGE—Lien.—Where part of mortgaged premises have been held for over 20 years by grantees of the mortgagor without offering to pay interest or principal, or other recognition of mortgage, and without entry by the mortgagee, the mortgage held not a lien on such portion.—Wills v. Field, N. J., 49 Atl. Rep. 1128.

126. MORTGAGES—Notice of Foreclosure.—A notice of foreclosure by advertisement, which states the date and the place of record, is sufficient, though it does not state the correct date of the instrument.—Brown v. Burney, Mich., 87 N. W. Rep. 221.

127. MORTGAGES—Payment of Debt Without Authority.—Payment of a mortgage debt to one without authority to receive it held not to satisfy the mortgage.—Schultz v. Sroelowitz, Ill., 61 N. E. Rep. 92.

128. MORTGAGES — Redemption.—Where two lots were conveyed by trust deed and subsequently devised to different persons, a judgment creditor of one of such persons held not entitled to redeem the lot devised to the other from sale on foreclosure of such deed, and by so doing he acquired no title thereto which he could have registered under the Torrens law.—Huber v. Hess, Ill., 61 N. E. Rep. 61.

129. MORTGAGES—Sale—Purchase by Trustee.—Where the trustees in a trust deed sell the property to a bank in which they are stockholders and directors, and the grantor sues to set aside the sale as void, injury to the complainant must be averred.—Copsey v. Sacramento Bank, Cal., 66 Pac. Rep. 204.

130. MORTGAGES—Valid Lien.—A mortgage given by an heir, who had acquired a conveyance of the land of his ancestor from another heir, who held under a forged deed, held to be a valid lien on the interest of the two heirs in the mortgaged property.—Cline v. Wixson, Mich., 87 N. W. Rep. 207.

131. MUNICIPAL CORPORATIONS—Annexation.—Under Annexation Act 1889, § 18, ordinances relating to the sale of intoxicating liquors passed by a village before it became annexed to the municipality held to continue in full force and effect.—People v. Harrison, Ill., 61 N. E. Rep. 99.

132. MUNICIPAL CORPORATIONS—Child on Sidewalk.—A child on a sidewalk and indulging in play held a traveler, to whom the city owes the duty of keeping its sidewalks in a reasonably safe condition.—Collins v. City of Janesville, Wis., 87 N. W. Rep. 241.

133. MUNICIPAL CORPORATIONS—Compelling Execution of Trust.—A city which is a devisee in a will held not required to allege, in a complaint filed to compel the trustees to execute the trust, that the corporation counsel was authorized to commence the suit.—City of Seattle v. McDonald, Wash., 66 Pac. Rep. 145.

134. MUNICIPAL CORPORATIONS—County Regulation of Business.—St. 1901, p. 685, held to prevent county supervisors from imposing any tax for revenue or for the

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regulation of business within the limits of any municipality in the county.—*Ex parte* Pfirrman, Cal., 66 Pac. Rep. 205.

135. MUNICIPAL CORPORATIONS—Notice.—In an action for injuries received on a defective sidewalk, held, that the question whether the city had notice of the defect was for the jury.—Wilkins v. City of Flint, Mich., 87 N. W. Rep. 195.

136. MUNICIPAL CORPORATIONS—State Interference.—Act March 21, 1901, giving governor power to appoint commission to redistrict city wards, held unconstitutional as authorizing regulation of municipal affairs by a commission.—Gilhooly v. City of Elizabeth, N. J., 49 Atl. Rep. 1106.

137. NUISANCE—Liquor Business.—Illegally carrying on liquor business held not a nuisance, and to be enjoined as such, in absence of statute declaring it a nuisance.—Pike County Dispensary v. Town of Brundidge, Ala., 30 South. Rep. 451.

138. OFFICERS—Extent of Authority.—Acts of public officer are valid only to the extent of the authority actually vested in that officer.—State v. Chilton, W. Va., 39 S. E. Rep. 612.

139. OFFICERS—Sheriff's Fees.—A sheriff, demanding fees, must point to some provision of law authorizing demand.—Torbert v. Hale County, Ala., 30 South. Rep. 488.

140. PARTITION—Validity.—Though oral partition proceedings were void for failure to join one of the parties, and as contrary to the statute of frauds, and not followed by 20 years' possession, held, that the tenants in common could be estopped from denying the validity.—Wescoat v. Wilson, N. J., 49 Atl. Rep. 1112.

141. PARTNERSHIP—Unpaid Subscription.—Liability for corporate stock held not partnership, but individual liability.—Morse v. Pacific Ry. Co., Ill., 61 N. E. Rep. 104.

142. PLEADING—Amendment.—Where, in an action for possession of realty, defendants set up a mortgage to plaintiff and pray its cancellation, plaintiffs may amend by asking a foreclosure of the mortgage.—Roundtree v. Blount, N. Car., 39 S. E. Rep. 631.

143. PLEADING — Amendment — Surprise. — Where notice of a proposed amendment setting up the defense of *res judicata* is given before the trial, and the court offers to grant a continuance if the opposite counsel is taken by surprise, the granting of the amendment is not erroneous.—Murphy v. Ganey, Utah, 66 Pac. Rep. 190.

144. PRINCIPAL AND AGENT—Not Taken on Condition.—Holder of note taken by his agent on condition not disclosed to such holder cannot repudiate the condition and enforce note.—Andrews v. Robertson, Wis., 87 N. W. Rep. 190.

145. PRINCIPAL AND AGENT—Selling on Credit.—An agent cannot sell on credit, unless authorized by power of attorney or by fixed usuage of trade.—State v. Chilton, W. Va., 39 S. E. Rep. 612.

146. PROCESS—Service on Foreign Corporations.—Jurisdiction of an action in a foreign state against a corporation held not obtained by service on a former secretary of the corporation, and judgment rendered thereon will not be enforced in the state.—Thum v. Pyke, Idaho, 66 Pac. Rep. 157.

147. PROHIBITION—Jurisdiction. — An attempted appeal from an order overruling a demurrer to a petition to condemn land does not give the supreme court jurisdiction to issue a writ of prohibition restraining the superior court from taking further action in the cause.—Parker v. Superior Court of Snohomish County, Wash., 66 Pac. Rep. 154.

148. PUBLIC LANDS.—An entry of state land held special, entitling the locator to preference over a claimant holding an older grant, but a younger entry.—Christian v. Gernt, Tenn., 64 S. W. Rep. 399.

149. PUBLIC LANDS—Extent—Boundaries.—Contract of sale by the state held not to include title lands within the calls of a certain lot, but only in front of, adjacent to, or abutting on the same.—Sheldon Logging Co. v. Gosser, Wash., 66 Pac. Rep. 151.

150. QUIETING TITLE—Bill—Allegations.—A bill filed under Code, §§ 809-813, to quiet title need not contain an offer to do equity.—Sloss-Sheffield Steel & Iron Co. v. Board of Trustee of University of Alabama, Ala., 30 South. Rep. 433.

151. QUIETING TITLE—Proof.—In a suit to quiet title plaintiff must establish the validity of his own title, as well as the invalidity of that of his opponent.—Shelton Logging Co. v. Gosser, Wash., 66 Pac. Rep. 151.

152. REFERENCE—Action to Recover Money.—Action to recover moneys collected by defendant on plaintiff's account held to be for a jury, and not for reference.—Wilson v. Union Distilling Co., Colo., 66 Pac. Rep. 170.

153. REFERENCE—Excessive Fees.—Trial court's allowance of fees to referees in partition proceedings held not so excessive as to be an obvious abuse of discretion, justifying reversal on appeal.—Treadwell v. Treadwell, Cal., 66 Pac. Rep. 197.

154. REFORMATION OF INSTRUMENTS—Requisites.—The reformation of a contract on the ground of mistake should not be decreed unless there is clear proof of mutual mistake, or mistake of one party induced by the fraud, deception, or wrong of the other party.—Clack v. Hadley, Tenn., 64 S. W. Rep. 403.

155. RELIGIOUS SOCIETIES — Realty—Possession.—A congregation after taking possession of realty purchased by their trustees, cannot contest the validity of mortgage given for purchase price.—Rountree v. Blount, N. Car., 39 S. E. Rep. 631.

156. SALES—Failure to Deliver.—Measure of damages for seller's failure to deliver goods to buyer, knowing him to be a retailer, held to be the buyer's profit; otherwise, the difference between the contract and market price.—Denhard v. Hirst, Ky., 64 S. W. Rep. 393.

157. SET-OFF AND COUNTERCLAIM — Unliquidated Damages.—On bill to foreclose bond and mortgage on wife's land given as collateral on husband's note, husband cannot, on foreclosure, set up counterclaim for unliquidated damages.—Provident Life & Trust Co. v. Parrott, N. J., 49 Atl. Rep. 1131.

158. SPECIFIC PERFORMANCE—Contract to Maintain Water Stage.—Contract between state canal commissioners and Chicago sanitary district, whereby the latter agreed to maintain the water stage in canal, held not such as equity would specifically enforce.—Canal Comrs. v. Sanitary Dist. of Chicago, Ill., 61 N. E. Rep. 71.

159. SPECIFIC PERFORMANCE—Damages.—Court, in an action to enforce specific performance of a contract, held to have power to retain jurisdiction thereof to assess damages for portion not enforceable.—Lyle v. Addicks, N. J., 49 Atl. Rep. 1121.

160. SPECIFIC PERFORMANCE—Inability to Enforce Decree.—Specific performance of an agreement to take down or remove a building will not be decreed, because of the court's inability to see that the work is carried out, and damages at law are an adequate remedy.—Armour v. Connolly, N. J., 49 Atl. Rep. 1117.

161. STATES—Authority of Officer to Bid.—A state is not bound by unauthorized act of public officer.—State v. Chilton, W. Va., 39 S. E. Rep, 612.

162. STATES—Board of Land Commissioners.—Action may be maintained against the state board of land commissioners to reinstate a lease to school lands wrongfully canceled; the duties involving business, and not governmental duties.—State Board of Land Comrs. v. Carpenter, Colo., 66 Pac. Rep. 165.

163. STATES—Sale on Credit.—Secretary of state cannot sell books of state on credit, and is responsible

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for their proceeds as if sold for cash.—State v. Chilton, W. Va., 39 S. E. Rep. 612.

164. STATUTES—Construction—Object of Enactment.—The general provisions of a statute are to be construed together in the light of the general objects and purposes of its enactment, and so as to give effect to the main intent.—People v. Harrison, Ill., 61 N. E. Rep. 99.

165. STATUTES — Duplex Title.—St. 1901, p. 685, held not open to the objection that the title is duplex, in that it purports to treat of the powers of counties, and also the powers of municipalties.—*Ex parte* Pfirrman, Cal., 66 Pac. Rep. 205.

166. TAXATION—Exemptions—Charitable Educational Purposes.—Under Const., art. 10, § 8, the legislature may exempt from taxation property the proceeds of which are used for charitable and educational purposes.—City of Staunton v. Mary Baldwin Seminary, Va., 39 S. E. Rep. 596.

167. TAXATION—Exempt Property—Injunction.—Injunction will lie to prevent the enforcement of a tax levied on exempt property.—City of Staunton v. Mary Baldwin Seminary, Va., 39 S. E. Rep. 596.

168. TAXATION — Sale—Void for Irregularities.—The failure to issue a subpœna to a delinquent taxpayer as required by the general tax law of 1869, in proceedings to sell lands for taxes, renders the sale void.—Nowlen v. Hall, Mich., 87 N. W. Rep. 228.

169. TAXATION—Tax Deeds—Void Assessment.—Tax deeds issued on an absolutely void assessment, though regular on their face, held voidable.—Eaton v. Bennet, N. Dak., 87 N. W. Rep. 188.

170. TAXATION—Void Assessment.—Where the assessor failed to attach an affidavit to assessment roll, taxes attempted to be charged during the year were wholly void.—Eaton v. Bennett, N. Dak., 87 N. W. Rep. 188.

171. TENANCY IN COMMON—Adverse Possession.—Where owner of real estate sells a half interest therein and takes a mortgage from the purchaser, he is in no condition to assert adverse possession until foreclosure.—Nowlen v. Hall, Mich., 87 N. W. Rep. 222.

172. TRIAL—Argument — Opening and Close.—Where defendant admitted the delivery of a part of the goods sued for, and pleaded a counterclaim for failure to deliver other goods, the counterclaim being denied, defendant was entitled to the concluding argument to the jury.—Denhard v. Hirst, Ky., 64 S. W. Rep. 398.

173. TRUSTS—Construction.—The word "sell" in a trust deed construed not to imply a transfer for valuable consideration other than what had already passed.—Smith v. Baxter, N. J., 49 Atl. Rep. 1130.

174. TRUSTS — Trustees — Liability for Interest.—Trustee, entitled to retain purchase money of land until title was perfected, held liable for interest from the time the title became perfect by limitations.—Mathewson v. Davis, Ill., 61 N. E. Rep. 68.

175. VENDOR AND PURCHASER—Conflict of Laws.—Where a contract was made in one state for the purchase of land lying in another, and an action for breach of contract was brought in the state where the land lay, the law of the state in which the contract was made will govern as to the damages recoverable.—Atwood v. Walker, Mass., 61 N. E. Rep. 58.

176. VENDOR AND PURCHASER — Entry.—Where a church voluntarily surrenders possession of realty claimed by purchase to another, and re-enters under deed and mortgage executed by their trustees, they cannot repudiate the transaction and hold under their first contract of purchase.—Rountree v. Blount, N. Car., 39 S. E. Rep. 681.

177. VENDOR AND PURCHASER — Equitable and Legal Owners.—An equitable part owner of mining claims, who assents to the bonding of the same by his co-owner, who holds the record title, has no standing in equity to impeach a conveyance made in accordance with the terms of the bond.—Cline v. James, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 961.

178. VENDOR AND PURCHASER — Misrepresentations.—A vendee of real estate held not entitled to a rescission on the ground of misrepresentations, where the facts relative to which the representations were made were obvious.—Trammell v. Ashworth, Va., 39 S. E. Rep. 596.

179. VENDOR AND PURCHASER — Misrepresentations.—Where a vendee of a house and lot occupied the same for a considerable time without claiming misrepresentations on the part of the vendor, held that she was not entitled to a rescission because of misrepresentations.—Trammell v. Ashworth, Va., 39 S. E. Rep. 596.

180. WATERS AND WATER COURSES—Conflict of Jurisdictions.—Where a stream rises in Idaho and flows into Utah, a court of the former state has no jurisdiction to try the title and right to the use of the water flowing in that portion of the stream which is situated in Utah and there diverted.—Conant v. Deep Creek & Curlew Val. Irr. Co., Utah, 66 Pac. Rep. 186.

181. WATERS AND WATER COURSES—Unreasonable Discrimination.—Equity will interfere to protect the public against unreasonable discrimination by a water company acting under a public franchise.—City of Mobile v. Bienville Water Supply Co., Ala., 30 South. Rep. 445.

182. WATER AND WATER COURSES — Use of Water.—Where it appeared that persons other than the plaintiffs and defendants were entitled to a prior use of water of stream, the court properly refused to award defendants the use of all the water in excess of plaintiffs' allowance.—Brown v. Baker, Oreg., 66 Pac. Rep. 196.

183. WILLS—Bequest to a Class.—A bequest in a will of a certain sum to various persons and to the heirs at law of A, held a gift of such sum to each of the heirs, and not to them as a class.—Auger v. Tatham, Ill., 61 N. E. Rep. 77.

184. WILLS—Construction of Devise.—A will in which testator directed a girl should be supported out of his estate so long as she remained a member of his family, or until she was 22, construed, and held to mean that the girl was entitled to support until she was 22.—Miller v. Miller, Va., 39 S. E. Rep. 597.

185. WILLS — Construction of Legacy.—Will construed, and held, that a legatee took nothing under the clause of the will giving the legacy on the happening of the contingency, where she was charged with the payment of the same by a subsequent clause of the will.—Woods v. Gilson, Mass., 61 N. E. Rep. 58.

186. WILLS—Contest—Evidence.—In a will contest, a question as to whether witnesses observed "any peculiarity of manner, speech, or conduct" was admissible.—Hogan v. Roche's Heirs, Mass., 61 N. E. Rep. 57.

187. WILLS—Contest—Evidence.—In a will contest, it was proper cross-examination to ask a witness whether he thought the testatrix had sufficient mental capacity at the time of an event stated.—Hogan v. Roche's Heir's, Mass., 61 N. E. Rep. 57.

188. WILLS — Execution — Conflict of Laws.—Provisions of 2 Civ. Code Cal. § 1313, relative to charitable devises, held not to apply to a will made in California devising realty situated in Washington.—*In re* Stewart's Estate, Wash., 66 Pac. Rep. 148.

189. WILLS—Trust Deed as Will.—A trust deed, providing for the conveyance of property on the death of the trustee, held not void because not executed as a will.—Smith v. Baxter, N. J., 49 Atl. Rep. 1130.

190. WITNESSES — Grantee of Deceased Grantor.—Rev. St. 1898, § 4318, does not prevent a grantee of a deceased grantor from testifying to conversations with the latter, in a suit by a divorced wife of the grantor to establish title in her own right to the property conveyed.—Murphy v. Ganey, Utah, 66 Pac. Rep. 190.

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Central Law Journal.

ST. LOUIS, MO., DECEMBER 6, 1901.

There is a strong sentiment arising, both in this country and England, against child insurance. The Montreal board of health has taken a most decided stand on this question. It seems that for a number of years there has been a most alarming increase in infant mortality in that city, and the board of health, authorized to make an investigation of the matter, reported that many of the infants so dying were insured, and in some cases were neglected in order that the parents might collect on the policies. The evidence is so strong that it is probable that the Canadian parliament will forbid child insurance altogether.

The law has always recognized an insurable interest in a child's life on the part of its parents. Loomis v. Insurance Co., 6 Gray (Mass.), 396; Grattan v. Insurance Co., 15 Hun (N. Y.), 74; Walseman v. Insurance Co., 30 Ont. 705; Carpenter v. Insurance Co., 161 Pa. St. 9. The ground of this interest is not only pecuniary, but upon consideration of strong morals and the force of natural affections. It is, indeed, strange and contrary to all human experience that parents should be so insensible to all natural affection thus to be willing to profit by the death of their offspring. Our boasted civilization is not something to be unduly proud of when such cankerous growths are reported to be so prevalent. If this case were exceptional it might be disregarded, but the same charges have often been made in England and in this country, and public opinion is rapidly becoming fixed as opposed to child insurance, at least where the amount of the policies is above what is necessary to pay the burial expenses of the child, and especially as to children of tender years whose services are of no pecuniary value.

decisions in the Insular Tariff Cases. In a learned dissertation on the "Absence of Judicial Precision," the honorable court which presumed to impose such decisions upon the country, comes in for severe chastisement. But unhappily for our youthful brethren, they apparently lost themselves in the labyrinth of their own discussion. "Elaborate discussion," says the learned writer, "and irreconcilable differences upon general principles and upon fascinating and fundamental problems suggested by equally indiscriminating *dicta* in other cases, complicate, when they do not hide, the points at issue." With this wonderfully indefinite impression of the meaning of the court's decision in these cases, it was easy and very proper on their part to resign the struggle with this frank admission: "It is extremely difficult to determine exactly what has been decided." Not profiting, however, by their narrow escape in the first encounter, they plunge more recklessly into the unequal struggle with unfortunate results. The conclusions reached by our contemporary are too ridiculous to be seriously discussed. "From our system of allowing judges to express opinions upon general principles (!) and of following judicial precedent (!!), two evils almost invariably result: our books are overcrowded with *dicta*, while *dictum* is frequently taken for decision. * * * Opinions such as those rendered cannot be allowed a permanent place in our system of government(!!!)" It is to be hoped that the successors of Mansfield and Marshall will be sufficiently humbled under this chastisement to profit by the correction. Otherwise they will undoubtedly lay themselves open to contempt of our honorable contemporary.

NOTES OF IMPORTANT DECISIONS.

HUSBAND AND WIFE—EFFECT OF MARRIED WOMEN'S ACTS ON WIFE'S CONTRACTS.—The recent case of Vann v. Edwards, 39 S. E. Rep. 66, is interesting, not so much because of the decision rendered as for the dissenting opinion of Judge Clark, on the proper construction of the

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husband, subject to her debts. Judge Clark, dissenting, condemns the illiberal attitude of the court in this and other cases. His plea for a liberal construction of constitutional or statutory provisions giving married women the right to contract is to be thoroughly commended. He says:

"In a barbarous age, woman was a slave, a chattel, and hence her property, and especially her chattels, passed to her master upon marriage, and with it the right to chastise her (Fitzh. Nat. Brev. 80; Litt. §§ 669, 670); which idea still survived to a late day (1 Bl. Comm. 444; Joyner v. Joyner, 59 N. Car., at page 326, 82 Am. Dec. 421; State v. Black, 60 N. Car. 262, 86 Am. Dec. 436); and though in State v. Oliver, 70 N. Car. 60, Settle, J., says at last 'the courts have advanced from that barbarism,' it has been held as lately as State v. Edens, 95 N. Car., 693, 59 Am. Rep. 294, that a man can commit the foulest libel upon his wife with impunity because she is his wife. Just in proportion as civilization has progressed, we have gotten away from a legal classification which placed in the same category 'infants, idiots, lunatics, convicts, and married women.' The laws of this state took married women out of that class, except as to the statute of limitations, and recent legislation has removed even the stigma of that 'survival' of the ideas of an age which deemed a married woman '*non sui juris*.' Const. 1868, art. 10, § 5, placed North Carolina nearly abreast of the legislation in England and our sister states by providing: 'The real and personal property of any female in this state,' after marriage, 'shall be and remain the sole and separate estate and property of such female, * * * and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.' The meaning of these words, never doubtful, was placed beyond controversy by the history of the movement for the emancipation of married women as to their property rights, and the uniform decisions in England and our sister states upon similar legislation or constitutional provisions. The clearly expressed meaning is that a married woman, as to the control of her property, shall 'remain' as if a *feme sole*, with liberty to devise or bequeath it, sell or dispose of it, except that, as to property which can only pass by 'conveyance,'—*i. e.*, by deed or mortgage,—the written assent of her husband is necessary. The general rule is that as to her 'property, real and personal,' her control is not changed by marriage. The sole restriction is that as to 'conveyances' the husband's written assent is needed. To construe 'conveyances' to mean ordinary dispositions of personal property, which are rarely made by 'conveyances,' is to put a forced meaning upon that word, and to veto the free control given a married woman in the first clause by making the restriction as broad as the liberty. It is to say, in effect, that a married woman is to have as full control of all her property, real and personal, as if she remained single, except that she is to have control of none of it, real or personal, without the written assent of her husband. Carrying out this idea, the courts invented the doctrine of 'charges in equity' without a line in any statute to support it, and thereby restricted a woman's rights over her property into narrower limits than she possessed before the adoption of the guaranty of emancipation given her by the constitution, though this charging in equity doctrine has since been virtually overruled. Brinkley v. Ballance, 126 N. Car., at page 396, 35 S. E. Rep. 631. If a woman could, as provided by the constitution, control her property is single, save as to alienation by deed, it follows that, of course, she can make contracts, as if single, whose enforcement might affect it. In New York, with the identical clause as to woman's control over property (for our convention copied it), and in all other states with similar provi ons, a married woman's right to contract is untrammeled. Bank v. Howell, 118 N. Car., at page 273, 23 S. E. Rep. 1005. But our decisions in later years have completely negatived the constitutional provision by holding that, if a married woman can contract without written consent of her husband, therefore she can subject her property to the payment of her liability, and therefore the courts will not allow her to sell, transfer, or assign her personal property without written consent of her husband, because her power to contract in some respect is restrained by Code, § 1826. If the restriction upon 'contracting' by that statute restrains the free control given by the constitution, then the statute, and not the constitutional provision, is null. But it seems to have been forgotten that the statute of frauds, for two centuries and a half, had made voidable oral contracts and agreements for sale of any interest in lands without any court ever conceiving that it was possible to hold that all verbal contracts were voidable, because realty could be sold to enforce the liability thereby created, and a party could thus 'do indirectly what he was forbidden to do directly.' Having left the broad, plain highway of the constitution, every step since has taken us further and further into the wilderness. The construction that a married woman's personal earnings are still the property of her husband belongs to to the age when she was her husband's chattel. It has no other support. There is no statute to that effect. It is true it was reannounced some 15 years ago by one of our ablest and most accomplished judges, who doubtless remembered that he had read it at law school in books hundreds of years old, but who forgot that he had read the decree of equality of woman's property rights in the constitution of 1868. And so on, from step to step, we have gone into the wilderness, away from the plain guaranty of the constitution that a married woman's rights over her property shall remain as if she were single, save that in deeds and mortgages the husband must give his written assent, just as he has like control

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over his own property, except that she must assent to the conveyance of his realty. Instead of holding to this plain, unmistakable provision, we have a multiplicity of judicial interpretations, reservations. restrictions, and conditions, till no one can say absolutely what are the rights of a married woman over her own property, except that they do not remain as if she were still single. The remedy is to get out of this wilderness, which becomes more and more tangled as we proceed, with the underbrush more and more confusing, and return to he straight and unmistakable highway marked out by the organic law, which is beautiful by its simplicity and clearness, and to plant our feet once more upon the rock of the constitution. Instead of the 'codeless myriad of precedent,' cited by Prof. Mordecai, the constitution has but one rule, which no one should misunderstand or misapply, which is that a married woman remains an absolute owner of her property as if she stayed single, except only that in deeds and mortgages the husband must give his written assent, which is exactly the case as to the husband's property, over which he retains the same control as if single, save that by statute, in deeds for his realty, the wife must oin."

THE CHICAGO SMOKE NUISANCE ORDINANCE AS A REGULATION OF INTERSTATE COMMERCE.

The city of Chicago passed an ordinance declaring the emission of dense smoke from the smoke-stack of any boat to be a public nuisance, and providing that the owner or owners of any boat, or person or persons employed as engineer or otherwise in the working of the engine or engines in said boat, who shall permit or allow dense smoke to issue or be emitted from the smoke-stack of any such boat, shall be deemed and held guilty of creating a nuisance, and for each such offense fined. The ordinance did not provide for any means of prevention of dense smoke and the devices recommended by the "society for prevention of smoke," which secured the passage of the ordinance, failed in their purpose when tried by the society's agents upon ugs. It did not limit liability to cases where smoke is negligently emitted, or except cases where dense smoke is caused by an emergency of navigation or for the preservation of life or property. The issuance of dense smoke, *per se*, was declared a nuisance. The local courts construed the word "dense" as meaning smoke that cuts off the view of objects on the other side of the chimney at the point of issue and in the line of vision, and not necessarily black. The question of duration, it will be noticed, is not material. Dense smoke issuing a few seconds is as much a violation of the ordinance as black clouds belching forth half a day. The question of frequency is not mentioned and, technically, a single puff of smoke is as much a nuisance as a thousand. It is generally agreed that the emission of dense smoke from chimneys can only be prevented by the burning of a particular kind of coal, anthracite, which at once brings up, in the coal-producing State of Illinois, the question of monopoly and discrimination against a very important state industry; or, if bituminous coal is used, it is necessary to attach to the machinery of the boat a mechanical device for the consumption of smoke not required by any act of commerce, and as such boats are, on account of the great expense of anthracite, built to burn bituminous coal, this would call for a change in construction.

Leaving the questions of monopoly and of whether the emission of dense smoke is inimical to the preservation of comfort, health, safety, order or morality of the public, and so a nuisance and within the scope of inherent police powers of a state and delegated to the municipality, as too large to deal with in the present article, we will consider only the validity of such an ordinance as it affects vessels engaged in interstate commerce and required by congress to be constructed in a particular way. The affirmative side of the question as to whether the state ordinance is or is not in conflict with congressional regulations is presented, not as the firm conviction of the writer, but as giving one side of an interesting problem. The Chicago river, running west from its connection with Lake Michigan about a mile and then dividing into two branches, one north and one south, running through the city, forms the port of Chicago. It is a navigable stream under the laws of the United States,[1] and the highway of commerce in its transit from the great lakes to foreign states, and although a public highway and subject to the general right of the state to control and regulate its use, this is only true in cases where congress has not exercised its

[1] Harmon v. City of Chicago, 110 U. S. 407.

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power in regard to it, or when, having exercised it, the state law does not come in conflict with the congressional regulation or interfere with the rights which are permitted by them.[2] The federal constitution, art. 1, § 8, cl. 3, provides that congress shall have power "to regulate commerce with foreign nations and among the several states." The word "commerce," said Chief Justice Marshall, in Gibbons v. Ogden,[3] in 1824, is uniformly understood by all America "to comprehend navigation. It was so understood when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government. * * * A power to regulate navigation is as expressly granted as if that term had been added to the word commerce." Among other cases in which this interpretation has been adopted by the United States Supreme Court is Henderson v. Mayor of N. Y.[4] In this case Mr. Justice Wayne said: "This power includes navigation upon the high seas and in the bays, harbors, lakes and navigable waters within the United States."

The word commerce includes transportation, which is essential to commerce, or, rather, is commerce itself.[5] It must include, therefore, by necessary implication, the means of transportation, since a power to navigate necessarily carries with it everything essential to the enjoyment of that power. The vessels by means of which the great bulk of lake traffic, coming from and going to foreign and interstate ports, is transported, are as much under the regulation of congress as though they had been expressly mentioned in the grant of federal power.

Tugs are the direct and indispensable accessories to commerce upon the great lakes. They may be and are considered by the courts, for the time being, a part of the vessels they tow. They are the servants of these vessels, the active power by which the vessel navigates,[6] after the water has become too shallow or the stream too narrow and dangerous for the larger vessel, unaided, to reach her port of destination. The lightering or towing is but the prolongation of the voyage of the vessels assisted to their port[7] of destination, which, in this case, means the grain elevators and freight depots along the banks of the Chicago river. The employment of tugs is distinctly maritime in its character,[8] and is so recognized in Harmon v. City of Chicago,[9] where the court states they are engaged in commerce among the states and perhaps with foreign nations, running in and out of the river and harbor at the port of Chicago, towing in large vessels freighted with the products of other states and of foreign nations, and admits that, without their use, it would be difficult, perhaps impracticable, for great vessels with their cargoes to get into or out of port.

Tugs are recognized by the federal government as a part of its commercial machinery and are regulated by act of congress, requiring inspection, a certificate of inspection, enrollment and license. It has enacted, from time to time, various statutes regulating steam vessels, including tugs, as to inspection of hulls and boilers, materials of which boilers shall be made and thickness of boiler plate and spaces between flues, proper attachment of safety valves, gauge cocks, low-water alarm indicators, steam gauges, fusible plugs, pressure of steam allowable, manner in which feed-water shall be delivered into boilers so as to prevent contracting the metal or injuring the boiler; statutes providing for punishment for improper construction of boilers, counterfeiting stamps, obstruction of safety valves, license of masters, chief mates, engineers and pilots;[10] and in § 4444 has provided that no state or municipal government shall impose upon pilots of steam vessels any obligation to procure a state or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by the act. The case of Harmon v. Chicago[11] was decided in accordance with this provision, and licenses imposed upon tugs by the city were held unconstitutional and void.

Statuatory regulations have been most minute, entering into many details, from the Banca tin, of which fusible plugs are to be

[2] Cooley's Const. Lim. (4th Ed.) 737.
[3] 9 Wheat. 1.
[4] 6 Wall. 35; 17 Wall. 560; 21 Wall. 456; 92 U. S. 270.
[5] R. R. Co. v. Huson, 95 U. S. 465.
[6] The Rescue, 2 Sprague Dist. Ct. Rep. 16.
[7] The Swan v. Davenport, 22 How. 244.
[8] The Acadia, 1 Brown Ad. Reps. 73.
[9] 110 Ill. 407.
[10] Rev. St. U. S. 1878, §§ 4427 to 4488.
[11] 110 Ill. 407.

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composed, to the smallest details of marking vessels' names on bow and stern and marking the draft,[12] and the color and position of lights.[13] In addition to punitory statutes already mentioned, neglect of duty as to the requirements mentioned, by any person on registered or enrolled vessels on a voyage upon the great lakes, is made punishable,[14] and congress has exercised police powers in navigable waters in an act directed against the obstruction thereof by bridges, wharves, rubbish, refuse, etc., in roadsteads, ports, navigable waters, etc, of the United States.[15] Congress has specifically extended its jurisdiction over the waters of the Chicago river, as in the act appropriating money for improving the harbor at Chicago.[16]

It being granted, then, that the power to regulate commerce includes the power to prescribe the laws governing the construction and operation of tugs, let us examine the nature of this power. It was said by Chief Justice Marshall, in Gibbons v. Ogden,[17] that there is great force in the argument of the appellant that the word "regulate" (as used in art. 1, §8, cl. 3, Fed. Const.) implied full power over the thing to be regulated, * * * and that full power implies the whole power and leaves no residuum; that a grant of the whole is imcompatible with the existence of a right in another to any part of it, and that it excludes necessarily the action of all others that would perform the same operation on the same thing, and that the court was not satisfied that it had been refuted. This has been interpreted by most later cases as a decision that the power of congress to regulate commerce is exclusive. Chief Justice Taney, in the License Cases,[18] placed a different construction upon it, but the almost universally accepted interpretation is as above stated. This doctrine has been adhered to in many cases.[19] It is also held in Gibbons v. Ogden that "regulation is designed for the entire results, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated." In other words, congress must be taken to have passed all the laws regulating commerce which it deems necessary, expedient or proper. As said in Prigg v. Commonwealth:[20] "It would seem upon just principles of construction that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject and, by necessary implication, prohibit it, for if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. * * * The legislation of congress, in what it does prescribe, manifestly indicates that it does not intend there shall be farther legislation to act upon the subject-matter." The court, in Houston v. Moore,[21] adds to this the opinion that the will of congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed.

Applying this reasoning to the present case, when congress passed the act of September 19th, 1890, requiring inspection of tugs, enrollment and license, it would seem to have laid down all the laws necessary to be complied with by such boats before they can lawfully navigate the waters of the Chicago river and Lake Michigan, and that having given tugs, through their ministerial officers, inspectors, certificates of inspection, the federal government thereby put the seal of its sanction upon the machinery of such

[12] 26 U. S. Stat. at Large, 765.
[13] 9 U. S. Stat. at Large, 382, Act 1849, ch. 105.
[14] 26 U. S. Stat. at Large, ch. 874, p. 424.
[15] 26 U. S. Stat. at Large, 453 §§ 4 to 10.
[16] 26 Stat. at Large, ch. 907, p. 433.
[17] 9 Wheat. 209.
[18] 5 How. 574.
[19] Brown v. State, 12 Wheat. 419; The Passenger Cases, 7 How. 400; Prigg v. Commonwealth, 16 Pet. 617; Houston v. Moore, 5 Wheat. 1, 21, 22; Sinnot v. Davenport, 22 How. 227; Swan v. Davenport, 22 How. 244; Crandall v. Nevada, 6 Wall. 35; *Ex parte* McNeil, 13 Wall. 236; State Freight Tax Cases, 15 Wall. 232; R. R. Co. v. Fuller, 17 Wall. 560; R. R. Co. v. Maryland, 21 Wall. 456; Henderson v. Mayor of New York, 92 U. S. 259; Welton v. State, 91 U. S. 275; R. R. Co. v. Husen, 95 U. S. 465; Ward v. Maryland, 12 Wall. 418; Chy Lung v. Freeman, 92 U. S. 275; Steamboat Co. v. Livingston, 3 Cow. (N. Y.) 743; Thurber v. People, 13 Ill. 535.
[20] 16 Pet. 617.
[21] 5 Wheat. (U. S.) 1 21 22.

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boats, including their smoke-stacks, declaring by the certificate that they are of the kind approved and considered proper, and that it is not within the power of the state of Illinois to delegate authority to the corporation of Chicago to declare such smoke-stacks a breeder of nuisances. As noticed before "a work authorized by the sovereign power of the government cannot be adjudged a public nuisance if executed in an authorized manner, in an authorized place." That the tugs, boilers and smoke-stacks are constructed in an authorized manner in accordance with the requirements of the government, is shown by their certificates of inspection; that they are operating in an authorized place is shown by their licenses; that the city authorized their navigation of the river in their then condition is proved by the city license. That the United States laws govern navigation solely and that a state may not exact additional requirements is held in Sinnot v. Davenport[22] and in The Swan v. Davenport.[23] In the latter case, the *status* of the tugs is fully set forth.

If it be said that the city of Chicago passed this ordinance by virtue of its inherent police power, a power which the state did not surrender to the federal government when they ceded to it by express grant the power to regulate commerce, it may be answered that the state cannot grant to the municipality that which it did not itself possess, the power to make laws in conflict with the laws of the federal government, and it was Chief Justice Marshall's opinion, expressed in Gibbons v. Ogden, that whether state laws are passed in virtue of a concurrent power to regulate commerce with foreign nations and among the several states, or in virtue of a power to regulate their domestic trade and police, if they come into conflict with an act of congress, they must yield to it. Instances of the happening of the latter contingency are found in Sinnot v. Davenport, above cited, R. R. Co. v. Husen,[24] the well-known case where the Missouri legislature passed an act prohibiting driving or conveying Texas, Mexican or Indian cattle into the state between certain months of the year and making transportation companies responsible for damages resulting from Texas fever along the line of transportation. The point was made that under cover of exerting its police powers a state may substantially prohibit or burden either foreign or interstate commerce.

Burdensome Restrictions are Regulation.—That placing obstacles upon transportation or imposing burdensome and almost impossible conditions upon it is "regulation," within the meaning of the federal constitution, and that it cannot be done by a state is held also in a number of cases.[25] Welton v. State and Chy Lung v. Freeman, refer to obstructions against the admission of persons into a state, but the principles asserted are equally applicable to all subjects of commerce. Is there a neutral ground in that occupied by regulations of commerce which may be occupied by the state and its legislation be valid? If so, what are its limits and do they embrace the power to make the ordinance under consideration? The existence of such a ground has been affirmed in some cases, and as vigorously denied in others, notably in Henderson v. Mayor of New York.[26] It was said in Harmon v. City of Chicago[27] that the smoke ordinance did not impose any restraint on the use of tugs, at most, only purporting to regulate their use so as not to produce effects detrimental to property and business, but if subjected to continual fines for violating an ordinance which cannot be complied with, as smoke consumers do not consume and the price of anthracite is prohibitory, the ultimate effect of the ordinance, if rigidly enforced, would be, in the course of time, to suspend their navigation through financial ruin, and thereby obstruct commerce with foreign nations and among the several states by way of the great lakes, as effectually as though the ordinance had, in express terms, forbidden them to use the river.

Flora V. Woodward Tibbits.
Chicago, Ill.

[22] 22 How. 227.
[23] 22 How. 244.
[24] 95 U. S. 465.
[25] Ward v. Maryland, 12 Wall. 418; Freight State Tax Cases, 15 Wall. 232; Welton v. State, 91 U. S. 275; Chy Lung v. Freeman, 92 U. S. 275.
[26] 92 N. Y. 272.
[27] 110 Ill. 407.

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FRAUDULENT CONVEYANCE—PROMISE IN CONSIDERATION OF MARRIAGE.

BRINKLEY v. BRINKLEY.

Supreme Court of North Carolina, June 5, 1901.

Where defendant agreed to deed land to plaintiff if she would marry him, and after her promise to do so, but before marriage, conveyed the land, without consideration, to his children by a former wife, such conveyance, though recorded before the marriage, was fraudulent and void as against a deed to plaintiff, made 16 years subsequently.

COOK J.: Upon the trial in the superior court, judgment as in case of nonsuit was rendered against the plaintiff upon motion of defendants, under chapter 109, Acts 1897, as amended by chapter 131, Acts 1899, and plaintiff excepted and appealed.

The plaintiff contends that, by reason of the promise of Joseph H. Brinkley to convey to her the interest in the land as stated, she became a creditor of his, and that the voluntary deed executed by Joseph H. Brinkley to his minor children (all of whom are now defendants, except one) after a contract of marriage had been entered into between herself and said Joseph H. Brinkley, and without her knowledge and consent, was a fraud upon her marital and contract rights, and void as to her; and that she is entitled to recover the interest in the land conveyed to her by reason of the deed executed to her in April, 1900, pursuant to the promise made her by said Joseph when she consented to marry him in June, 1884. The defendants (other than Joseph H. Brinkley) claim title under the voluntary deed executed to them in July, 1884, and, while denying the parol promise alleged by the plaintiff, contend that it was void under the statute of frauds; that the deed executed to the plaintiff in April, 1900, conveyed no interest to her, was voluntary, and without valuable consideration; that she had actual knowledge at the time and long before its execution, and insist that she has no title to the land, and is not entitled to recover. It appears from the case on appeal that defendants introduced evidence contradicting the plaintiff's, but none appears in the record; and, the motion of defendants having been made "upon the whole of the testimony," the case must be considered by this court only upon that which appears in the record, which, for the sake of the motion, must be accepted as true.

While the contention of the plaintiff as to being a creditor of Joseph H. Brinkley by reason of the parol promise to convey the land is without merit, yet her contention that the voluntary conveyance of the land to his children was a fraud upon her marital rights presents a very serious question. The contract of marriage entered into between the plaintiff and Joseph H. Brinkley in June, 1884, was based upon a valuable consideration. She had not only a right to expect the benefits to be derived from the marriage in her suitor's property to be cast upon her by operation of the law, but also had his express verbal promise to convey to her one-half undivided interest in his tract of land (which was substantially all the property that he then owned) immediately after their marriage. Relying upon these rights and his promise, and after many years sharing with him the toils of life, nurturing, caring for, and raising his minor children by his former wife, bearing children to him, and being a true and faithful wife, she suddenly finds herself, her husband, and several children of tender age ousted of her home, to which she was carried when a bride, and then informed that her marital rights and contracts had been supplanted by a voluntary deed, executed by a man whom she had consented to and had married; and that his promise, not being in writing, was void, and of no effect. But his parol promise to convey land was not void, only voidable; and between the parties could have enforced, unless the statute of frauds were pleaded (Hemmings v. Doss, 125 N. Car. 400, 34 S. E. Rep. 511; Williams v. Lumber Co., 118 N. Car. 928, 24 S. E. Rep. 800; Loughran v. Giles, 110 N. Car. 423, 14 S. E. Rep. 966), which cannot be material in this action, since the deed was, before the institution of this action, duly executed, with full recitals of the original promise; that statute applying to executory, and not to executed, contracts (Hall v. Fisher, 126 N. Car. 205, 35 S. E. Rep. 425; McManus v. Tarleton, 126 N. Car. 790, 36 S. E. Rep. 338; Choate v. Wright, 13 N. Car. 289); and, while it has the effect of a postnuptial settlement, yet it is valid, except as to creditors and purchasers for value, and without notice. Rodg. Dom. Rel. § 255, p. 217. The defendants (other than Joseph) claim title by reason of this voluntary deed, executed to them by their father after he had induced the plaintiff to consent to become his wife, and without her knowledge or consent. For what purpose was this deed then executed? If for the love and affection he had for his children, why did he wait until after the courtship and engagement? Why did he hold it as a basis of credit, and, after securing a promise for his prize, place it, as he thought, beyond the reach of the woman whose consent he had obtained to share with him the vicissitudes of life for weal or for woe? If he had changed his mind, and concluded not to convey to her the interest in the land, as he had promised her to do, then why did he not so inform her, to the end that she might exercise the privilege of changing her mind as to the marriage? He admits in his answer (which was put in evidence) the agreement as stated in the complaint to be true. It is admitted for the sake of the motion, by defendants, that the plaintiff did not know of the voluntary deed until many years after the marriage; that it was executed without her knowledge or consent. While it is true that a man or woman, before marriage, is at liberty to dispose of his or her property at will and pleasure, yet it must not be done with an improper motive. If it be done to deceive the person who

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is then in treaty of marriage, it is a fraud. Then courts have uniformly held that a voluntary deed, made by a woman in contemplation of marriage, afterwards consummated, and without the existence of the deed being made known to the intended husband, is in law a fraud upon him. Strong v. Menzies, 41 N. Car. 544; Baker v. Jordan, 73 N. Car. 145; 1 Rop. Husb. & Wife, pp. 163, 164; Poston v. Gillespie, 58 N. Car. 258, 75 Am. Dec. 427. Then why should not the same rule apply to the intended husband, who gave to his children his property without the knowledge or consent of his fiancee? She, under our laws, acquires valuable interest and rights in his property. While, on the one hand, the husband, in addition to the personal services and earnings of the wife, acquires the right of a curtesy estate, absolutely owns all of the personalty in case of intestacy, etc., on the other hand the wife obtains a security in respect to her future support, and has the rights of dower, homestead, year's support at the death of the husband (which cannot be defeated by his will or creditors), a distributive share of his personalty, etc. Schouler, Dom. Rel. (3d Ed.) § 181. Nor can the constructive notice of registration avail the defendants. In the case of Spencer v. Spencer, 56 N. Car. 404, in which case the intended wife, had, previously to marriage and after engagement, made a voluntary deed to her property, it is held: "But if, after the courtship begins, the court of equity recognizes an inchoate right in the intended husband at all, it follows that it cannot be disposed of by the intended wife without his direct knowledge and acquiescence. In a case like the present there is no place for a constructive notice. That is always resorted to for the purpose of preventing the person who has it from doing an act to the injury of another. Here the husband can injure no other person. He has rights which the rule protects by preventing another person from injuring him." In Taylor v. Rickman, 45 N. Car. 278, the husband actually signed the contract, but it was avoided upon the ground of surprise, because the paper was presented to him after the parties had met together for the purpose of being married. And in Poston v. Gillespie, *supra*, it was held that, after the contract of marriage is made, neither can give away his or her property without the consent of the other, and notice before the marriage of such a gift does not hinder the party injured from insisting upon its invalidity. True it is, from the testimony in the case, that the defendants were minors, and innocent; but that cannot avail them now. "Though not a party to any imposition, whoever receives anything by means of it must take it tainted with the imposition. * * * Let the hand receiving it be ever so chaste, yet it comes through a polluted channel, the obligation of restitution will follow it." Tisdale v. Bailey, 41 N. Car. 358. Upon all the evidence submitted, it is clear to the court that the execution of the deed under which the defendants (other than Joseph) claim was fraudulent and void as to the plaintiff's marital rights, and there is error.

FURCHES, C. J. (concurring in the opinion of Justice Cook): I state the following reasons for my concurrence:

If the plaintiff is entitled to recover, it is by reason of the fraud committed upon her marital rights. The statute of frauds has nothing to do with the case, for the reason that the deed had been executed, and the statute of frauds does not apply to executed contracts. Hall v. Fisher, and other cases cited in the opinion. Nor does the statute of frauds prevent a party from carrying out his contract, unless it affects creditors or purchasers for a full price, and without notice. Triplett v. Witherspoon, 70 N. Car. 589. In this case there are no creditors of the grantor, unless the plaintiff be treated as such; and the defendant children are not purchasers for a full price. Indeed, it appears that they paid nothing for their deed. If the plaintiff was not strictly a creditor, her claim was in the nature of that of a creditor. After her contract with the grantor (J. H. Brinkley) in June, 1884, it was a fraud upon her marital rights for her intended husband to give away his property; and in this case it seems to have been all the property he had. In Poston v. Gillespie, 58 N. Car. 258, 75 Am. Dec. 427, it is said: "After the courtship or negotiations about and concerning the marriage are concluded, and the parties bind themselves by a contract to marry, neither can give away his or her property without the consent of the other; and the matter does not then rest upon a mere question of deceit, which may be repelled by proof of notice, but involves a question of fraud on a right vested by force of a contract, for a breach of which an action will lie at law." So, if this case states the law, the action is given to either party. It rests on contract and vested rights, and is not to be defeated by notice. If this be the law, it is claimed that plaintiff's right of action was not defeated by the registration of defendant's deed, and that contention of defendant's must fail. But defendant's claim that since the constitution of 1868 the wife has no marital rights except the inchoate right of dower, which is not due until his death; and that the husband has no marital rights in the wife's estate. If these contentions are true, there ceases to be such a thing as fraud on marital rights in North Carolina. While the husband may not have the same rights over the estate of the wife that he had before the constitution of 1868, I do not admit that the wife has not now the same rights in her husband's estate that she had before the constitution of 1868, and the same she had in 1859, when the case of Poston v. Gillespie was decided by this court, in which case it held "that, after the engagement to marry, neither party has the right to give away his or her property." But this very question,—fraud on marital rights,—since the constitution of 1868, has been before the court, and it was held that the constitution of

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1868 worked no such wonders, and that the doctrine of fraud upon marital rights still exists in North Carolina. Upon these authorities I must hold that the doctrine of fraud on marital rights still exists in this state; that the defendant, J. H. Brinkley, having disposed of his land by gift to the other defendants after he and the plaintiff were engaged to be married, was a fraud upon her marital rights, and the deed must be set aside. My opinion is put upon the fraud, and not upon his promise to convey. But, when defendant's deed is set aside for fraud, there is nothing to prevent the plaintiff's deed of 1900 from becoming effective, and the plaintiff is entitled to be admitted to the possession of one undivided half of said land, as tenant in common with her husband.

We have had it impressed upon us that the first wife's father gave this land to the defendant, J. H. Brinkley, and his first wife. This may be a reason for making the deed of July, 1884, to the defendant children; but it could not constitute a legal consideration, and we are trying to dispose of the case according to the law. Under the laws of this state, upon the death of the wife the land becomes the property of the husband, and, as such, was liable to his contracts and creditors to the same extent as if he had bought the same with dollars. I must therefore concur in the opinion that there was error.

MONTGOMERY, J., concurs in the opinion of the chief justice.

NOTE.—*Secret Conveyances by Wife or Husband in Contemplation of Marriage.*—It must be admitted that the principal case is not a thoroughly satisfactory discussion of the interesting question involved in the subject of this annotation. The facts in this case were complicated by several irrelevant, but disagreeable circumstances which the majority of the court had the judicial insight to disregard in arriving at the kernel of the difficulty. Secret conveyances by either husband and wife in fraud of the marital rights of the other after engagement, but before marriage, are generally held voidable, at least in this country. It England this rule has been applied only to a conveyance of the wife in fraud of the right of the prospective husband, but not *vice versa*. That the husband acquired, by the mere engagement of marriage, such interest and prospective rights in the property then owned and possessed by the wife, as a court of equity will protect against secret conveyances by the wife in fraud of his rights, is well established by English decisions. Strathmore v. Bowers, 1 Ves. 22, 1 Lead. Eq. Cas. 449. But the reason of the rule, it is held, does not extend to conveyances by the husband executed in contemplation of marriage, since the marriage does not impose upon the wife any liability for the debts of the husband, or any duty to support the family; and the reason of the rule ceasing, the rule itself has no application. What is known as the American rule, however, makes no distinction between secret conveyances by either wife or husband executed without the knowledge of the other, and in contemplation of marriage; in either case such conveyances will be set aside in equity as a fraud upon the marital rights of the other spouse. Kelly v. McGrath, 70 Ala. 75; Dearmond v. Dearmond, 10 Ind. 191; Murray v. Murray, 90 Ky. 1; Gainor v. Gainor, 26 Iowa, 337; Petty v. Petty, 4 B. Mon. (Ky.) 217, 39 Am. Dec. 501; Youngs v. Carter, 56 How. Pr. (N. Y.) 410; Smith v. Smith, 6 N. J. Eq. 515; Beere v. Beere, 79 Iowa, 555. In Kelly v. McGrath, *supra*, the distinction between the American and English cases is stated, and the reasons underlying the rule announced by the former are also thoroughly discussed. The court says: "The doctrine of the English court of chancery seems to be that an alienation by the intended husband, although made on the eve of marriage, excluding the intended wife from dower, cannot, after marriage, be impeached as a fraud upon her rights. The reasons for distinguishing such a conveyance from a similar conveyance by the intended wife are, that she by marriage does not acquire such rights to the property of the husband as he acquires to hers; and because in England, on marriage, estates are usually so settled or conveyed as to prevent dower attaching; and it is not therefore presumed that the woman was induced into the contract in the expectation of acquiring the right of dower. This latter reason can have no application in this country where dower is a right, which every man must presume the woman expects and intends shall follow the marriage, as certainly as its other incidents. · · · That a husband, in contemplation of marriage, may commit frauds upon the rights which, on the marriage, would accrue to the intended wife, from which, after marriage, a court of equity will relieve her, as it relieves the husband from the antenuptial frauds of the wife, is recognized by a large number of adjudications in this country. We confess an inability to distinguish the antenuptial frauds of the husband, from the antenuptial frauds of the wife, or to perceive any sound reason for repudiating and avoiding the one, while permitting the other to work out its injury and injustice. The fraud of the woman defeats and disappoints the just expectations of the intended husband; and his fraud defeats and disappoints equally her just expectations. There can be no presumption that she is, less than he, influenced by prudential considerations, or is unmindful on entering into the contract of marriage, of acquiring a home in the event of her widowhood, and the means of sustenance for herself, and of nurture and education of her children."

We review the cases as follows: A voluntary conveyance of property by a husband or wife prior to marriage, will be held fraudulent as to the marital rights of the other only when made in contemplation of the marriage, and pending a treaty therefore between the parties. Gainor v. Gainor, 26 Iowa, 337. In this case the conveyance was made four months before the negotiations for the marriage began at a time when neither of the parties thought about uniting in wedlock. In Kelly v. McGrath, 70 Ala. 75, it was held that a mortgage of his lands by the husband, executed in contemplation of marriage, and without the knowledge of his intended wife, for the purpose of preventing her right of dower and homestead from attaching to the lands, is a fraud on the rights acquired by the wife on marriage; and though the debt secured by it was a present loan of money, it will be regarded as a voluntary conveyance, where it appears that the mortgagee had knowledge of the intended fraudulent purpose of the husband, and actively participated in carrying it into effect. The case of Beere v. Beere, 79 Iowa, 555, was a case in which a son conveyed all his property to his mother

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because he feared he would be compelled to marry a girl he had betrayed in order to avoid an action for seduction. His fears were well grounded and he married the girl and the next day abandoned her and absconded. The conveyance to the mother was held in fraud of the rights of the son's wife and the grantee was adjudged to hold the property in trust for the plaintiff,—the son's wife. In the case of Petty v. Petty, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 501, it was held that a deed of gift by a man on the eve of his marriage, of all his property, to his children, executed after the agreement to marry, and kept secret from the intended wife until after the marriage, is fraudulent and void, so far as it deprives her of dower in the real estate coveyed by such deed; and a court of equity will declare the deed void to that extent, even in the lifetime of the husband. It was also held in that case, however, that a husband may, without the wife's consent, dispose of his personal property as he pleases, and a gift of such property made by him will not be set aside as in fraud of the right of the wife. See also as sustaining this latter point. Dunnock v. Dunnock, 3 Md. Ch. 140; Cranson v. Cranson, 3 Mich. 230; Holmes v. Holmes, 3 Paige, 363. However, if the conveyance of personalty be a mere device by the husband to deprive his widow of her share of his personalty, as for instance, where he does not part with absolute dominion over the property, such conveyance will be ineffectual against the wife. Dunnock v. Dunnock, 3 Md. Ch. 140; Davis v. Davis, 5 Mo. 183; Tucker v. Tucker, 29 Mo. 350; McGee v. McGee, 4 Ired. L. 105. But see *contra*, Cameron v. Cameron, 10 Smed. & M. 394. In Leach v. Duvall, 8 Bush. (Ky.) 201, the facts were as follows: Ten days before the marriage, without knowledge of the intended wife, and after the agreement to marry had been entered into, the intended husband conveyed land to his children by a former marriage in consideration of love and affection. The court held that such a voluntary conveyance was binding on the husband, but that it was a fraud upon the marital rights of the wife, and inoperative and void so far as it might operate to deprive her of her potential right of dower in the land so conveyed; that the grantees are entitled to the land subject to her prospective rights aforesaid. In a very late case from Kentucky, (Murray v. Murray, 90 Ky. 1,) the court extended the rule to personal property.

JETSAM AND FLOTSAM.

JOEL PRENTISS BISHOP.

Joel Prentiss Bishop, best known as writer of books on law, although he was prominent in the anti-slavery agitation and was an unusually brilliant scholar, died November 4, 1901, at his residence, 51 Sacramento street, Cambridge. He was born in Volney, Oswego county, N. Y., March 10, 1814, in a small log house, with but one other dwelling near it. His father was Amos Bishop. His mother was the first white child born in Paris, Oneida county, N. Y. Through his grandmother on his father's side he claimed descent from King Richard I. His mother died when he was a child, and his father moved to Oneida county, his former place of residence. Joel's early youth was spent at this place assisting his father on a farm and attending a remote district school. Later he was a pupil at the Whitestone Seminary, Oneida Institute and the Stockbridge Academy. He was naturally a brillant scholar.

Upon the completion of his studies his health failed and he sought an occupation which would not too severely test his strength. His interest in the anti-slavery question brought him in time to be the business manager, publishing agent and assistant treasurer of the New York Anti-slavery Society and assistant editor of the Friend of Man, an anti slavery publication printed in Utica, N. Y. He later resigned the editorship of the paper.

He came to Boston and in 1842 entered the law office of Henry B. Stanton and John A. Bolles. His health improved and he was admitted to the Suffolk bar in April, 1844. While attending to his larger cases, he began the work of writing a law book as a change from his work. The first edition of his "Marriage and Divorce" was the result. The success of this work induced him to give up his lucrative practice and thereafter he devoted himself to legal literature. For years after this he devoted himself to his books and wrote many very valuable works, the worth of which is shown by the degree of doctor *juris utriusque*, conferred upon him by the University of Berne, Switzerland, in express recognition of the "great services" rendered by him to his country and the science of law.—*Boston Daily Globe.*

[The following are the principal works of Mr. Bishop which are also among the classics of legal literature: Bishop on Contracts, 1 vol., 1887; Bishop on Non-Contract Law, 1 vol., 1889; Bishop on Marriage, Divorce and Separation, 2 vols., 1891; Bishop's New Criminal Law, 2 vols., 1892; Bishop's New Criminal Procedure, 2 vols., 1896; Bishop on Statutory Crimes, 1 vol., 1901; Bishop's Directions and Forms, 1 vol. 1901; Bishop on the Written Laws, 1 vol., 1882; Bishop's Law of Married Women, 2 vols., 1871-75; Bishop's First Book of the Law, 1 vol., 1868. All except the last three books are published by T. H. Flood & Co., of Chicago, Ill.—Ed.]

CORRESPONDENCE.

BENEFIT SOCIETIES—OBLIGATION OF EXPELLED MEMBER TO EXHAUST REMEDIES WITHIN THE ORDER.

To the Editor of the Central Law Journal:

In the note to your leading case in the issue of your Journal of November 15th, the case of the People v. Order of Forresters, 162 Ill. 78, 44 N. E. Rep. 401, is cited in connection with the case of Screwmen Association v. Benson, 76 Tex. 552, 13 S. W. Rep. 379, and other cases as authority for the proposition that the member of a mutual benefit society cannot resort to the civil courts for reinstatement without first exhausting the remedies provided by the constitution and by-laws of the society, *and this though the order of expulsion be void.*

While the latter of the two cases cited above may announce the rule as broad as your annotator states it, yet the Illinois Supreme Court in the case cited above on page 83, after commenting on the Screwmen's case, expressly disclaim going to that extent, and on page 83 announce the doctrine that if the resolution of expulsion "is void for want of jurisdiction" that the member can resort immediately to the civil courts without taking any further step in the tribunals of the order. W. W. MELOAN.

Macomb, Illinois, November 16, 1901.

[Our correspondent is quite right in his correction that the court in the case above mentioned made an exception to the rule that members of benefit societies must exhaust their remedies within the order before appealing to the courts,—*i. e.*, where the ex-

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pulsion is void, "for want of jurisdiction." The other cases cited with this do not make this exception. Nevertheless, it belongs to the class mentioned as distinguished from the decisions in Missouri with which it was contrasted in the annotation. For instance, on page 83 of the court's opinion in this case, after the exception just referred to, Magruder, J., says: "It is to be remembered, however, that there is a clear distinction between the obligation to appeal from the lower to the higher tribunals of the society itself resting upon one who presents a question of discipline, and such obligation so far as it concerns one who asserts a claim to money due upon a contract. Where the controversy is concerning the discipline or policy, or doctrine of the order, the member must resort to the method of procedure prescribed by the association including the remedy by appeal, before invoking the power of the courts. But it is otherwise, when a member claims money due from the society on its contract, or where the beneficiary of a deceased member claims money due from the society on its contract." —Ed.]

BOOK REVIEWS.

ABBOTT'S BRIEF ON THE FACTS.

A second edition has just issued from the press of that popular and useful work by Mr. Austin Abbott, entitled A Brief on the Modes of Proving the Facts, most frequently in issue or collaterally in question on the trial of civil or criminal cases. The following quotation sufficiently accounts for the popularity of this work: "To get in our legal evidence and to keep out illegal evidence of the adversary, is the great art of trying causes; and the policy of counsel is to choose among various modes of proof, that evidence which is competent, either of right or in the discretion of the judge, prudent in the face of the adversary, and likely to be not only effective now, but also safe in the case of appeal." This second edition has been substantially enlarged and re-edited with the addition of several new chapters. We commend the book to the profession. One volume of 653 pages and bound in good quality of law sheep. Published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y.

BOOKS RECEIVED.

A Treatise on the Law of Damages for Personal Injuries, Embracing a Consideration of the Principles Regulating the Primary Question of Liability, as well as the Measure and Elements of Recovery after Liability Established. By Archibald Robinson Watson, of the New York City Bar, formerly of the Memphis Bar. The Michie Company, Publishers, Charlotteville, Va., 1901. Sheep, pp. 1014. Price $6.40. Review will follow.

Cyclopedia of Law and Procedure. Edited by William Mack and Howard P. Nash. Volume II. New York. The American Law Book Company. London: Butterworth & Co., 12 Bell Yard, 1901. Sheep. Review will follow.

HUMORS OF THE LAW.

count with the following advice: "Mr. ——— is dead and in h—l, and as Iowa is nearer that place than Missouri, you had better bring suit in Iowa."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

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1. ABDUCTION — Intention to Marry.—Instruction held properly refused, as withdrawing from consideration of jury the charge in the indictment that defendant intended to marry the female abducted.—Boyett v. State, Ala., 30 South. Rep. 475.

2. ACTION — Installments.—Where one repudiates contract to make payments at certain times, the other party may bring a separate action for installments as they become due.—Peurrung v. Carter-Crume Co., U. S. C. C., S. D. (Ohio), 110 Fed. Rep. 107.

3. ADVERSE POSSESSION — Alley.—Where an alley dedicated for the common use of two lots abutting thereon had been adversely used by the owner of one of the lots for more than 40 years, the rights of others therein were barred by limitations.—Hegan v. Pendennis Club, Ky., 64 S. W. Rep. 464.

4. ALIENS — Chinese — Certificate of Residence.—A Chinese laborer, having a certificate of residence under Act Cong. May 5, 1892, is entitled to remain in the country, though he has no certificate under Act Cong. Nov. 3, 1893.—United States v. Jung Jow Tow, U. S. D. C., D. (Oreg.), 110 Fed. Rep. 154.

5. APPEAL—Remarks of Counsel.—Remarks of counsel, where no objection is taken, cannot be reviewed on appeal.—State v. Mooney, W. Va., 39 S. E. Rep. 657.

6. APPEAL AND ERROR—Amendment of Answer.—The action of the court in sustaining demurrer to certain paragraphs of an answer was not prejudicial, where the answer was amended and issue then joined upon its averments.—Atkeson v. Salyer, Ky., 64 S. W. Rep. 443.

7. APPEAL AND ERROR—Bill of Exceptions.—On appeal from judgment of nonsuit, only such adverse rulings compelling nonsuit as are properly reserved by bill of exceptions will be reviewed.—Chastain v. Porter, Ala., 30 South. Rep. 492.

8. APPEAL AND ERROR — Conflicting Evidence.—The

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may be examined on motion.—Pierce v. Rodliff, Me., 50 Atl. Rep. 32.

10. APPEAL AND ERROR—Evidence.—Where issues are questions of fact, decree of circuit court will not be disturbed, unless clearly against preponderance of evidence.—Bailey v. Calsee, W. Va., 39 S. E. Rep. 642.

11. APPEAL AND ERROR — Exceptions Too General.—Under Code, § 550, where there are several questions of law involved, exceptions in a case on appeal merely "to the charge as given" will be disregarded as too general.—Mitchell v. Baker, N. Car., 39 S. E. Rep. 688.

12. APPEAL AND ERROR — Notice of Appeal.—Judgment having been entered on a note in favor of the usee, an appeal held ineffectual, where the notice of appeal was served only on the payee, in whose name the suit was brought.—Barden v. Pugh, N. Car., 39 S. E. Rep. 724.

13. APPEAL AND ERROR—Refusal to Remove Cause.—An appeal from an order refusing to remove a cause to another county for trial, taken at the time of the entry of the order, is not premature.—Connor v. Dillard, N. Car., 39 S. E. Rep. 641.

14. APPEAL AND ERROR—Transfer to Equity.—An exception to an order sustaining a motion to transfer to equity will not authorize a review of that ruling on appeal, unless an objection was first made.—Spencer v. Society of Shakers, Ky., 64 S. W. Rep. 468.

15. APPEAL AND ERROR—Want of Evidence.—The question whether there was any evidence tending to prove the facts found may be considered on writ of error.—King v. Smith, U. S. C. C. of App., Ninth Circuit, 110 Fed. Rep. 95.

16. ASSISTANCE, WRIT OF—Delay.—An *alias* writ of assistance should be refused to a purchaser of land under a decree of court after several years' delay and after the original writ had been returned executed.—*Ex parte* Forman, Ala., 30 South. Rep. 480.

17. ASSUMPSIT, ACTION OF—Parol Lease.—Where defendant refused to comply with a void parol contract to lease land, the remedy of plaintiff was upon a *quantum meruit*, for the value of his services in preparing the land and putting in a crop; defendant having agreed to pay for them when he refused to carry out the contract.—Thomas v. McManus, Ky., 64 S. W. Rep. 446.

18. ATTORNEY AND CLIENT — Improper Relation.—While it is improper for an attorney to occupy inconsistent positions in a suit without the consent of the parties, yet a party who has consented thereto cannot refuse to pay for the services rendered for him.—Brodie v. Parsons, Ky., 64 S. W. Rep. 426.

19. BAIL—Sureties.—Failure of grand jury to prefer indictment held not to discharge sureties of defendant, where case was regularly entered and order of continuance made.—State v. Fuller, Ala., 30 South. Rep. 506.

20. BANKRUPTCY—Assignment.—Assignment for benefit of creditors held an act of bankruptcy.—Green River Deposit Bank v. Craig, U. S. D. C., D. (Ky.), 110 Fed. Rep. 137.

21. BANKRUPTCY—Chattel Mortgage—Preference.—A chattel mortgage by a merchant on stock, he retaining possession and paying living expenses and debts from proceeds, held within Bankr. Act 1898, § 67e, and void on adjudication in bankruptcy within four months thereafter.—*In re* Platts, U. S. D. C., D. (S. Dak.), 110 Fed. Rep. 126.

22. BANKRUPTCY — Exemptions — State Laws.—A bankrupt, entitled by the state statute to select property as exempt, not exceeding a certain value, and who has selected property of less value, may claim the remaindar from a sum of money surrendered to the trustee by a creditor as the proceeds of a preference received.—*In re* Falconer, U. S. C. C. of App., N. D. (Ga.), 100 Fed. Rep. 111.

23. BANKRUPTCY — Partnership.—In case of the separate bankruptcy of a member of a firm, though all the assets are partnership assets, the separate creditors are entitled to vote.—*In re* Beck, U. S. D. C., D. (Mass.), 110 Fed. Rep. 140.

24. BANKRUPTCY — Priority of Wages.—Ballinger's Ann. Codes & St. Wash. § 5919, entitles a traveling salesman for a bankrupt lumber company to priority of payment for wages earned within six months prior to the bankruptcy, as a debt of the rank described by Bankr. Act 1898, § 64b, cl. 5.—*In re* Lawler, U. S. D. C. D. (Wash.), 110 Fed. Rep. 135.

25. BANKRUPTCY—Referee—Exceptions.—In excepting to findings of fact or conclusions of law by referee in bankruptcy, the errors should be specifically pointed out.—*In re* Covington, U. S. D. C., E. D. (N. Car.), 110 Fed. Rep. 143.

26. BANKRUPTCY—Smelter Company — "Manufacturing."—A corporation, whose chief business is the operation of a smelter, is "engaged principally in manufacturing," within the meaning of Bankr. Act 1898, § 4b, and may be adjudged a bankrupt.—*In re* Tecopa Mining & Smelting Co., U. S. D. C., S. D. (Cal.), 110 Fed. Rep. 120.

27. BANKRUPTCY—State Courts—Jurisdiction.—When bankruptcy act became operative, July 1, 1898, the jurisdiction of the state courts to determine insolvent cases not then pending was at an end.—First Nat. Bank v. Ware, Me., 50 Atl. Rep. 24.

28. BANKRUPTCY — Vested Remainders.—Where devise is made to mother, and at her death to her surviving children, a child has a vested remainder, which, on his bankruptcy before death of his mother, passes as part of the bankrupt estate.—*In re* Twaddell, U. S. D. C., D. (Del.), 110 Fed. Rep. 145.

29. BANKRUPTCY—Wife's Claims.—The wife of a bankrupt is not estopped, as against his general creditors, to claim her interest in lands to which her husband held a bond for a deed, in which she was in fact half owner, by representations made by him without her knowledge or consent.—*In re* Garner, U. S. D. C., N. D. (Ga.), 110 Fed. Rep. 128.

30. BENEFICIAL ASSOCIATIONS — Non-Payment of Dues.—A member in default as to payment of dues continues to be a member in good standing until suspended or expelled, and until then is entitled to sick benefits.—Rogers v. Union Benev. Soc. No. 2, Ky., 64 S. W. Rep. 444.

31. BILLS AND NOTES—Defense.—Where a note sued on did not on its face purport to be made by defendant, a denial of extrinsic matter contained in the petition and essential to a cause of action held to present a good defense.—Spencer v. Society of Shakers, Ky., 64 S. W. Rep. 468.

32. BOUNDARIES—Parol Division.—A parol agreement between adjoining owners, fixing the dividing line between their lands, is valid when executed, and will be upheld.—Campbell v. Campbell, Ky., 64 S. W. Rep. 458.

33. BUILDING AND LOAN ASSOCIATIONS—Assignment.—An insolvent building association may make an assignment for the benefit of its creditors, and in determining its insolvency for that purpose its liability to its stockholders is to be considered.—United States Bldg. & Loan Assns.' Assignee v. Jones, Ky., 64 S. W. Rep. 447.

34. CARRIERS—Authority.—A carrier, after acting upon a contract with knowledge of the fact that it had been made by a clerk assuming to act as general passenger agent, cannot deny his authority.—Southern Ry. Co. v. Marshall, Ky., 64 S. W. Rep. 418.

35. CHAMPERTY AND MAINTENANCE—Conveying Easements.—Ky. St. § 210, providing that all sales of any lands of which any other person has adverse possession shall be void, does not apply to conveyances of private easements.—Hegan v. Pendennis Club, Ky., 64 S. W. Rep. 464.

36. CHATTEL MORTGAGE — Retaining Possession.—Provision in mortgage allowing mortgagee to retain

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possession held not to render the mortgage invalid, if the debt was a *bona fide* one.—Kidd v. Morris, Ala., 30 South. Rep. 508.

37. COLLEGES AND UNIVERSITIES—Appointment of Trustees.—Under Const. art. 13, § 9, appointment of trustees of University of Alabama without advice and consent of senate is unathorized.—State v. Foster, Ala., 30 South. Rep. 447.

38. COLLISION—Use of Signal.—Use by vessel at anchor, and not *in extremis*, of a passing signal is a gross fault.—The Maling, U. S. D. C., D. (Del.), 110 Fed. Rep. 227.

39. COMMERCE—Compelling Foreign Corporation to Become Resident.—A statute requiring a foreign railroad corporation to become a resident corporation as a condition of its right to continue to operate that part of its road within the state is not an interference with interstate commerce.—Commonwealth v. Mobile & O. R. Co., Ky., 94 S. W. Rep. 451.

40. COMPROMISE AND SETTLEMENT—Consideration.—A controversy as to the title to property, in order to constitute a consideration for a compromise or a family settlement, must be a real one, and the question must be one about which well-informed lawyers and judges might easily differ.—Bunnell v. Bunnell, Ky., 64 S. W. Rep. 420.

41. COMPOSITION WITH CREDITORS—Assent of Creditors.—Creditors assenting to composition held not thereby to become parties to prior assignment of the debtor for the benefit of creditors.—First Nat. Bank v. Ware, Me., 50 Atl. Rep. 24.

42. CONSTITUTIONAL LAW—Construction.—The supreme court will not test the constitutionality of an act, when the record presents any other grounds on which its judgment may be based.—Hill v. Tarver, Ala., 30 South. Rep. 499.

43. CONTRACTS — Public Policy.—Agreement with third party to present claim against the United States for property destroyed during the Civil War, in which he had no interest, such third party to have one-half of the proceeds thereof, held against public policy and unenforceable.—Spotswood v. Bentley, Ala., 30 South. Rep. 498.

44. CONVICTS—Work and Labor.—When a workshop in the penitentiary has been burned, the convicts employed there may be temporarily worked outside the walls in another building until the burned building can be replaced.—Harris v. Commonwealth, Ky., 64 S. W. Rep. 434.

45. CORPORATIONS — Cancellation of Stock.—The averments of a bill by a stockholder for the cancellation of stock alleged to have been fraudulently issued held insufficient to entitle complainant to maintain the suit.—Bimber v. Calivada Colonization Co., U. S. C. C., W. D. (Pa.), 110 Fed. Rep. 59.

46. CORPORATIONS—Logs and Logging—Recovery.—An action against a corporation to recover logs and damages for their taking was properly brought in the county in which they were alleged to have been wrongfully taken and held by defendant.—Hileman v. Day Bros. Lumber Co., Ky., 64 S. W. Rep. 419.

47. COVENANTS—Breach of Warranty.—A judgment for the recovery of land under an agreement between the parties does not entitle defendant to an action against his vendor for breach of warranty.—Vincent v. Hicks, Ky., 64 S. W. Rep. 456.

48. COVENANTS—Right to Enforce.—Where a deed contains a restriction for the benefit of the vendor's remaining land, the right to enforce the same passes to a subsequent grantee of the vendor.—Hemsley v. Narlborough Hotel Co., N. J., 50 Atl. Rep. 14.

49. CRIMINAL EVIDENCE—Circumstantial.—A person may be convicted of crime on circumstantial evidence alone.—State v. Sheppard, W. Va., 39 S. E. Rep. 676.

50. CRIMINAL LAW—Bar to Further Prosecution.—A trial and conviction before a police justice, which is set aside in the hustings court on the defendant's appeal for defects in the indictment, held not a trial on the merits, which would bar a further prosecution.—Watts v. Commonwealth, Va., 39 S. E. Rep. 706.

51. CRIMINAL LAW—Instructions.—Where court's oral charge is too favorable to defendant, the fact that conclusions of such charge may be erroneous is no ground for reversal of judgment of conviction.—Boyett v. State, Ala., 30 South. Rep. 475.

52. CRIMINAL LAW—Self-Defense.—Question of self-defense held a jury question, and verdict against that defense will rarely be set aside.—State v. Newman, W. Va. 39 S. E. Rep. 655.

53. CRIMINAL LAW—Void Warrant.—Warrant of arrest directing special constable to arrest person for assault, held not void for any defect on its face.—Parish v. State, Ala., 30 South. Rep. 474.

54. CRIMINAL TRIAL—Absence of Defendant.—Refusal of a new trial on the ground that defendant was by unavoidable casualty prevented from being present and making defense cannot be reviewed on appeal.—Webb v. Commonwealth, Ky., 64 S. W. Rep. 451.

55. CRIMINAL TRIAL—Absence of Prisoner.—In case of felony, it is reversible error to proceed with examination of witnesses in absence of prisoner.—State v. Sheppard, W. Va., 39 S. E. Rep. 676.

56. CRIMINAL TRIAL—Change of Venue.—Burden of proof is on accused to show cause for removal of trial to a county other than that in which the crime is committed.—State v. Sheppard, W. Va., 39 S. E. Rep. 676.

57. CRIMINAL TRIAL—Illustration.—The commonwealth's attorney, in the course of his argument on a trial for murder, can have a man stand before the jury for the purpose of illustrating with an empty pistol that the shots could not have been fired as claimed by accused.—Herron v. Commonwealth, Ky., 64 S. W. Rep. 432.

58. CRIMINAL TRIAL—Rulings—Exceptions.—It is essential to review of the rulings on charges requested, in the absence of exceptions thereto, that the rulings be assigned as error.—Williams v. State, Ala., 30 South. Rep. 484.

59. CRIMINAL TRIAL—"Working" Penalty.—Under Ky. St. § 1877, defendant cannot complain that the jury, without an instruction authorizing them to do so, returned a verdict inflicting the working penalty.—Johnson v. Commonwealth, Ky., 64 S. W. Rep. 467.

60. DEEDS—Cancellation.—The chancellor properly canceled a deed executed in consideration of the grantee's agreement to support the grantor's father; it appearing that the grantees had broken their agreement by maltreating the father.—Bevins v. Keen, Ky., 64 S. W. Rep. 428.

61. DEEDS—Conflict in Terms.—Where the granting and habendum clauses of a deed passed the fee, a limitation in the granting part which was inconsistent therewith was void.—Ray v. Spears' Exr., Ky., 64 S. W. Rep. 418.

62. DEEDS—Delivery.—Deeds become effectual only from date of delivery.—Fitzpatrick v. Brigman, Ala., 30 South. Rep. 500.

63. DEED—Fee-Simple.—Deed in which a widow holding a life estate and her children joined held to pass a good title in fee-simple.—Pender v. Pender, N. Car., 39 S. E. Rep. 640.

64. DEEDS—Presumption of Delivery.—Where the grantor has executed and acknowledged a deed, and caused it to be recorded, a rebuttable presumption arises that the deed was delivered on the day of its date.—Bunnell v. Bunnell, Ky., 64 S. W. Rep. 420.

65. DEEDS—Subsequent Alterations.—Where a deed has been delivered, it passes title which cannot be devested by subsequent alterations in the deed.—Gulf Red Cedar Co. v. O'Neal, Ala., 30 South. Rep. 466.

66. DEPOSITIONS—Opinions of Witness.—Exceptions were properly sustained to portions of a deposition

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which were op nions of the witness upon questions of e v. Finley's Exr., Ky., 64 S. W. Rep. 459.

67. DISCOVERY—Insufficient Allegations.—A bill for discovery held insufficient, in failing to allege facts ng the validity of the contract in aid of which it ought.—American Ore Machinery Co. v. Atlas Cement Co., U. S. C. C., D. (N. J.), 110 Fed. Rep. 58.

68. DISCOVERY—Production of Books.—The court will not act favorably on an application for production of books and papers, ambiguous on its face, or not conforming to Rev. St. § 724.—Victor G. B oede Co of Baltimore City v. Joseph Bancroft & Son Co., U. S. C. C., D. (Del.), 110 Fed. Rep. 76.

69. DISMISSAL AND NONSUIT—Defective Statement.—A defective statement of a cause of action cannot be taken advantage of by a motion to dismiss.—Hileman v. Day Bros. Lumber Co., Ky., 64 S. W. Rep. 419.

70. DISTRICT AND PROSECUTING ATTORNEYS—Deputies.—Under Acts 1882 83, p. 647, providing for prosecutions of offense in the county court, and imposing on the judge the power of appointing a solicitor *pro tem*, in the absence of the so citor, a deputy cannot represent the state in the prosecution of misdemeanors.—Douglass v. Prowell, Ala., 30 South. Rep. 498.

71. EJECTMENT—Burden of Proof.—Plaintiff in e ectment must recover on the strength of his own title.—Bromberg v. Smee, Ala., 30 South. Rep. 483.

72. EJECTMENT—Right of User—Ejectment will not lie to recover a mere right of user in lands sold to a railway for railway purposes, which right only exists until the railway elects to use the same.—King v. Norfolk & W. Ry. Co., Va., 29 S. E. Rep. 701.

73. ELECTION—Mandatory Provisions.—The provisions of Code, ch. 8, § 34, requiring the names of all persons for whom the voter desires to vote to be placed on one column, all other columns to be defaced, are mandatory.—Daniel v. Simms, W. Va., 39 S. E. Rep. 690.

74. EMINENT DOMAIN—Street Railway.—Construction of electric street railway with consent of municipal authorities held not an imposition of additional servitude for which an abutting owner can demand compensation.—Baker v. Selma St. & S. Ry. Co., Ala., 30 South. Rep. 464.

75. EQUITY—Declaring a Contract.—A court of equity cannot entertain a suit merely to declare the existence and terms of a contract, where no facts are alleged or shown which would warrant the granting of any substantive relief.—McCormick v. McDonald, U. S. C. C., S. D. (N. Y.), 110 Fed. Rep. 50.

76. EQUITY—Dismissal of Bill.—Bill dismissed, without prejudice, on failure of complainants to offer to account for benefits received from sale, for which they seek to set aside.—Marx v. Clisby, Ala., 30 South. Rep. 517.

77. EQUITY—Laches.—Where testators devised land to his wife for life, with limitation on the coming of age of any of his sons or on her remarriage, and some of the children acquiesced in the occupation of the land for more than 50 years after their coming of age, their rights were barred by laches.—Wainwright v. Massenburg, N. Car., 39 S. E. Rep. 725.

78. EQUITY—Maxim.—The maxim that "they who seek equity must do equity" applies to an infant as a condition of court's action in her behalf.—Bunnell v. Bunnell, Ky., 64 S. W. Rep. 420.

79. EQUITY — Multifariousness. — Bill to establish trust in certain lands, and to recover rents and profits, and to assess dower, and to recover purchase money alleged to be due, held multifarious.—Bailey v. v. Calfee, W. Va., 39 S. E. Rep. 642.

80. EQUITY—Parties.—Where bill is filed to enforce rights of children of decedent, and the administrator of a deceased child and her surviving children are made parties, it is not necessary that the husband of the deceased child be made a party.—Gulf Red Cedar Co. v. O'Neal, Ala., 30 South. Rep. 466.

81. ESCAPE—Allegation of Cause.—An indictment against a convict for escaping from custody while out under guard need not allege the cause for which the convict was out under guard or the length of the term for which he was convicted.—Harris v. Commonwealth, Ky., 64 S. W. Rep. 434.

82. ESCAPE—Negligence of Sheriff.—Evidence held sufficient to sustain the conviction of a sheriff for negligently allowing a prisoner to escape.—Watts v. Commonwealth, Va., 39 S. E. Rep. 706.

83. ESTOPPEL—Covenants of Warranty.—Wife, joining in conveyance to release her dower, held not bound by covenants of warranty.—Threefoot v. Hillman, Ala., 30 South. Rep. 513.

84. EVIDENCE—Intent.—Where, in ejectment, the question was as to the sufficiency of delivery, evidence of grantor as to intent in delivering deed to his attorney, held inadmissible.—Fitzpatrick v. Brigman, Ala., 30 South. Rep. 500.

85. EVIDENCE—Possession.—Evidence that a paper purporting to be the assignment of a judgment to one claiming as assignee had been seen in his possession was incompetent, without proof of its execution.—Hagins v. Arnett, Ky., 64 S. W. Rep. 430.

86. EVIDENCE—Remarks of Attorney.—Evidence of remarks made by attorney without the scope of his employment held inadmissible in evidence.—Town of Waterbury v. Waterbury Traction Co., Conn., 50 Atl. Rep. 8.

87. EXEMPTIONS—Defense.—That a debtor, claiming exemptions out of attached property, appropriated after the attachment a part of the property of greater value than the exemptions claimed, constitutes a complete defense.—Strange v. Gess, Ky., 64 S. W. Rep. 458.

88. FEDERAL COURTS — Foreclosure—Supplemental Bill.—A supplemental bill may be filed in a mortgage, foreclosure suit in the federal court to enjoin an action in a state court against the mortgagor and purchaser on a pre-existing claim, and to enforce a lien on the property, notwithstanding Rev. St. § 720.—State Trust Co. v. Kansas City, P. & G. R. Co, U. S. C. C., W. D. (Mo.), 110 Fed. Rep. 10.

89. FEDERAL JURISDICTION—Corporation Inhabitant.—A corporation of one state is not, for the purpose of federal jurisdiction, under Act Cong. March 3, 1887, as amended by Act Cong. Aug. 13, 1888, an inhabitant or resident of another state, in which it has a usual place of business.—United States v. S. P. Shotter Co., U. S. C. C., S. D. (Ala.), 110 Fed. Rep. 1.

90. FEDERAL JURISDICTION — Diverse Citizenship.—A stockholder who is a resident of another state cannot maintain a suit in a federal court in the state of which the corporation is a citizen against the corporation and others, who are residents of a third state, to set aside an alleged illegal contract between the corporation and its co-defendants.—Lengel v. American Smelting & Refining Co., U. S. C. C., D. (N. J.), 110 Fed. Rep. 19.

91. FEDERAL JURISDICTION — Limits.—The federal courts must determine for themselves the limits of their jurisdiction, and as to such question the Supreme Court of the United States is the final arbiter.—Starr v. Chicago, R. I. & P. Ry. Co., U. S. C. C., D. (Neb.), 110 Fed. Rep. 8.

92. FEDERAL JURISDICTION—Protection of Riparain Rights.—A federal court of equity held to have jurisdiction of a suit for the protection of riparian rights, and as incidental thereto, to enjoin the prosecution of actions of ejectment against the complainant in a state court.—Sullivan Timber Co. v. City of Mobile, U. S. C. C., S. D. (Ala.), 110 Fed. Rep. 186.

93. FRAUDS, STATUTE OF—Antenuptial Agreement.—A parol antenuptial agreement, by which each party relinquishes all interest in the estate of the other, is within the statute of frauds, and void.—Powell's Admr. v. Meyers, Ky., 64 S. W. Rep. 428.

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94. FRAUDS, STATUTE OF—Parol Lease.—A parol contract for a lease for one year, to begin at a future date, is within the statute of frauds.—Thomas v. McManus, Ky., 64 S. W. Rep. 446.

95. GIFTS—Donor Unconscious.—It is immaterial that delivery to a donee is while the donor is unconscious, he having directed the delivery to be made.—King v. Smith, U. S. C. C. of App., Ninth Circuit, 110 Fed. [illegible] 95.

96. GUARDIAN AND WARD—Settling Controversy.—Under Gen. St., ch. 80, art. 2, a guardian has no power to settle controversy concerning the lands of his ward without the approbation of court.—Bunnell v. Bunnell, Ky., 64 S. W. Rep. 420.

97. HABEAS CORPUS — Jurisdiction.—Under Code, § 4817, the probate judge, in county where party is confined in jail or by order of circuit court pending investigation by grand jury, has no jurisdiction to issue a writ of *habeas corpus* on petition of such party.—Hall v. State, Ala., 30 South. Rep., Ala , 502.

98. HIGHWAYS — Abandonment.—Where a highway had not been used for 33 years, and trees had grown up therein, so that it was impassable by a vehicle, and other highways were provided and used by the public, there was an abandonment of the highway.—Phillips v. Lawrence, Ky., 64 S. W. Rep. 411.

99. HIGHWAYS—Lien—Street Not Dedicated.—No lien can arise against abutting property for the cost of improving that part of a street which had not been dedicated.—Bodley v. Finley's Exr., Ky., 64 S. W. Rep, 439.

100. HOMICIDE—Accused—Waiver of Rights.—A person on trial for murder waives none of his legal rights.—State v. Oakes, Me., 50 Atl. Rep. 29.

101. HOMICIDE—Declarations of Accused.—Evidence of declarations of accused, which he denies having made and which did not relate to the homicide are inadmissible.—State v. Sheppard, W. Va., 39 S. E. Rep. 676.

102. HOMICIDE—Evidence.—It is proper to ask a witness if he was a member of the coroner's jury on the inquest held over the child alleged to have been killed by accused.—State v. Sheppard, W. Va., 39 S. E. Rep. 676.

103. HOMICIDE — Evidence—Conversation.—On trial for murder, evidence of acts and conversations of accused prior to homicide held admissible, when tending to establish motive or the intent to commit the crime.—State v. Sheppard, W. Va., 39 S. E. Rep. 676.

104. HOMICIDE—"Fault."—It was error to leave to the jury the determination of the question as to what was the "fault" of the brother without an instruction to guide them.—Cornelius v. Commonwealth, Ky., 64 S. W. Rep. 412.

105. HOMICIDE — Reasonable Doubt.—Evidence on trial for murder, held to justify instruction that, if the jury believe the evidence beyond a reasonable doubt, they must convict.—Williams v. State, Ala., 30 South. Rep. 484.

106. HOMICIDE—Self-Defense.—On trial for murder, where self-defense is relied on by defendant, the jury must consider all evidence tending to prove it.—State v. Johnson, W. Va., 39 S. E. Rep. 665.

107. HUSBAND AND WIFE—Postnuptial Agreements.—A postnuptial agreement held to exclude the husband from any interest in the wife's estate, not only during her life, but after her death.—Powell's Admr. v. Meyers, Ky., 64 S. W. Rep. 428.

108. INDEMNITY—Payment of Judgment.—In an action to recover indemnity for payment of a judgment and expenses of a suit, evidence as to defendant's attorney having advised certain steps held admissible to show that the expense incurred was reasonably necessary.—Town of Waterbury v. Waterbury Traction Co., Conn., 50 Atl. Rep. 8.

109. INDIANS—Allotment.—Act August 15, 1894, confers on a circuit court of the United States jurisdiction to decree relief to an Indian, entitled under the law to an allotment of certain lands, of which right he has been deprived by the rulings of the land department.—Smith v. He-yu-tse-mil-kin, U. S. C. C., D. (Oreg.), 110 Fed. Rep. 6

110. INDIANS—Sale of Liquors.—A Puyallup Indian is not within Act. Cong. Jan. 30, 1897, prohibiting sale of liquors to Indians for whom the United States holds title to land in trust.—United States v. Kopp, U. S. D. C., D. (Wash.), 110 Fed. Rep. 160.

111. INDICTMENT AND INFORMATION—Misdemeanor.—Under Const. art 1, § 9, the general assembly can provide that, where a prosecution for misdemeanor is begun by affidavit in the county court, the case may be transferred to the circuit court, and there tried without action by the grand jury.—Witt v. State, Ala., 30 South. Rep. 473.

112. INDICTMENT AND INFORMATION—Sufficient Record.—A record entry in a hustlings court, ordering an indictment to be certified to the police justice for trial held a sufficient record of the presentment of the indictment.—Watts v. Commonwealth, Va., 39 S. E. Rep. 706.

113. INFANTS—Repudiating Sale.—Equity has power to elect for infant, and will not allow him to hold proceeds of an unauthorized sale of his property and repudiate the sale.—Marx v. Clisby, Ala., 30 South. Rep. 517.

114. INJUNCTION—Estoppel.—Plaintiff in an action to enjoin building of hotel in violation of a restriction, held estopped.—Hembley v. Marlborough Hotel Co., N. J., 50 Atl. Rep. 14.

115. INJUNCTION—Invasion of Property Rights.—A court of equity has jurisdiction to grant an injunction to prevent the threatened invasion by a city of the property rights of the owners of wharves within its limits by the adoption of an ordinance prohibiting the charging of wharfage for their use.—Leverich v. City of Mobile, U. S. C. C., S. D. (Ala.), 110 Fed. Rep. 170.

116. INSURANCE — Insurable Interest.—Person contracting to build a house and furnish materials held to have insurable interest.—Ulmer v. Phœnix Fire Ins. Co., S. Car., 39 S. Rep. 712.

117. INSURANCE — Service of Process.—The power of attorney given to the insurance commissioner by a foreign company, authorizing service of process on him, held irrevocable.—Moore v. Mutual Reserve Fund Life Assn., N. Car., 39 S. E. Rep. 637.

118. INSURANCE—Warranties or Representations.—In a case of doubt as to whether statements made by an applicant for insurance are to be regarded as warrants, the benefit of the doubt will be given to the insured, and they will be held as representations merely as to all things not material to the risk.—McClain v. Provident Sav. Life Assur. Soc., U. S. C. C. of App., Third Circuit, 110 Fed. Rep. 80.

119. INTOXICATING LIQUORS — Evidence.—Under an indictment charging the offense of selling liquor to I, defendant cannot be convicted upon proof of a selling to H, though I furnished the money to pay for the liquor.—Cornett v. Commonwealth, Ky., 64 S. W. Rep. 415.

120. INTOXICATING LIQUORS — Local Option.—Where the person procuring whisky for another acted as agent for the seller, as well as of the buyer, and the means by which he procured the liquor was a device to evade the local option law, he is guilty of violating the law.—Penner v. Commonwealth, Ky., 64 S. W. Rep. 485.

121. JUDGES — Special Judge.—Where special judge is absent, and a second special judge is elected, it will be presumed there was reason therefor, though none is shown by the record.—State v. Newman, W. Va., 39 S. E. Rep. 655.

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122. JUDGMENT — Conclusiveness.—The fact that the court refused to hear any evidence in an action in which a judgment sought to be enforced was rendered, and refused defendant's demand for a jury trial, states no defense, as the judgment is conclusive until reversed or vacated.—Bell Co. v. Foley, Ky., 64 S. W. Rep. 433.

123. JUDGMENT — Mortgages — Foreclosure — Interveners.—Where a foreclosure decree in the federal court provided that the purchaser should be entitled to litigate in that suit the claims of interveners, the interveners could not escape that provision by dismissing their petition without prejudice and resorting to another forum.—Tolle v. Owensboro, etc. R. Co., Ky., 64 S. W. Rep. 455.

124. JUDGMENT — Nonsuit.—On non-compliance by one party with an order for production of papers, the remedy is restricted to a judgment of nonsuit or by default.—Bloede Co. of Baltimore City v. Bancroft & Sons Co., U. S. C. C., D. (Del.), 110 Fed. Rep. 76.

125. JUDGMENT — Res Adjudicata.—A suit construing certain deeds and the rights of the parties thereunder will not be considered *res judicata* of an action of ejectment founded on an alleged breach of the condition of the deeds.—King v. Norfolk & W. Ry. Co., Va., 39 S. E. Rep. 701.

126. JURY—Constitutional Guaranty.—Const. U. S. Amend. arts. 5, 6, relating to trial by jury, apply to federal, and not to state courts.—Williams v. Hert, U. S. C. C., D. (Ind.), 110 Fed. Rep. 166.

127. JUSTICE OF THE PEACE — Criminal Jurisdiction. —A justice of the peace is without authority to review an order of the circuit court remanding one accused of crime to await investigation by grand jury, or to change the amount of bail bond fixed by the order.—Hall v. State, Ala., 30 South. Rep. 502.

128. JUSTICE OF THE PEACE — Examination.—Under Code, ch. 156, § 12, a justice must examine any person brought before him for an offense, if demanded, as soon as may be.—Harper v. Harper, W. Va., 39 S. E. Rep. 661.

129. LANDLORD AND TENANT — Liability of Lessor for Defects.—Lessors of a building, not having known of a defect therein whereby the ceiling fell, held not liable to persons present therein by license of lessee, and injured thereby.—Dyer v. Robinson, U. S. C. C., S. D. (Ohio), 110 Fed. Rep. 99.

130. LANDLORD AND TENANT — Title of Tenant.—Before tenant can assert title to rented premises he must surrender possession.—Davis v. Williams, Ala., 30 South. Rep. 488.

131. LIFE TENANT — Repairs.—The life tenant must alone pay the cost of repairing a sidewalk in front of the property, where the old pavement had been worn out by long use.—Brodie v. Parsons, Ky., 64 S. W. Rep. 426.

132. LIMITATION OF ACTIONS — Destroying Timber.—Under Gen. St. 1888, § 1379, suit brought for destroying timber under section 1345 is not barred within one year.—Plumb v. Griffith, Conn., 50 Atl. Rep. 1.

133. LIMITATION OF ACTIONS — Negligence of Attorney.—Limitations held not a bar to action against attorney, who had collected money for the estate of a non-resident, because of failure to acquire knowledge of such collection at an earlier date.—Bromberg v. Sands, Ala., 30 South. Rep. 510.

134. LIS PENDENS—Subjecting Debt.—An action upon a judgment and return of no property, seeking to subject a debt owing to the judgment defendant by one who was made a party, created a *lis pendens* as to such debt.—Hacker v. White, Ky., 64 S. W. Rep. 446.

135. LOGS AND LOGGING—Conclusive Measurements. —A contract for the sale of logs construed as not making conclusive the measurements taken by the buyer alone after delivery of the logs.—Southern Lumber Co. v. Asher, Ky., 64 S. W. Rep. 462.

136. MALICIOUS PROSECUTION — Indictment — Presumption.—In action for malicious prosecution, discharge by justice of plaintiff, who has been arrested, or refusal of grand jury to indict, held *prima facie* evidence of want of probable cause, unless it was after hearing of witnesses for the accused, as well as for the prosecution.—Harper v. Harper, W. Va., 39 S. E. Rep. 661.

137. MANDAMUS — Board of Canvassers.—Where board of canvassers adjourns without having performed its duties, under Code, ch. 3, § 69, it may be reconvened under section 89 of said chapter.—Daniel v. Simms, W. Va., 39 S. E. Rep. 690.

138. MANDAMUS — Council — Ordinances.—*Mandamus* lies to compel the mayor and council of a town to pass an ordinance striking certain territory from the town, in accordance with Ky. St. § 3433, as amended in March, 1899, where the requisite petition has been presented.—Steele v. Willis, Ky., 64 S. W. Rep. 417.

139. MASTER AND SERVANT—Fellow-Servant.—Plaintiff, employed by defendant railroad company, injured by the negligence, if any, of himself and his fellow workmen, held not entitled to recover.—Martin v. Louisville & N. R. Co., Ky., 64 S. W. Rep. 417.

140. MASTER AND SERVANT — Sufficient Employees—Risk.—A railroad company cannot set up as a defense to an action by a section master assumption of risk on failure of company to furnish a sufficient number of employees.—Bodie v. Charleston & W. C. Ry. Co., S. Car., 39 S. E. Rep. 715.

141. MASTER AND SERVANT — Telegraph Company—Injury to Lineman.—A telegraph company is liable for an injury to a lineman caused by the falling of a decayed pole on which he was working, the unsafe condition of which would have been discovered by a proper inspection.—Tracy v. Western Union Tel. Co., U. S. C. C., W. D. (Pa.), 110 Fed. Rep. 103.

142. MORTGAGE — Contest by Bondholders.—Individual bondholders, in suit by trustee to foreclose mortgage, can contest validity of certain of the bonds.—Central Trust Co. of New York v. California & N. R. Co., U. S. C. C., N. D. (Cal.), 110 Fed. Rep. 70.

143. MORTGAGES—Omission of Redemption Clause.—Where a grantee and his devisees have been in undisturbed possession for years, and there is no evidence that the clause of redemption was omitted through mistake or fraud, the conveyance will not be declared a mortgage.—Frazier v. Frazier, N. Car., 39 S. E. Rep 684.

144. MORTGAGES—Right of Junior Mortgagee.—Right of junior mortgagee to have lands sold in inverse order of alienation held destroyed by foreclosure of prior mortgage and purchase of lands by a third party.—Threefoot v. Hillman, Ala., 30 South. Rep. 513.

145. MUNICIPAL CORPORATIONS — Highways — Abutting Owners — Assessment.—Abutting property in cities of the first class cannot be charged with the cost of reconstructing a street, though the original construction may not have been at the cost of abutting owners.—City of Louisville v. Tyler, Ky., 64 S. W. Rep. 415.

146. MUNICIPAL CORPORATIONS—Highways—Improvements.—That a railroad company is in possession of wharf property owned by the city and derives revenue therefrom does not render it liable for improvement of a street on which the property abuts.—Louisville & N. R. Co. v. Nehan, Ky., 64 S. W. Rep. 457.

147. MUNICIPAL CORPORATIONS — Improvements.—A city will not be restrained from executing a plan of its trustees as to the construction of a sidewalk, though the improvement may be limited to one piece of property.—Trustees of Hazelgreen v. McNabb, Ky., 64 S. W. Rep. 431.

148. MUNICIPAL CORPORATIONS — Survey of Town—Notice.—Plan and survey of town, when duly recorded, held notice to all abutting real estate owners as to location of lines of streets and alleys.—McClellan v. Town of Weston, W. Va., 39 S. E. Rep. 670.

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149. NEGLIGENCE—Repair After Accident.—Repair of railing by defendant after accident held not an admission that its having been torn away by it was the cause of such accident.—Town of Waterbury v. Waterbury Traction Co., Conn., 50 Atl. Rep. 8.

150. NEW TRIAL—Comments of Judge.—Comments of judge which are deductions only of truth based on general experience are not subject to exceptions.—State v. Means, Me., 50 Atl. Rep. 30.

151. NEW TRIAL—Disturbance of Verdict.—Judgment by court without intervention of jury will not be disturbed, where there is evidence to support it.—Louisville & N. R. Co. v. Solomon, Ala., 30 South. Rep. 491.

152. NEW TRIAL — Evidence.—Refusal of new trial, where there is evidence tending to sustain the verdict, held not error of law.—Hagen v. Anderson Co., S. Car., 39 S. E. Rep. 712.

153. OBSTRUCTING JUSTICE — Resisting Special Constables.—A person arrested for resisting special constable, appointed by justice, under Code, § 978, cannot question his appointment.—Parish v. State, Ala., 30 South. Rep. 474.

154. OFFICERS—Buying Jurors' Claims.—For the offense of buying or contracting for the claims of jurors for services, a county officer is subject to a fine of $50.—Commonwealth v. Dockery, Ky., 64 S. W. Rep. 460.

155. OFFICERS—Drunkenness.—Under Ky. St. § 3749, any officer who at any time is so drunk as to disqualify him from discharging the duties of his office is guilty, though he may never be drunk while attempting to perform any official act.—Johnson v. Commonwealth, Ky., 64 S. W. Rep. 467.

156. PAUPERS—Pauper's Property.—The directors of a county poor house were not authorized to apply property acquired by a pauper inmate after entry to the payment of his board prior to the acquisition of such estate.—Board of Directors of Mason County Infirmary v. Smith's Committee, Ky., 64 S. W. Rep. 466.

157. PERPETUITIES—Limitation of Devise.—To avoid the common-law rule against perpetuities, a limitation of a devise must be so made that the estate not only may, but must, vest within the prescribed period.—Hanley v. Kansas & T. Coal Co., U. S. C. C. W. D. (Ark.), 110 Fed. Rep. 62.

158. PLEADING—Demurrer.—Where plea is not frivolous, but defective, its sufficiency should be tested by demurrer, and not by motion to strike.—Karter v. Fields, Ala., 30 South. Rep. 504.

159. PLEADING—Non Est Factum.—A plea of *non est factum* and a plea of no consideration are not inconsistent.—Spencer v. Society of Shakers, Ky., 64 S. W. Rep. 468.

160. POWERS—Reference.—In execution of a power in trust given by a deed, a direct reference to the power is unnecessary.—Gulf Red Cedar Co. v. O'Neal, Ala., 30 South. Rep. 466.

161. PRINCIPAL AND AGENT—Power of Attorney.—One claiming under a power of attorney to recover land, whereby he is to have one-half of what he recovers, has not an interest coupled with the power, which prevents death from terminating the agency.—Wainwright v. Massenburg, N. Car., 39 S. E. Rep. 725.

162. PROCESS—Insurance Companies.—In an action against a foreign insurance company, held, that the defendant could not avoid service of process on the insurance commissioner on the ground of no liability to plaintiff.—Moore v. Mutual Reserve Fund Life Assn., N. Car., 39 S. E. Rep. 687.

163. PROHIBITION—When Issued.—Where there is objection to jurisdiction, prohibition will not be issued until party complaining of abuse of power shall have sought redress in the court below by proper objection, and failed to obtain it.—Hill v. Tarver, Ala., 30 South. Rep. 499.

164. PUBLIC LANDS—Patents.—The fact that a patent embraces older grants or surveys renders it void only to the extent of such prior grants.—Nickels v. Commonwealth, Ky., 64 S. W. Rep. 448.

165. PUBLIC LANDS—Timber Lands.—An applicant for the purchase of timber lands under 70 Stat. 89, is not required to make a personal examination of the land before making the declaratory statement, so as to be able to verify the same from personal knowledge.—Hoover v. Salling, U. S. C. C. of App., Seventh Circuit, 110 Fed. Rep. 43.

166. QUIETING TITLE—Evidence.—Where an action is brought to determine the title to land, a grant from the state is admissible in evidence to show such title.—Midgett v. Midgett, N. Car., 39 S. E. Rep. 722.

167. QUIETING TITLE—Remedy at Law.—A federal court of equity held without jurisdiction under the allegations of the bill, on the ground that complainant's remedy was at law.—Hanley v. Kansas & T. Coal Co., U. S. C. C., W. D. (Ark.), 110 Fed. Rep. 62.

168. QUIETING TITLE—Sufficient Allegations.—In an action to quiet title, a petition alleging that defendant claims the land, by stating that he is the owner of the land and has trespassed thereon, sufficiently states the facts showing the defendant is setting up the claim of hostile title.—Campbell v. Campbell, Ky., 64 S. W. Rep. 458.

169. QUIETING TITLE—Sufficient Averments.—In an action to quiet title, an answer setting forth defendant's adverse title cured any lack of sufficient averment in the petition.—Campbell v. Campbell, Ky., 64 S. W. Rep. 458.

170. QUO WARRANTO—Authority—Burden of Proof.—In *quo warranto*, where respondent admits that he is holding the office, the burden is on him to show his authority.—State v. Foster, Ala., 30 South. Rep. 477.

171. RAILROADS—Bridge.—Though defendant raised the bridge to remove the danger to brakemen on freight trains, it was liable if it failed to comply with its contract with plaintiff.—Louisville & N. R. Co. v. Pittman, Ky., 64 S. W. Rep. 460.

172. RAILROADS—Defective Bridge.—As the defect in the bridge was due to the fact that defendant, after it was constructed, raised it in the center, defendant was not entitled to notice of its insufficiency before the bringing of suit.—Louisville & N. R. Co. v. Pittman, Ky., 64 S. W. Rep. 460.

173. RAILROADS—Failure to Give Signals.—Railroad company held liable on failure to give statutory signals at crossing, whereby person on the crossing was injured.—Hutto v. South Bound R. Co., S. Car., 39 S. E Rep. 710.

174. RAILROADS—Lien for Injuries.—No lien exists upon a railroad for damages for temporary injuries resulting from negligent failure to construct a sufficient culvert under an enbankment.—Tolle v. Owensboro, F. of R. & G. R. R. Co., Ky., 64 S. W. Rep. 455.

175. RECEIVERS—Sale—Acquiescence.—In a suit to set aside the confirmation of a receiver's sale, held, that the affidavit of the principal stockholder objecting to the sale would not be considered, because of his acquiescence to the sale.—Rogers v. Rogers, Locomotive Co., N. J., 50 Atl. Rep. 10.

176. REFORMATION OF INSTRUMENTS—Mistake.—A contract cannot be reformed on the ground of mistake, unless it is clearly shown that the mistake was mutual.—Fulton v. Colwell, U. S. C. C., D. (N. J.), 110 Fed. Rep. 54.

177. REMOVAL OF CAUSES—Not Separable.—An action commenced in a state court, against two corporations of that state, on a cause of action not separable as to defendants, cannot be removed to the United States court on the petition of one defendant.—State Trust Co. v. Kansas City, P. & G. R. Co., U. S. C. C., W. D. (Mo.), 110 Fed. Rep. 10.

178. REPLEVIN—Assignee—Seizure.—Where the assignee of a mortgage of chattels seized the same under proceeding in claim and delivery, held not necessary that plaintiff should show demand before insti-

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tuting a proceeding.—Satterthwaite v. Ellis, N. Car. 39 S. E. Rep. 726.

179. SALES — Confirmation of Condition. — Where salesman inserts condition that sale shall be subject to confirmation, no action for non-delivery can be maintained without showing confirmation.—Gilman v. Stock, Me., 50 Atl. Rep. 81.

180. SALES—Recovery of Goods.—Placing of goods in car with goods delivered to railroad in accordance with contract two days previous, held not to prevent recovery for the original goods.—Bowers v. J. B. Worth Co., N. Car., 39 S. E. Rep. 685.

181. SALES—Refusal to Deliver.—For the refusal of the seller to deliver goods to the buyer, the measure of damages is the difference between the contract price and the market price at the time and place of delivery.—Parry v. Mfg. Co. v. Lyon, Ky., 64 S. W. Rep. 436.

182. SCHOOLS AND SCHOOL DISTRICTS—Levying Taxes.—A county board of supervisors has authority to levy a tax for county public school purposes on all property within their jurisdiction; and hence Acts 1895-96, p. 290, exempting property in a certain town from school taxes is void.—Supervisors of Washington County v. Saltville Land Co., Va., 39 S. E. Rep. 704.

183. SCHOOL AND SCHOOL DISTRICTS—Taxation.—Ky. St. § 4458, providing that, when lines dividing districts divide the lands of any person, the tax shall be levied and paid to the district where the homestead may be situated, applies only to common school districts and not to free graded school districts.—Trustees of Paintsville Graded Free School Dist. v. Davis, Ky., 64 S. W. Rep. 433.

184. SHIPPING—Crowding Passengers.—A steamship company is responsible for damages to its passengers occasioned by crowding beyond the accommodations provided for them.—The Valencia, U. S. D. C., D. (Wash.), 110 Fed. Rep. 221.

185. SPECIFIC PERFORMANCE—Relief—Parties.—Where bill to enforce specific performances is filed by several persons, all of the complainant must be entitled to relief, or none will be granted.—Davis v. Williams, Ala., 30 South. Rep. 488.

186. STARE DECISES—Land.—Decisions acted on for many years, and upon the faith of which large bodies of land have been bought and sold, will not be overruled.—Nickels v. Commonwealth, Ky., 64 S. W. Rep. 448.

187. STATUTES—Construction.—Where the language of the statute is ambiguous, resort may be had to surrounding circumstances to determine its meaning.—Daniel v. Simms, W. Va., 39 S. E. Rep. 690.

188. STATUTES — Construction. — When words in a statute have acquired well understood meaning, it is presumed that they were used in that sense in a subsequent statute on the same subject.—Daniel v. Simms, W. Va., 39 S. E. Rep. 690.

189. STATUTE—Passage.—Where a statute does not appear from the journal of the houses to contain any provisions which the same did not contain in passing, and none were omitted, and all constitutional steps are shown to have been taken, it is valid.—Robertson v. State, Ala., 30 South. Rep. 494.

190. STREET RAILROADS.—It is not necessary for the charter of a street railway company to limit the sought to be attached to pay taxes on the mortgage and bonds, may enjoin the collection of the taxes.—Board of Councilmen of City of Frankfort v. Fidelity Trust & Safety-Vault Co., Ky., 64 S. W. Rep. 470.

193. TAXATION—Void Levy—Void Sale.—Where assessment of land for taxation is illegal, a sale for nonpayment of taxes is void.—State v. Tavenner, W. Va., 39 S. E. Rep. 649.

194. TRESPASS—Denial.—Where, in an action under Gen. St. 1888, § 1845, defendant denied cutting any trees, a claim that he was misled is untenable.—Plumb v. Griffin, Conn., 50 Atl. Rep. 1.

195. TRIAL—Admission of Evidence.—The court has a wide discretion of the admission of evidence in rebuttal.—Spencer v. Society of Shakers, Ky., 64 S. W. Rep. 468.

196. TRIAL—Selection of Jurors.—One who has formed an opinion as to guilt of accused, held not competent, unless he can state unequivocally that his opinion will not affect his judgment.—State v. Johnson, W. Va., 39 S. E. Rep. 665.

197. TROVER AND CONVERSION—Extent of Recovery.—In action for conversion of cotton subject to land. lord's lien, plaintiff cannot recover more than the amount of his demand existing at the time of the trial.—Karter v. Fields, Ala., 30 South. Rep. 504.

198. TRUSTS—Chargeable with Interest.—A trustee was not chargeable with interest where he paid out money as fast as it was collected and there were no credits of interest on sums paid out.—Doom v. Howard, Ky., 64 S. W. Rep. 469.

199. TRUSTS—Compensation of Trustee.—Where no extraordinary services were rendered by a trustee, he was not entitled to any compensation in excess of 5 per cent. commission.—Doom v. Howard, Ky., 64 S. W. Rep. 469.

200. TRUSTS—Suit for Beneficiaries.—Where executor in will is trustee for beneficiaries, and in breach of his trust executes a mortgage, beneficiaries cannot sue purchaser at foreclosure to enforce the trust without accounting for the proceeds.—Marx v. Clisby, Ala., 30 South. Rep. 517.

201. VENUE—Where Land is Situated.—Under Code, § 190(3), held error to refuse to remove to the county where the land was situated an action brought in the county of the defendant's residence to enforce the payment of a purchase-money bond.—Connor v. Dillard, N. Car., 39 S. E. Rep. 641.

202. WATERS AND WATER COURSES — Navigable Waters.—It is fundamental law throughout the United States that all navigable waters are common highways, forever free to the use of all citizens of the United States, without any tax, imposts, or duty therefor.—Leverich v. City of Mobile, U. S. C. C. C., S. (Ala.), 110 Fed. Rep. 170.

203. WILLS—Conclusiveness of Probate.—A judgment probating a will devising land held binding, not only on the heirs, but as a proceeding *in rem* on all the world.—Davies v. Leete, Ky., 64 S. W. Rep. 441.

204. WITNESSES—Assignor of Judgment.—The assignor of a judgment was not a competent witness for his assignee to establish the fact that the judgment had been assigned to him by a person since deceased.—Hagins v. Arnett, Ky., 64 S. W. Rep. 430.

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Central Law Journal.

ST. LOUIS, MO., DECEMBER 13, 1901

The *New York Law Journal* in a recent issue favors us with an extended criticism of our position on the validity of legislation regulating the practice of medicine, which we indicated editorially in our issue of November 8th. In this particular editorial we endeavored to lay open the clear invasion of private right inherent in such legislation, especially when it presumes to bar from practice homœopaths, osteopaths, christian scientists, magnetic healers, or any other school of healing not recognized by the state or represented on the board of examination. We took this position, not because we believe in any of the "heretical systems," as our contemporary styles all systems of healing outside of the orthodox schools of medicine and surgery, but because the experience of history has taught it to be unwise for one generation to pass judgment on heresy, in either religion or science, that may spring up in its midst and does not concern any one but its immediate votaries; the reason being that very often the heretical views of one generation become the orthodox views of the next. The cry of "heresy" is the cry of the dark ages,—it never was the slogan of a progressive people. This unreasonable antipathy to new things and new systems has its petrified unanswerable object lesson in the history of the Chinese Empire. Our contemporary speaks of the science of medicine as founded on the "experimentation of centuries." Not more than ten or twelve centuries. The Chinese have a system based upon the experimentation of forty centuries, together with the total exclusion of "heretical systems" by imperial edict! It cannot be denied that the great freedom of thought and practice permitted and encouraged during the century which has just closed, has been the principal cause for the wonderful advancement of the civilized particular instance the courts, in comparatively recent cases, have recognized and sustained the position we have taken, holding that while the state may prescribe who is proficient enough to practice "medicine" they cannot say that one who does not rely at all upon medicine shall not minister to the sick. In other words, by constructional limitations, these statutes have been held to have no application to these so-called "unorthodox methods of treatment." Nelson v. State Board of Health (Ky. 1900), 57 S. W. Rep. 501; Evans v. State, 9 Ohio, S. & C. P. Dec. (Ohio 1899) 222; State v. Myloid (R. I.), 40 Atl. Rep. 15; State v. Liffring, 61 Ohio St. 39.

In another recent issue of The *New York Law Journal*, and on another question of state interference with individual rights, our contemporary, with apparent reluctance, takes up the gauntlet for the individual. The subject referred to is quite a timely one—"Practical Restraints of the Evils of Ambulance Chasing." It seems that in the east the lawyer whose practice consists mainly in bringing suits against large corporations for personal injuries, is subjected, not only to a "certain amount of professional and social ostracism," but also of very hostile criticism which often regards his methods as criminal, and is continually suggesting some appropriate punishment for him. One ridiculous suggestion, according to our contemporary, was made in one of the newspapers of New York City recently—that the present rules of negligence should be revised, because modern inventions and the modern spirit of haste call for a less stringent measure of liability for common carriers! The suggestion is worthy of a Czar or a Son of Heaven! We wonder what the rights of the individual can be in the city of New York when such suggestions can be even tolerated. Does twentieth-century civilization demand that the individual must bow before the "modern spirit of haste," and that the lawyer who seeks out the man who has been crushed by it and

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that it is very unprofessional. But the seriousness of this offense is much mitigated when we consider that the great corporations themselves have made the practice almost necessary by rushing upon their unfortunate victims and endeavoring, by falsely stating their rights under the circumstances, to induce them to compromise their claims against the company for a mere pittance. We believe more odium attaches to the latter practice than to the former.

The whole trend of this discussion, however, is wrong, and lawyers and law journals are as much responsible for the state of public sentiment on this question as any other source of criticism. The public have been led to believe that an action for damages for negligence resulting in personal injury is an unfair and illegitimate scheme to make money; that there is no equity in it; and that any damages which plaintiff may obtain in such a case is punitive rather than compensatory. It is a pleasure to note, however, that the courts of the country have not encouraged this sentiment, but, with very few exceptions, have, in firmly sustaining verdicts obtained in such cases, asserted that damages for a broken limb, or a blinded eye, are just as legitimate as those for the loss of profits in a business transaction. Bringing an action for damages, therefore, based on negligence, does not ostracize the lawyer. On the other hand, he performs the noblest function of the advocate, in defending the weak against the strong, and upholding the rights of the individual as superior to any and all rights of property and to any "modern spirit of haste" that would sacrifice human life for material gain.

NOTES OF IMPORTANT DECISIONS.

LARCENY BY KEEPING WHAT WAS INNOCENTLY GOT.—The distinction between the felonate the money was conceived, and that therefore the intent, appropriation, and receipt were simultaneous. But this kind of reasoning is very far from satisfactory. Some judges have also regarded a case of this kind as equivalent to the retention by the finder of lost property. But, if the possession of property is innocently obtained, the subsequent retention of it, with a purpose to deprive the true owner thereof, cannot be deemed larceny without doing violence to the ordinary definitions of that crime. In the case of retention of lost property by the finder the cases generally agree in holding that the taking must be with the criminal intent in order to constitute larceny; that, if the finder did not have any intent to withhold the property from the true owner at the time when he found it he is not guilty of larceny, even if he afterwards appropriates it to his own use. It is obvious, of course, that, if he does retain the property when he knows or could easily ascertain, who the owner is, it will be pretty difficult in most cases for him to prove that he did not have such intent when the property was first found, but this is merely a matter of proof, and, if the circumstances are such that he can show his innocent intent at the time of finding the property, he is not guilty of larceny.

A change of the common-law definition of larceny has been made by statute in so many instances that it is obviously necessary to take what has been said above with the understanding that it is no longer true in all the states. In New York, for instance, the statute defining this crime has been so broadened as to include almost every withholding of another's property with intent to deprive him of it. But wherever the common-law rule on the subject of larceny is in force it may be safely said that the unlawful retention of property innocently received will never constitute that crime.—*Weekly Law Bulletin.*

A PURCHASER'S LIEN FOR DEPOSIT.—The vendor's lien for unpaid purchase money is one of the most familiar instances of a charge arising by operation of law, but it is less usual to meet with a purchaser's lien such as was discussed in the recent case of Whitbread & Co. v. Watt, 49 W. R. 534 (1901), 1 Ch. 911. That a vendor of land, who has conveyed without receiving the purchase money or part of it, has a lien for the amount unpaid has been undisputed law ever since Lord Eldon's examination of the doctrine

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otherwise, and does not ultimately obtain a conveyance, the contract going off through no default of his, is entitled to a similar lien on the land for the amount which should be repaid to him. The similarity of the two liens was pointed out by Kindersley, V. C., in Wythes v. Lee, 3 Drew. p. 403. After suggesting that a possible distinction might exist in the fact that the vendor had the estate in the land at the time of the contract, and only intended to convey subject to payment of the purchase money, while the purchaser had not the estate in his possession, and his lien, consequently, was not in its origin the same sort of lien as that of the vendor, he continued: "But when a contract is made and that goes off, it appears to me that, in principle and justice, the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of the vendor after conveyance. * * * It appears to me that, on the principles of equity and justice, the purchaser, when the contract goes off, has a lien." As long as the land remains in the hands of the vendor the question of lien is not so likely to arise. It is when the vendor, who has received part of the purchase money, sells or mortgages the land without accounting to the assignee for what he has received that the original purchaser may find his right disputed. In the present case of Whitbread & Co. v. Watt, *supra*, by a contract made in January, 1897, one Saunders agreed to sell, and the purchasers agreed to buy, a freehold plot upon a building estate of the vendor for £500, of which £200 was paid at once as deposit, and the remaining sum of £300 was to be paid on completion. As to date of completion it was stipulated that this should take place as soon as 300 houses had been erected on the estate, but if so many houses were not erected within two years the purchasers were to have the right to cancel the agreement. Subsequently to this contract Saunders sold and conveyed the estate and the assignee mortgaged it. In November, 1900, the mortgagees sold and conveyed the estate to the defendant Watt with notice of the contract of January, 1897. The 300 houses had not been built, and Saunders had not paid or accounted for the deposit of £200 to any of his successors in title. In December, 1900, the plaintiffs gave notice to rescind the contract of January, 1897, and they claimed from Watt, the then owner, the return of the deposit. This was refused, and the question was raised in the action whether the plaintiffs were entitled to a lien for £200 upon the land in the hands of Watt. We have already seen that the principle that a purchaser may be entitled to a lien was laid down in Wythes v. Lee; but the part of the purchase money, then to the extent of the amount paid the transfer is complete. Where, said Lord Westbury, L. C., in the case just referred to, the contract is an executory contract "in this sense, namely, that the ownership of the estate is transferred subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of the contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate." And Lord Cranworth laid down the doctrine in similar terms: "There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of a part of the purchase money the vendor had executed a mortgage to him of the estate to that extent." In Rose v. Watson a purchaser was bound by his contract to pay a deposit immediately and the balance in three years' time, and to pay interest on the balance half-yearly in the meantime. He paid the deposit and made several payments of interest, but at length declined to complete the contract on the ground that the representations on which he had been induced to enter into it remained unfulfilled. It was held that the purchaser was justified in the course he had taken, and that he had a lien on the land for the sums which he had paid on account of principal and interest, a lien which he was entitled to enforce against mortgagees of the vendor who had taken with notice of the contract.—*Solicitors' Journal.*

CRIMINAL LAW—CRUEL AND UNUSUAL PUNISHMENTS.—Justice Rumsey in the case of *In re* Bayard, 25 Hun (N. Y.), 546, proved his utter failure as a prophet when he said: "The courts have rarely had occasion to construe the meaning of the phrase 'cruel and unusual punishment.' And since no punishment can be inflicted until authorized by the legislature which is often elected, and represents the general moral ideas of the people, it is not likely that they will often be called on to construe it." It may seem an irony of fate, but since that decision, one of the most [illegible] questions of law has been that of

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nal. It is not an easy matter to find out just what is meant by the prohibition against "cruel and unusual punishments," but the cases all seems to point to the conclusion that it was not the intention by this provision of the constitution to limit legislative discretion in fixing the punishment for crime. This question arose and was intelligently discussed in the recent case of Territory v. Ketchum, 65 Pac. Rep. 169, where the Supreme Court of New Mexico held that a statute prescribing the death penalty for assault upon a train with intent to commit robbery or other felony, does not prescribe a cruel and unusual punishment, within the meaning of the eighth amendment to the constitution of the United States. The court reviews the authorities holding that "cruel and unusual punishments" include only those involving torture and lingering death. Sturtevant v. Commonwealth, 158 Mass. 598, 33 N. E. Rep. 648; State v. Williams, 77 Mo. 310; People v. Morris, 80 Mich. 634, 45 N. W. Rep. 591; *In re* Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930. The test applied by all these cases was not the proportion between the offense and the punishment but the character of the punishment and its mode of infliction. The court said: "If this be the test in all cases, then it must be clear that legislative discretion in determining the severity of punishment for crime is not to be interfered with by the courts, so long as all forms of torture are avoided." In State v. Williams, 77 Mo. 310, the court said: "The interdict of the constitution against the infliction of cruel and unusual punishments would apply to such punishments as amount to torture, or such as would shock the mind of every man possessed of common feeling. If a punishment by imprisonment for life of one convicted of the offense therein defined [obtaining money under false pretenses], should be inflicted, it might well be said that such punishment would be excessive, or, rather, entirely disproportioned to the magnitude of the offense, yet, notwithstanding, there is high authority for saying that the question whether the punishment is too severe and disproportionate to the offense is for the legislature to determine." Numerous late cases hold the same position. The following punishments have been held not violative of the constitutional prohibition against 'cruel and unusual punishments' on the same principle: a heavier penalty on one convicted of felony where he has twice before been convicted for similar offenses (McDonald v. Commonwealth, 180 U. S. 311, 21 Sup. Ct. Rep. 389); a fine $25 to $100 per day for operating a street car in winter without protecting screen for motorman (State v. Whitaker, 160 Mo. 59, 60 S. W. Rep. 1068); penitentiary imprisonment of tramp threatening injury (State v. Hogan, 63 Ohio St. 202, 58 N. E. Rep. 572); death penalty on train robbers (State v. Stubblefield, 157 Mo. 360, 58 S. W. Rep. 337); hard labor in county jail for two years for carrying concealed weapons (State v. Hamby, 126 N. Car. 1066, 35 S. E. Rep. 614); fine of not less than $100 and imprisonment for not less than 10 days for selling merchandise without a license (State v. Foster [R. I. 1900], 40 Atl. Rep. 833); disbarment of attorney for misdemeanor in addition to fine (*In re* Coffey, 123 Cal. 522, 56 Pac. Rep. 448); fine of $20 for every bird unlawfully killed or in possession (*In re* Stone [R. I. 1898], 41 Atl. Rep. 658); fine of not more than $500 and imprisonment for not more than eighteen months for violating saloon closing statute (Cardillo v. People, 26 Colo. 355, 58 Pac. Rep. 678); punishment of one between 16 and 30 years of age convicted of burglary by imprisonment in reformatory to be terminated within 14 years according to the rules of the institution (Miller v. State [Ind. 1898], 49 N. E. Rep. 894); fine of not more than $500 on railroad for not giving signals at highway crossings (Louisville, etc. R. R. v. Commonwealth [Ky. 1898], 46 S. W. Rep. 207); providing industrial school for children under restraint (State v. Phillips [Minn. 1898], 75 N. W. Rep. 1029); two years' imprisonment at hard labor for unjustifiable assault (State v. Apple [N. Car. 1897], 28 S. E. Rep. 469); six years' imprisonment of a member of city council for asking a bribe (State v. Durnam [Minn. 1898], 75 N. W. Rep. 1127). Massachusetts courts are very outspoken on this question and hold that the provision against cruel and unusual punishment in the state constitution providing that no court shall inflict cruel and unusual punishments is directed to the courts, and not to the legislature. McDonald v. Commonwealth [Mass. 1899], 53 N. E. Rep. 874. In the same case they also hold that the eighth amendment to the constitution of the United States providing that no cruel or unusual punishment shall be inflicted has no application to the states. There are some authorities, however, which hold that the constitutional provision under consideration is broad enough to confer upon the court the power to review legislative discretion concerning the adequacy of punishment, "in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people." State v. Becker, 3 S. Dak. 29, 51 N. W. Rep. 1018. This doctrine has been recognized in other cases. *In re* MacDonald (Wyo.), 33 Pac. Rep. 18; *In re* Bayard, 63 How. Proc. 73; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. Rep. 854, 29 Am. St. Rep. 68. See also dissenting opinions of Justices Field, Harlan and Brewer in O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. Rep. 693, 36 L. Ed. 450.

WHAT IS THE POWER OF A STATE TO RESTRICT OR FORBID THE DOING BUSINESS WITHIN ITS TERRITORY BY A FOREIGN CORPORATION.

A corporation is a legal entity composed of one or more individuals united by law, under the grant of a franchise from the state,

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into one body having a special denomination and vested by law with the power of prepetual succession and of acting in many respects as a single individual. A foreign corporation is one that derives its existence, powers, and rights solely from the laws of another state, government, or country. This is essentially the definition given in Daly v. The National Insurance Company.[1] It may be well to note, however, that a corporation organized by the federal government for a federal purpose, or a private corporation empowered to carry out some federal power, purpose, or need, as, for example, to build warships or to build bridges along post-roads or to carry the mails, cannot be controlled by state laws. "Such corporations may supply all their needs and buy materials and machinery to carry on their work in any state in the union and no state law shall restrict or forbid,"[2] for they are arms of the United States government, organized or controlled by United States laws, which laws are just as much binding on states and citizens thereof as the state laws are. "The government of the United States, in its relation to the government of the several states, cannot be considered a foreign government in the ordinary acceptation of the term. Within the sphere of its delegated powers, its authority extends over all the states of which it is composed, and to that extent it may be said to be identified with each. Hence, a corporation created by the government of the United States cannot with propriety be said to be a foreign corporation."[3]

What power, then, has a state to restrict or forbid the doing business within its boundaries by a foreign corporation? And, first, what is meant by "doing business?" There seems to be considerable conflict on this point. Alabama seems to hold that the doing of any act involving the use of the corporate franchise or power is "doing business within the meaning of the statute," while Colorado[4] holds that "the constitution and statutes forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation. * * * The constitution requires the foreign corporation to have one or more places of business in the state before doing any business therein. This implies a purpose at least to do more than one act of business, for a corporation that has done but a single act and purposes to do no more cannot have one or more known places of business in the state. To have known places of business it must be carrying on business."[5] And this is substantially the doctrine enunciated by the federal courts.[6] Adopting this rule the doctrine, broadly stated, may be laid down as follows: A corporation is the mere creature of legislature, and as the states of the union are, for the purpose of jurisdiction, foreign to each other, one state may exclude absolutely all corporations created by a foreign state, nation, or country from doing business within its limits, subject only to the limitations, expressed or implied, found in the federal constitution.[7] Mr. Justice Field, in Paul v. Virginia, adds to the above restrictions that imposed by comity. He says: "The recognition of its (the corporation's) existence, even by other states and the enforcement of its contracts made therein, depends purely upon comity." But what is comity? Mr. Murfree in his work on Corporations says: "It is a principle of the law of nations that, in the absence of any positive rule affirming, denying, or restricting the operation of foreign laws, courts will presume the tacit adoption of them by their government, unless repugnant to its policy and interests;" and then it adds, in section 3: "Comity, however, is a matter of grace rather

[1] (1878) 64 Ind. 1.

[2] Stockton v. Ry. Co. (1887), 32 Fed. Rep. 9.

[3] Commonwealth v. Tex. & Pac. Ry. Co. (1881), 98 Pa. St. 90.

[4] Beard v. Union and Am. Pub. Co. (1881), 71 Ala. 60; Farrier v. New Eng. Mort. Co. (1889), 88 Ala. 275; Dundee v. Mort. Co. v. Nixon (1890), 95 Ala. 318; Nelmo v. Land & Mort. Co. (1889), 92 Ala. 157.

[5] Colo. Iron Works v. Mining Co. (1890), 15 Colo. 499; Utley v. Clark-Gardiner Mining Co. (1878), 4 Colo. 369.

[6] Cooper Mfg. Co. v. Fuerguson, 113 U. S. 727; St. Louis Wire Mill Co. v. Consolidated Barb Wire Co., 32 Fed. Rep. 802. Other cases bearing on this point are: Mandel v. Swan (1895), 154 Ill. 177; Galveston City Ry. Co. v. Hook & Green (1890), 40 Ill. App. 547; Potter v. Bank of Ithaca (1843), 5 Hill, 490; Snydam v. Morris Canal & Canking Co. (1843), 6 Hill, 217, and People v. Wemple (1892), 131 N. Y. 64.

[7] Cutcher v. Ky. (1891), 141 U. S. 47; Cooper Mfg. Co. v. Ferguson (1885), 113 U. S. 127; Pembina Mining Co. v. Pa. (1888), 125 U. S. 181; People v. Wemple (1892), 131 N. Y. 64; Norfolk & Western Ry. Co. v. Pa. (1890), 136 U. S. 114; McCall v. Cal. (1890), 136 U. S. 104; Gloucester Ferry Co. v. Pa. (1885), 114 U. S. 196; Robbins v. Shelby County Taxing District (1887), 120 U. S. 489; Paul v. Va. (1868), 8 Wall. 168.

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than of right. It is within the power of the local sovereign either to exclude foreign corporations altogether from doing business within its jurisdiction, or it may prescribe regulations under which they may be admitted. Its power in this direction is limited only by a proper interpretation of the federal constitution."

Professor Kirchner, in his lectures on Private International Law, says: "Comity is the self-imposed duty of the state to apply by its courts to controversies between private parties, the laws or acts of a foreign jurisdiction when and in so far as they may be pertinent to the matter in hand." He thus makes it more than mere courtesy, but, if the duty be self-imposed, there is no power outside of the state to enforce it, and, hence, the state may extend or withhold it at will. This, too, is the view held by Mr. Justice Field in the opinion above referred to, for, after saying that the recognition of the existence of a foreign corporation depended purely on comity, he continues: "A comity which is never extended where the existence of a foreign corporation or the exercise of its powers is prejudicial to the interests of the state or repugnant to its policy." Comity is attended by no legal sanction. It is merely the good will of one state extended to a sister state at the will of the former. "It may extend it or refuse it or, having once extended it, it may revoke or modify it, and this is the law, and all the cases which enunciate the doctrine of comity enunciate the power to exclude." The constitutional limitations are five in number: (1) Congress shall have power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. Art. 1, sec. 8. (2) No state shall lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. Art. 1, sec. 10, cl. 2. (3) No state shall without the consent of congress lay any duty of tonnage. Art. 1, sec. 10, cl. 3. (4) The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. Art. 4, sec. 2. (5) No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Art. 14, sec. 1, amendments.

Foreign Corporations Are Not Entitled to the Privileges and Immunities of Citizens.—Treating the last two restrictions, first, the most difficult question will be to determine how far and for what purposes a foreign corporation may be said to be a citizen. The law is well settled now "that a corporation may, for the purposes of suit, be said to be born when, by law, it is created or organized, and to reside, where, by or under the authority of its charter, its principal office is." A corporation, therefore, created by or organized under the laws of a particular state and having its principal office there, is, under the constitution and laws of this country for the purpose of suing and being sued, a citizen of that state, possessing all the rights and having all the powers its charter confers."[8] In the earlier cases it was held that the citizenship of a corparation, for the purposes of the suit, was determined by the citizenship of its members, and that in order to be a citizen of a certain state all its members must be citizens of that state.[9] This rule, however, was changed, and the unquestioned rule now is that laid down in Louisville, Cincinnati, & Charlestown Ry. Co. v. Letson,[10] "that where a corporation is created by the laws of a state the legal presumption is that its members are citizens of that state in which alone its corporate body has a legal existence; and that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the courts of the United States."[11]

A foreign corporation is a citizen within the meaning of the constitution, when, after it has entered a foreign state and been per-

[8] Ry. Co. v. Koontz (1881), 104 U. S. 5.
[9] Bank v. Deveaux, 5 Cranch, 61.
[10] 2 How. 497, 558.
[11] Ohio & Miss. Ry. Co. v. Wheeler (1861), 11 Black, 236; Marshall v. Balt. & O. Ry. Co. (1853), 16 How. 314; Covington Drawbridge Co. v. Shepherd (1857), 20 How. 227; Paul v. Va. (1868), 8 Wall. 168; Railway Co. v. Harris (1870), 12 Wall. 65; Railway Co. v. Koontz (1881), 104 U. S. 5; Steamship Co. v. Tugman, (1882), 106 U. S. 118.

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mitted to do business there, the state seeks to deprive it of its property without due process of law; but farther than this the courts have not gone, and there is a long line of decisions holding that it is not a citizen, within the meaning of the constitution, excluding the two exceptions noted. "Whatever may be the implied powers of aggregate corporations by the common law and the modes by which these powers were to be carried into operation, corporations created by statute must depend both for their powers and mode of exercising them upon the true construction of the statutes creating them."[12] "Being," then, "a mere creature of the law" and not a citizen, "it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."[13] In the case of Paul v. Virginia,[14] the court said: "If, on the other hand, the provisions of the constitution could be construed to secure to citizens of each state, in other states, the peculiar privileges conferred by their laws, an extraterritorial operation would be given to local legislation utterly destructive of the independence and harmony of the states. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursuit requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that with the advantages thus possessed the most important business of those states would soon pass into their hands. The principal businesses of every state would, in fact, be controlled by corporations created by other states." "If the right asserted of the foreign corporation, when composed of citizens of one state, to transact to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without opening the door to a flood of foreign corporations to engage in the same pursuits." "They could not repel an intruding corporation except on the condition of refusing incorporation for a similar purpose to their own citizens, and it may be of the highest public interest that the number of corporations in the state be limited; that they be required to give publicity to their transactions; that they submit their affairs to proper examination; to submit to forfeiture of their corporate rights in case of mismanagement; and that their officers be held to a strict accountability for the manner in which the business of the corporation is carried on and be liable to summary removal."

Neither Are Foreign Corporations Entitled to the Privileges and Immunities of Domestic Corporations.—The principal reasons are that "the grant of a franchise to a corporation is nothing more than the grant of a special privilege given to it by the sovereign creating it. The corporation exists entirely by virtue of this privilege expressed in its charter, and the laws of the state granting this can have no force or effect outside of its own boundaries. Mr. Justice Field, in rendering the opinion of the court in Paul v. Virginia, said: "The privileges and immunities secured to citizens of each state in the several states by the provision in question, are those privileges and immunities which are common to the citizens of the latter state under their constitution and laws by virtue of their being citizens of that state, and special privileges enjoyed by citizens in their own states are not secured in other states by this provision." * * * "Special privileges which are conferred must, therefore, be enjoyed at home only unless the assent of the foreign state to their enjoyment be given." Hence, it follows that a corporation possessing special privileges

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put foreign corporations which are creatures of foreign laws on the same footing as corporations which are the creatures of our own laws of the state from the simple fact of their being like corporations." "It can do no acts and make no contracts within or without the state which creates it except such as are authorized by its charter." * * * "It exists only in contemplation of the law and by force of the law, and where that law ceases to operate and is not longer obligatory the corporation can have no existence. That law must designate the place of its creation and it cannot migrate to another sovereignity."[16] The cases arising under the second and third restrictions may be treated within the discussion of the first or what is commonly called the "Commerce Clause."

The Commerce Clause--"*Congress shall Have Power to Regulate Commerce with Foreign Nations among the States and with the Indian Tribes.*"—This has been by far the most fruitful source of litigation of any of the restrictions imposed by the federal constitution. A corporation organized by and under the laws of Michigan and domiciled there, seeks to transact business in Illinois. Illinois wishes to restrict or forbid it doing business there. One of the first questions that might arise is, "Is the Michigan corporation engaged in interstate commerce?" If it is, the way is comparatively clear, for the constitution and laws of the United States are the supreme laws of the land and any clause or article in a state constitution or statute passed by the state legislature that comes in conflict therewith must yield to the paramount law. It is true that if the Michigan corporation is engaged in interstate commerce and its business is of a nature such that different rules may be suitable to regulate the business in the different localities and the federal government has not acted, then the Illinois legislature may regulate and to that extent restrict—though it can never forbid—until the general government has acted. But when it has once acted, then the Illinois law ceases to be of any force or effect. Again, if the subject-matter requires a uniform system between the states, then Illinois can in no way restrict or forbid farther than is absolutely necessary to carry out its police or inspection regulations.[17] The vital question will thus be seen to be, *What is or what is not interstate commerce?* If the foreign corporation is engaged in interstate commerce then the state cannot restrict or forbid, tax regulate, or discriminate against its doing business within its (the state's) territory. If it is not engaged in interstate commerce and is not a national corporation, nor a private corporation engaged in carrying out some national purpose or duty, the state may forbid absolutely; or discriminate against;[18] or impose conditions upon;[19] or charge a license fee;[20] or tax;[21] or restrict its operations to certain territory;[22] or, having once admitted the foreign corporation, the state may revoke its license and expel.[23]

Our inquiry must be, then, "What is interstate commerce?"[24] "Commerce," says Chief Justice Marshall in Gibbons v. Odgen,[25] "undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches." "It includes navigation and facilities for the transmission of intelligence by telegraph and telephone."[26] "It is not confined to the instrumentalities of intercourse known or in use when the constitution was adopted, but keeps pace with the advancement, the development of time and circumstances." The power to regulate all these agencies of intercourse "among the several states" has been expressly or impliedly granted to congress, and whenever by constitutional or legislative action a state seeks to interfere with the operations of a foreign corporation engaged in one of these pursuits, its enactments must fail. It would be useless to give

[16] Bank of Augusta v. Earle (1839), 13 Pet. 586; Paul v. Va. (1868), 8 Wall. 168; Pensacola Tel. Co. v. West. U. Tel. Co. (1877), 96 U. S. 1; Cooper Mfg. Co. v. Ferguson (1885), 113 U. S. 727; Gloucester Ferry Co. v. Pa. (1885), 114 U. S. 196; Robbins v. Shelby Co. Taxing District (1887), 120 U. S. 489; Pembina Mining & Milling Co. v. Pa. (1888), 125 U. S. 181; McCall v. Cal. (1890), 136 U. S. 114; Crutcher v. Ky. (1891), 141 U. S. 47; People v. Wemple (1892), 131 N. Y. 64.

[17] Leisy v. Hardin (1890), 135 U. S. 100.

[18] Bank of Augusta v. Earle (1839), 13 Pet. 519.

[19] Ducat v. Chicago (1875), 76 Ill. 172.

[20] Pembina Mining Co. v. Pa. (1888), 125 U. S. 181.

[21] Paul v. Va. (1868), 8 Wall. 138.

[22] Lafayette Ins. Co. v. French (1855), 18 How. 405.

[23] Potter v. Bank of Ithaca (1843), 5 Hill, 490.

[24] Pierce v. People of the State of Ill. (1883), 106 Ill. 13.

[25] (1824), 9 Wheat. 1.

[26] 96 U. S. 1.

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all the cases bearing on this point. Enough only will be given to show that when it is once determined that the business in which the foreign corporation is engaged, which is sought to be regulated, is interstate commerce, then the state's right to control has been granted to a higher authority, and any act by the state by way of regulation is void, unless it be some act necessary to the enforcement of its police regulations or inspection laws.[27]

The law in relation to foreign insurance companies gives us, perhaps, the clearest view of the power of a state over foreign corporations; the cases being almost entirely free from complications arising out of the limitations upon state power found in the federal constitution.

The State may Exclude. This doctrine was laid down in Paul v. Virginia.[28] After deciding that the issuing of a policy of insurance was not a transaction of commerce, the court, speaking of foreign corporations, says: "Having no absolute right of recognition in other states, but depending for such recognition upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to certain localities; or they may exact such securities for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest. The whole matter rests in their discretion." This rule does not conflict with the first section of the fourteenth amendment, says Mr. Justice Field's in Pembina Silver Mining and Milling Co. v. Pennyslvania. The states may require for the admission within their limits of the corporations of other states, or any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the fourteenth amendment." "The only limitations upon the power of the state to exclude foreign corporations from doing business within its limits, * * * * or to exact conditions for allowing the corporation to do business, arises where the corporation is in the employ of the federal government or where its business is strictly commerce, interstate or foreign." This rule was reiterated by Mr. Justice Brewer in 29 Kan. 672, where he says: "Corporations created by other states have no adherent right to enter into this state and transact business. Each state may determine for itself what corporations of other states may transact business within its borders and upon what conditions they may so transact business."

In Noble v. Mitchell,[29] which was a suit to recover on an insurance policy issued by a Philadelphia company without having first complied with the Alabama law, the court says: "It is well settled that the legislature of the state has authority to exclude foreign insurance companies altogether, and may impose any restriction it may deem proper as a condition upon which foreign corporations may do business." The Illinois courts unwaveringly maintain the doctrine and seem even to go a step farther. In Pierce v. The People of the State of Illinois,[30] the court says, "it is competent for the legislature to declare all contracts of insurance made by a citizen of this state with a foreign company having no right to do business here, void, on the ground of being contrary to the public policy of the state." The Michigan court held in Home Ins. Co. v. Davis,[31] that, "while for a certain jurisdictional purposes a corporation is called a citizen of the state which charters it, the authorities are uniform in denying it the rights of actual citizenship anywhere else. It is competent for any state to prescribe any condition it chooses to prescribe, within which foreign corporations must act if they act at all. It may exclude them entirely if it seems fit so to do, and

[27] Gibbons v. Ogden (1824), 9 Wheat. 1; Brown v.

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extent it may, in its discretion, choose, as the condition upon which the corporation shall be allowed to exercise its functions and privileges in the state."[32] Third, the state may impose a license. This power is undoubted.[33] Fourth, it may discriminate against.[34] "Taxation against a foreign corporation need not be uniform. A state may discriminate between its own corporations and those created by other sovereignties. The legislature may classify for the purpose of taxation and license, and if such classification exclude foreign corporations and is not arbitrary but fair and just there can be no constitutional objection to it.[35] Fifth: The state may pass retaliatory statutes.

This, perhaps, is one of the least tried powers, but it has been sustained in New York, Michigan, Ohio, Indiana and Kansas. One of the cases most often cited in the State v. Ins. Co.,[36] and as the provisions are very similar in all the states we will quote Indiana statute brought in question in the case. In 1877 Indiana enacted a statute which provided that, "when obligation or prohibitions are, by the laws of any other state, imposed upon insurance companies of this state greater than are required by the laws of this state; then such obligations or prohibitions shall be imposed upon insurance companies of that state doing business here." Pennsylvania imposed a fee of $500 upon all insurance companies doing business in that commonwealth. Indiana officials immediately demanded a like fee of the Pennsylvania companies doing business in Indiana and the court sustained the statute holding, that it depended only on the happening of a contingency, and when the contingency happened the statute could be enforced.

These are the principal measures resorted to by the states in enforcing their right or power to restrict or forbid foreign corporations doing business within their limits. Many others might be given, but the doctrine is so well established that the compilation of cases would serve no valuable purpose. Briefly, then, the foreign corporation is a mere creature of a foreign law. Its powers and liabilities are such only as are conferred upon it by its charter and the laws of the state creating it. It exists only in contemplation of the law and by force of the law, and where that law ceases to operate and is no longer obligatory the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty. If it is engaged in interstate commerce or commerce with foreign nations, or is a national corporation, or is one engaged in carrying out some federal need, purpose, or duty, or, if it possesses some special privileges granted by congress, then its rights and liabilities are controlled by the supreme law of the land, and the state cannot restrict or forbid their doing business within its limits. If these conditions do not exist, the power of the state is plenary. It may exclude the foreign corporation entirely, restrict its business to certain localities, exact license fees, tax, impose conditions upon, discriminate against, or make them subject to retaliatory statutes. Having once admitted it, the state may appeal its license and again exclude it subject only to the rule that in tax cases the law must apply to all of class and not be purely arbitrary. And this we believe to be the law.

Springfield, Ill. T. E. Lyon.

PERSONAL INJURIES—DAMAGES—MENTAL SUFFERING.

HORN v. BOISE CITY CANAL CO.

Supreme Court of Idaho, May 20, 1901.

1. In case of personal injury resulting from care-

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such condition, in case the injured parties are not guilty of contributory negligence.

PER CURIAM: This action was commenced in the district court of Ada county to recover damages for personal injuries occasioned by the respondent Ardella Horn, wife of the respondent Jake Horn, by walking into a ditch owned by the appellant, the Boise City Canal Company, running through the city of Boise for a large portion of the way along the north side of Grove street, in said city, but upon the highway. The accident occurred between Eighth and Ninth streets. The respondents were traveling along said highway, returning in a cab from the depot to the Overland Hotel, where they were stopping. After leaving Ninth street, going easterly towards Eighth street, on Grove, one of the cab horses fell; whereupon the driver requested the respondent Mrs. Horn to step out of the cab for fear of an accident, as the horse might, in its struggles to get up, cause the cab to lurch, and thus injure said respondent. The evidence shows that respondent inquired as to where the sidewalk could be found, to which her husband, respondent Jake Horn, replied, "Over there." There were a number of arc lights along the streets, and the ground upon this occasion was covered with snow. The respondent Ardella Horn started to the north side of the street, in order to get upon the sidewalk. In approaching the ditch it appeared dark, snow being on either side, and said respondent naturally concluded that the ditch was the sidewalk, and stepped into it; the water being filled with slush ice, running rapidly, and about two feet eight inches in depth. Said respondent lost her footing, sank once or twice, and attracted her husband by her screams, who rescued her from the ditch. Respondent was naturally chilled by her contact with said ice water, and suffered considerably from nervousness during that night, and for some time afterwards suffered more or less physical pain from her ankle being sprained and one of her wrists injured in her fall. The evidence does not show that said respondent lost any time, or was so disabled as to be disqualified from performing her ordinary domestic duties for any length of time, and no actual damage, by way of expense for medical service, was proven at the trial. The amount of damages demanded is $600, for which amount the jury brought in a verdict in favor of the respondent. The evidence shows that Grove street is 80 feet wide; that the accident in question occurred at a point opposite the Hardman Block; that it is 73 feet from the Hardman Block, on the southerly side of the street, to the said ditch, which is on the northerly side of the street, running parallel with said street. Appellant, at the close of the trial, moved for a nonsuit, which motion is as follows: "Defendant moves for a nonsuit, on the ground that the evidence on the part of the plaintiffs fails to show any negligence on the part of the defendant, and does show contributory negligence on the part of the plaintiffs." This motion was overruled by the court. The appellant presenting no evidence, the cause was submitted upon instructions to the jury, which returned the said verdict. Appellant insists upon a reversal upon the following grounds: (1) That the damage or injury claimed by the plaintiffs, if any was sustained by the plaintiffs, was not attributable to any negligence of the defendant corporation as the proximate cause thereof; (2) that the evidence fails to show any negligence on the part of defendant; (3) the evidence shows palpable contributory negligence on the part of plaintiffs; (4) there was no proof whatever of damages.

There is no question but that the appellant is the owner of a ditch in the city of Boise, upon one of the public highways. This ditch being upon the public highway, in an inhabited city, it was the duty of appellant, as owner, to keep the same in such condition as not to endanger the life or person of the traveler upon said street. The evidence shows the failure upon the part of appellant to keep this property in such condition. This failure was negligence, and such as renders appellant responsible to persons, who, exercising reasonable care, should be injured by reason of such condition of said ditch. We do not think the evidence shows any contributory negligence upon the part of the respondent who was injured. Both she and her husband testified that they were ignorant of the existence of said ditch in that locality. Her attempt to reach the sidewalk, under the circumstances, was natural and prudent. It being night, the immediate locality being but dimly lighted, and the ground on either side of said ditch being covered with snow, the water, as a matter of course, appeared dark, and respondent evidently believed, as testified to by her, that said ditch was the sidewalk.

It is true that the evidence of no witness states any amount of damages, but the respondent suffered more or less physical pain for a considerable length of time. Both mental and physical suffering are elements of damages, and are to be considered, in actions of tort, by the jury. This is one of those cases in which it is impossible to show with reasonable certainty the amount of damages sustained by result of an injury. This being true, the measure must necessarily be left to the good sense and sound discretion of the jury. It is well said in 8 Am. & Eng. Enc. Law (2d Ed.), at page 630, that "in no other class of cases does the amount of damages rest so largely in the discretion of the jury as in those involving the recovery for the infliction of personal injuries, and the courts are very loath to interfere with a verdict in such cases, in the absence of plain evidence that the jury have abused the discretion vested in them." The same authority says: "The real question in all these cases is, not whether the amount of the damages awarded by the jury is more or less than is, in the opinion of the court, proper, but whether it is shown that

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the jury have abused the discretion vested in them." While it appears to us that the verdict of the jury is for rather a large amount for the injury received, yet under the evidence in the record, which we have carefully examined, we do not feel authorized to disturb the verdict upon the ground that the jury has abused the discretion vested in it, or that the jury has given an excessive verdict for damages while acting under the influence of passion or prejudice. For the foregoing reasons, the judgment is affirmed. Costs awarded to the respondents.

NOTE.—*Damages Recoverable for Mental Suffering.*—There has been considerable discussion and confusion among the authorities in the endeavor to lay down the correct rule as to the recovery of damages for mental suffering. To-day, however, the rules have become quite well settled and only those who have not a clear idea of the late cases will find difficulty in cases of this character. All authorities are agreed that mental injuries constitutes an element of damages. See Chicago v. McClain, 133 Ill. 148; Connell v. Telegraph Co., 116 Mo. 34; Head v. Railroad, 79 Ga. 358; Seger v. Barkhamsted, 22 Conn. 290. Storrs, J., in the last case cited observed that the sufferings of the mind and body each frequently, if not usually, act reciprocally on the other. The dismay and the consequent shock to the feelings thus produced by the danger attending a personal injury not only aggravate it, but are frequently so appalling as to suspend the reason and disable a person from warding it off; and to say that the mental suffering does not enter into the character and extent of the actual injury, and form a part of it, would be an affront to good sense. So also in Head v. Railroad, *supra*, it was said: "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical; in either case the damages is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last the amount is indefinite." Mental suffering is therefore always a legitimate item in estimating the damages resulting from negligence where bodily injury results. Chicago v. McLean, 133 Ill. 148; Reinke v. Bentley, 90 Wis. 457; Wallace v. Railroad, 104 N. Car. 442; Townsend v. Briggs, 99 Cal. 481; Wabash R. R. v. Morgan, 132 Ind. 430; Riley v. Railroad, 27 W. Va. 145; San Antonio R. R. v. Corley (Tex. Civ. App.), 26 S. W. Rep. 903; Kenney v. Folkerts, 84 Mich. 616; Alexander v. Humber, 86 Ky. 565; Richmond R. R. v. Norment, 84 Va. 167, 10 Am. St. Rep. 827; Salena v. Trosper, 27 Kan. 544; Giblin v. McIntyre, 2 Utah, 384; Wall v. Cameron, 6 Colo. 275; Montgomery R. R. v. Mallette, 92 Ala. 209; Weber v. Creston, 75 Iowa, 16. Thus, one may recover for mental anguish due to disfigurement of person. The case of Heddles v. Railroad, 77 Wis. 228, 20 Am. St. Rep. 106, was an action for injuries to a boy seven years old, which necessitated the amputation of both legs. The jury were instructed that in assessing damages they should give adequate compensation for the plaintiff's physical pain and mental suffering, past and future, occasioned by his injuries; also for the mortification and anguish of mind which he had suffered, and would in the future suffer, by reason of the mutilation of his body, and the fact that he might become an object of curiosity or ridicule among his fellows. This charge was held not to be error. It is, of course, generally held that there can be no recovery for mental suffering for physical injuries of another. Atchison, etc. R. R. v. Chance, 57 Kan. 40; Keyes v. Railroad, 36 Minn. 290; Pacific Express Co. v. Black, 8 Tex. Civ. App. 363. Thus, it was held in one action against a railroad company for fatal injuries inflicted upon the plaintiff's intestate, where evidence was sought to be introduced of the mental distress of the decedent prior to his death on account of his apprehension that he would leave his wife and child in a dependent and helpless condition. Atchison, etc. R. R. v. Chance, *supra*. Where mental suffering is a consequence of a "recognized cause of action," it becomes an element in the assessment of damages. Melcher v. Scruggs, 72 Mo. 407; Barbour v. Stephenson, 32 Fed. Rep. 66; Summerfield v. Telegraph Co., 87 Wis. 1; Simons v. Busby, 119 Ind. 13; Vogel v. McAuliffe, 18 R. I. 791; Hampton v. Jones, 58 Iowa, 317; Western Union v. Rogers, 68 Miss. 748, 24 Am. St. Rep. 300; Breon v. Henkle, 14 Oreg. 494; Chapman v. Western Union, 90 Ky. 265. Thus, where the employees of a railroad company wrongfully dumped earth and stone into and against the plaintiff's home, it was held proper to allow a recovery in damages for the insults and indignities offered by such employees, and for the illness of the plaintiff's wife resulting therefrom. Ft. Worth, etc. R. R. v. Smith (Tex. Civ. App. 1894), 25 S. W. Rep. 1032. This latter rule, of course, presupposes no direct wrong other than mere negligence from which injury has resulted. One of the best considered authorities on the question of mental suffering as an element of damages is that of Spade v. Boston Railroad, 168 Mass. 284, where it was held that in an action to recover for an injury sustained through the mere negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance. The court gave this clear statement of the rule: "The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met." These views are supported by the following leading authorities: Mitchell v. Rochester Railway, 151 N. Y. 107; Ewing v. Railway, 147 Pa. St. 40; Haile v. T. & P. Railway, 60 Fed. Rep. 557. *Contra:* Bell v. Great Northern Railway, 26 L. R. (Ir.) 428; Purcell v. Railway, 48 Minn. 134. Justice Allen, after laying down the above rule, makes this important exception: "It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with

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gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind"

JETSAM AND FLOTSAM.

REMEDY FOR ANARCHISM.

Mr. John R. Dos Passos, a member of the New York Bar and author of a well-known work on the law affecting stockbrokers, desires that the congress of the United States should call an international conference to consider the suppression of anarchism. This idea is not a new one, nor capable of doing much to supply a prompt remedy for the evil. It will be remembered that some three years ago such a conference was convened in Rome, a great deal of interest was evoked by it, much discussion took place and resolutions were adopted for the mutual surrender of criminal anarchists. But since this conference the anarchists have offered the cruellest sort of testimony to their disregard for its deliberations—they have boldly assassinated the King of Italy and President McKinley. Perhaps the most effective way of dealing with this cancerous growth in the body-politic is for each member of the family of nations to make it a legal offense to attempt to promote the aims and interests of anarchism by word or deed within its borders. This done, there would be no need for international concert beyond some provisions for the extradition of this class of offenders.

Having done this, the powers should agree upon a suitable island and transport thither all persons convicted of any such offense; provide them plentifully with the usual weapons used by anarchist assassins, appropriate implements for agriculture and fishing, etc., and such supply of food, clothing and household effects as might be necessary to start them in business. After that let them work for their own living, and live or starve as they might elect. As people of this class consider that all governments are objectionable, give them none, but merely provide a gun boat to see that they are not taken away from the island, and leave them to work out their destiny according to their own will and pleasure. They might perhaps in the course of a short time realize something of the desirability of law and order, and probably find out that all men are not born equal. If the result should prove to be the same as happened to the Kilkenny cats, the world would be none the worse for the legacy of their tails, and a wholesome lesson would have been taught to kindred spirits still at large.

BOOK REVIEWS.

WATSON ON DAMAGES FOR PERSONAL INJURIES.

One of the most important of legal text books from the standpoint of the practicing lawyer which has been issued from the press for some time is that prepared by Archibald Robinson Watson of the New York City Bar on the subject of Damages for Personal Injuries. The work considers with practically absolute exhaustiveness, not only the right to recover *any* damages for a personal injury, but also the measure of damages and the several elements of recovery after liability established. One of the best treated subjects in this treatise is that of what damages are recoverable for mental suffering, one of the most confused and unsettled questions of law arising at the present time. The cases on this subject are cited and discussed with unusual exhaustiveness and discrimination. Mr. Watson's attempt to reconcile them, however, cannot be said to be entirely satisfactory—that were indeed a hopeless task—but his clever arrangement and classification will undoubtedly assist the courts in clearing up the confusion on this question and in arriving at some definite rules. We thoroughly commend the book as of exceptional value for citation. One volume of 1,018 pages, bound in an extra quality of law sheep. Published by The Michie Company, Charlottesville, Va.

BOOKS RECEIVED.

Prosecution and Defense. Practical Directions and Forms, for the Grand Jury-Room, Trial Court, and Court of Appeal in Criminal Causes, with Full Citations of Precedents from the Reports and other Books. By Joel Prentiss Bishop, LL.D., Honorary Doctor Juris Utriusque of the University of Berne. Second Edition, by Winslow Evans, Ph. D. of the Peoria, Ill., Bar. Chicago, T. H. Flood & Company, 1901. Sheep, p. 761. Price, $6.30. Review will follow.

HUMORS OF THE LAW.

The will of John George, of Lambeth, who died in London in June, 1791, contained the following words: "Seeing that I have had the misfortune to be married to the aforesaid Elizabeth, who ever since our union has tormented me in every possible way, that not content with making game of all my remonstrances, she has done all she could to render my life miserable; that heavens seems to have sent her into the world solely to drive me out of it; that the strength of Samson, the genius of Homer, the prudence of Augustus, the skill of Pyrrhus, the patience of Job, the philosophy of Socrates, the subtlety of Hannibal, the vigilance of Hermogenes, would not suffice to subdue the perversity of her character; that no power on earth can change her, seeing we have lived apart during the last eight years, and that the only result has been the ruin of my son, whom she has corrupted and estranged from me; weighing maturely and seriously all these considerations, I bequeath to my said wife Elizabeth the sum of one shilling, to be paid unto her within six months after my death."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

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1. APPEAL AND ERROR—Appeal Bond—Obligees.—While for greater certainty all obligees in an appeal bond should be named therein, and an appeal duly allowed will not be dismissed by the circuit court of appeals because they are not so named, but opportunity will be given to file a new bond.—Swift & Co. v. Kortrecht, U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 328.

2. APPEAL AND ERROR—Issue Determined on Former Appeal.—Where an issue has been determined on a former appeal, the same question will not be considered on a subsequent appeal.—State Hospital v. Fountain, N. Car., 39 S. E. Rep. 734.

3. APPEAL AND ERROR—Motion to Dismiss.—The motion to dismiss will be continued for want of proper notice thereof.—Walling v. Trevor, Oreg., 66 Pac. Rep. 284.

4. APPEAL AND ERROR—Questions Reviewable.—Action of the appellate court, not assigned as error on appeal to the supreme, is not reviewable.—Peterson v. Gibson, Ill., 61 N. E. Rep. 127.

5. APPEAL AND ERROR—Writ of Error.—An appeal reviews judgment on pleadings and evidence, but review of rulings rejecting evidence must be by writ of error.—Battelle v. McIntosh, Neb., 87 N. W. Rep. 361.

6. ARREST—Insufficient Affidavit.—Order quashing a writ of *capias* held justified because of insufficiency of the affidavit on which the writ was based.—Northrup v. Stone, Mich., 87 N. W. Rep. 382.

7. ATTACHMENT—Amendment.—Omission to set out in the writ of attachment, as provided by Hurd's Rev. St. 1899, § 176, the cause of attachment, does not make it void, but may be cured by amendment.—Cline v. Patterson, Ill., 61 N. E. Rep. 126.

8. ATTACHMENT—Debt Fraudulently Contracted.—That a debt was fraudulently contracted held to furnish no ground for seizure by attachment of property covered by additional assignment by debtor.—Marlin v. Teichgraeber, Kan., 66 Pac. Rep. 234.

9. ATTORNEY AND CLIENT—Accounting of Attorney.—Where an attorney collected a judgment for his client, a motion to compel him to pay over the money is properly heard in the county in which the judgment was recovered.—Union Bldg. & Sav. Assn. v. Soderquist, Iowa, 87 N. W. Rep. 433.

10. ATTORNEY AND CLIENT—Accounting to Client.—Under Code, §§ 3826-3830, the court may on motion require an attorney to pay over money collected for his client.—Union Bldg. & Sav. Assn. v. Soderquist, Iowa, 87 N. W. Rep. 433.

11. BANKRUPTCY—Discharge.—A discharge in bankruptcy does not discharge the liability of a divorced husband to pay alimony.—Deen v. Bloomer, Ill., 61 N. E. Rep. 131.

12. BANKRUPTCY—Corporation — Residence.—Under Bank. Act 1898, § 2, cl. 1, and *Id.* § 1, cl. 19, a federal court has jurisdiction of an involuntary bankruptcy petition against a corporation having its principal place of business, as distinct from its residence, within the district.—*In re* Magid-Hope Silk Mfg. Co., U. S. D. C., D. (Mass.), 110 Fed. Rep. 352.

13. BANKRUPTCY—Evading—Farming.—One who has committed an act of bankruptcy within four months before filing the petition cannot evade the statute by engaging in farming after the act and before filing of petition.—*In re* Mackey, U. S. D. C., D. (Del.), 110 Fed. Rep 355.

14. BANKRUPTCY—Insurance Policy.—An order requiring a bankrupt to assign a life insurance policy held without prejudice to the rights of the bankrupt or of a prior assignee, which gave either a right to review the same.—*In re* Madden, U. S. C. C. of App., Second Circuit, 110 Fed. Rep. 348.

15. BANKRUPTCY — Petition — Amount of Provable Claims.—Under Bankr. Act, § 59f, creditors other than original petitioners may, before adjudication, join in petition to supply deficiency in amount of provable claims.—*In re* Mackey, U. S. D. C., D. (Del.), 110 Fed. Rep. 355.

16. BANKRUPTCY—Preference—Advancing Interest.—Payments of interest in advance to secure the renewal of notes, made by an insolvent within four months prior to his bankruptcy, do not constitute preference which the creditor must surrender before proving his claim.—*In re* Kellar, U. S. D. C., N. D. (Iowa), 110 Fed. Rep. 348.

17. BANKRUPTCY — Preference Surrender.—All that can be required of a creditor who has received a preference, to entitle him to prove his claim, is a surrender of such preference in specie, where it consisted of the transfer of property or assets of the bankrupt, and not cash.—Dickinson v. Security Bank, U. S. C. C. of App., Fourth Circuit, 110 Fed. Rep. 353.

18. BANKRUPTCY—Service on Foreign Corporation.—Service in an involutary bankruptcy petition against a foreign corporation on the commissioner of corporations, appointed its attorney to receive process, held sufficient.—*In re* Magid-Hope Silk Mfg. Co., U. S. D. C., D. (Mass.), 110 Fed. Rep. 352.

19. BENEFIT SOCIETIES—Amendment.—Amendment to constitution of beneficial association, depriving member of right to appoint beneficiary by will, held invalid as to member who had not contracted to be bound by any such amendment.—Peterson v. Gibson, Ill., 61 N. E. Rep. 127.

20. BENEFIT SOCIETY—Subsequent Amendment.—Contract between beneficial association and member held not an agreement on his part to be bound by subsequent amendment of constitution depriving him of right to appoint beneficiary by will.—Peterson v. Gibson, Ill., 61 N. E. Rep. 127.

21. BILLS AND NOTES—Joint Maker.—One not a party to a note, who puts his name on the back of it before negotiation, is a joint and several promisor.—Merchants' Trust & Banking Co. v. Jones, Me., 50 Atl. Rep. 48.

22. BOUNDARIES—Meander Line of River.—In an action to recover possession of land abutting on a river, an instruction defining the meander line held correct.—Welch v. Browning, Iowa, 87 N. W. Rep. 430.

23. BOUNDARIES—Monuments.—The lines of a government township are determined by the monuments in the field.—Harrington v. Boehmer, Cal., 66 Pac. Rep. 214.

24. BROKERS—Revocation of Authority.—Where the employment of an agent to sell land is coupled with an interest, the agency cannot be revoked at will of the principal.—Bird v. Phillips, Iowa, 87 N. W. Rep. 414.

25. BUILDING AND LOAN ASSOCIATIONS—Dividend as Credit on Loans.—In winding up the affairs of an insolvent building association, the amount of the probable dividend which will be payable to borrowing stockholders may be computed and allowed as a credit on their loans.—Alexander v. Southern Home Building & Loan Assn., U. S. C. C., N. D. (Ga.), 110 Fed. Rep. 267.

26. BUILDING AND LOAN ASSOCIATION—Insolvency—Maturity of Loan.—Where a building association becomes insolvent and is wound up, and the loan of a borrowing stockholder is thereby matured contrary to its terms, he is entitled to credit as partial payments for all installments of premium paid.—Coltrane v. Baltimore Building & Loan Assn., U. S. C. C., D. (Md.), 110 Fed. Rep. 296.

27. BUILDING AND LOAN ASSOCIATIONS — Usury.—

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Under the law of Maryland a premium arbitrarily fixed without competition is usurious, and the borrower is entitled to have all payments made thereon credited on the principal of his loan.—Coltrane v. Baltimore Building & Loan Assn., U. S. C. C., D. (Md.), 110 Fed. Rep. 296.

28. BURGLARY—Breaking Wire Screen.—Opening of a window closed only with a wire screen held to constitute burglarious breaking.—State v. Herbert, Kan., 66 Pac. Rep. 235.

29. CARRIERS—Limitation of Liability.—A stipulation in a ticket for first-cabin passage across the Atlantic in a first-class steamship, limiting the liability of the carrier for loss of the passenger's baggage to $50, is unreasonable and will not be enforced.—The New England, U. S. D. C., D. (Mass.), 110 Fed. Rep. 415.

30. CARRIERS—Passenger's Negligence.—The want of time for a passenger to go from one car to another, or the brakeman's signal for him to look out on the separation of the car from the train, held not the proximate cause of an injury to the passenger.—Butts v. Cleveland, C., C. & St. L. R. Co., U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 329.

31. CHATTEL MORTGAGES—Attachment—Conflict of Laws.—Where a chattel mortgage is executed in one state on property in another, and attached by a creditor of the mortgagor in the latter state, the rights of the parties will be determined by the law of the state where the property is situated.—Aultman & Taylor Machinery Co. v. Kennedy, Iowa, 87 N. W. Rep. 435.

32. CHATTEL MORTGAGES—Possession.—The assignee of a note secured by mortgage on chattels is entitled to the possession thereof.—Satterthwaite v. Ellis, N. Car., 39 S. E. Rep. 726.

33. COLLISION—Failing to Display Light.—Where a canal boat, being towed alongside a tug in the night in a harbor, failed to display the light required by inspector's rule 11, the fault is chargeable to both vessels.—The Nettie L. Tice, U. S. D. C., E. D. (N. Y.), 110 Fed. Rep. 461.

34. CONSTITUTIONAL LAW—Appointment to Office—Delegation.—The power of appointment to office may be delegated to a city council.—Oren v. Bolger, Mich., 87 N. W. Rep. 866.

35. CONTEMPT—Refusal to Pay Alimony.—A contention, raised in contempt proceedings for a refusal to pay alimony brought seven years after the decree was entered, that the allowance was too much was without merit.—Deen v. Bloomer, Ill., 61 N. E. Rep. 181.

36. CONTRACTS — Action for Services.—Where action is brought for services under written contract, evidence as to value is incompetent.—Pettibone v. Lake View Town Co., Cal., 66 Pac. Rep. 218.

37. CONTRACTS—Sale of Fruit on Trees.—Where a contract for the sale of merchantable peaches was made, and the purchaser canceled the same, the seller could leave the peaches in the orchard and recover the price, or sell them at the buyer's risk and recover any loss.—Darby v. Hall, Del., 50 Atl. Rep. 64.

38. CONTRACTS — Signature.—Failure of a third party to sign a writing under the signature of the parties to a contract held not to render the same incomplete.—Pettibone v. Lake View Town Co., Cal., 66 Pac. Rep. 218.

39. COPYRIGHTS — Infringement — Demand.—A de-

41. CORPORATIONS—Authority of President.—In an action by a corporation for goods sold, held, that the defendant was not relieved from liability by an agreement with plaintiff's president to perform professional services for his family in part payment.—Bowditch Furniture Co. v. Jones, Conn., 50 Atl. Rep. 41.

42. CORPORATIONS—Liability on Tort—Dissolution.—Common-law rule that liabilities of corporations are extinguished by dissolution, if ever obtaining in New York, held abrogated by changed conditions.—Shayne v. Evening Post Pub. Co., N. Y., 61 N. E. Rep. 115.

43. CORPORATIONS—Power of Agents.—Any act of agent of corporation, altering a contract of the corporation made under its corporate seal, cannot work an estoppel against the corporation.—Sullivan v. Louisville & N. R. Co., Ala., 30 South. Rep. 528.

44. COSTS—Stenographer's Fees.—Where the plaintiff and defendant employed stenographers in trial court, and the costs were not taxed there, and no appeal was taken therefrom, the supreme court will not allow such cost.—Albert v. City of Salem, Oreg., 66 Pac. Rep. 233.

45. CRIMINAL EVIDENCE—Endearing Expression—Evidence.—Evidence of endearing expression used by wife towards paramour after leaving scene of his murder by husband held inadmissible in husband's behalf.—State v. Yanz, Conn., 50 Atl. Rep. 37.

46. CRIMINAL EVIDENCE—Good Character.—Defendant may prove his character and general reputation with respect to the traits involved, but cannot go into details.—State v. Dexter, Iowa, 87 N. W. Rep. 417.

47. CRIMINAL EVIDENCE—Statements of Third Persons.—In a criminal prosecution, conversations and statements of third parties not made in defendant's presence held inadmissible.—People v. Warren, Cal., 66 Pac. Rep. 212.

48. CRIMINAL TRIAL—Instruction—False Testimony.—In a prosecution for larceny, an instruction that a witness testifying falsely in part may be distrusted in all held not erroneous.—People v. Wilder, Cal., 66 Pac. Rep. 228.

49. CRIMINAL TRIAL—Transcript for Poor Defendant.—Indigent defendant, appealing from conviction of manslaughter, held entitled to transcript of stenographer's notes at cost of county.—State v. Gray, Iowa, 87 N. W. Rep. 416.

50. DAMAGES—Mental Suffering.—A servant receiving injuries necessitating the amputation of both arms, may recover for past and future mental and physical pain and suffering, and for such permanent injuries.—Strattner v. Wilmington City Electric Co., Del., 50 Atl. Rep. 57.

51. DEDICATIONS—Requisites.—Under Code 1860, § 1018, failure on laying out a plat to designate a strip as a street and give its width held not to negative an intent to dedicate it.—Coe College v. City of Cedar Rapids, Iowa, 87 N. W. Rep. 444.

52. DEEDS—Delivery.—Anything which signifies the intent of the grantor to part with his control over a deed to the grantee held a legal delivery.—Smith v. May, Del., 50 Atl. Rep. 59.

53. DEPOSITIONS—Incompetent Testimony.—Incompetent testimony taken by commission held not admissible for failure to object to allowance of interrogatories, or failure to move to suppress.—Wanamaker v. Megraw, N. Y., 61 N. E. Rep. 112.

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tent held for the jury.—Daugherty v. Powe, Ala., 30 South. Rep. 524.

57. ELECTIONS—Special Election.—Where the validity of the act substituting biennial for annual elections in Detroit is affirmed, it is proper to order a special election to fill an existing vacancy in the office of alderman.—Common Council of City Detroit v. Schmid, Mich., 87 N. W. Rep. 888.

58. EMINENT DOMAIN—Grade Crossing.—Remedy for damages provided in St. 1890, ch. 428, § 5, in case of abolition of a grade crossing, held precluded where town's land was taken.—Town of Middleboro v. New York, N. H. & H. R. R. Co., Mass., 61 N. E. Rep. 107.

59. EMINENT DOMAIN—Life Saving Station.—A life-saving station erected under license from a life tenant of the land held not to have become the property of the remainder-men on his death, so as to entitle them to compensation therefor in proceedings instituted by the government to condemn the land.—United States v. Smith, U. S. D. C., E. D. (N. Y.), 110 Fed. Rep. 888.

60. EMINENT DOMAIN—Public Use of Land.—Land jointly owned by an individual and a carrier, and used for a landing, held not invested with a trust in favor of the public.—Diamond Jo Line Steamers v. City of Davenport, Iowa, 87 N. W. Rep. 899.

61. EQUITY—Setting Aside Decree.—A chancellor cannot set aside final decree at subsequent term.—McQueen v. Whetstone, Ala., 30 South. Rep. 548.

62. ESTOPPEL—Former Allegations in Pleading.—Plaintiff on third trial of case, held estopped to deny allegations in his former pleadings.—Zalesky v. Home Ins. Co., Iowa, 87 E. W. Rep. 428.

63. ESTOPPEL—Mutuality—Mutuality is an essential ingredient of an estoppel.—Sullivan v. Louisville & N. R. Co., Ala., 30 South. Rep. 528.

64. EVIDENCE—Competency of Mortgagor's Testimony.—In a suit for foreclosure of a mortgage given by a certain person and a corporation, statements of such person held not competent, as against the corporation, to estop it from denying the validity of the mortgage.—Kelley v. Campbell, Cal., 66 Pac. Rep. 220.

65. EVIDENCE—Identification—Voice.—Where offense is committed in the dark, witness may identify defendant by his voice.—State v. Herbert, Kan., 66 Pac. Rep. 285.

66. EVIDENCE—Letters—Action for Services.—Letters written by the president of a corporation held admissible in an action to recover for services under a contract signed by him to show authority to contract.—Pettibone v. Lake View Town Co., Cal., 66 Pac. Rep. 218.

67. EVIDENCE—Will as Evidence—The introduction of a will to show that it was passed on in a former suit held not to estop the party introducing it, who relied on the decree in the former suit, as *res judicata*, from denying a title shown by the will.—Weeks v. McPhail, N. Car., 39 S. E Rep. 732.

68. EXECUTION—Advancements.—Code, § 2925, held not to apply to a receipt for an advancement made by his father, and hence an execution purchaser of the son's interest in the realty acquired only the interest in excess of the advancement.—Pinckney v. Pinckney, Iowa, 87 N. W. Rep. 406.

69. EXECUTORS AND ADMINISTRATORS—Failing to File Claim.—Where the owner of a note against decedent failed to file his claim because of fraudulent misrepresentations of the executor, equity will permit the filing, though the statutory time has expired.—Henry v. Day, Iowa, 87 N. W. Rep. 416.

70. EXECUTORS AND ADMINISTRATORS—Sale of Land—Debts.—A creditor of an estate cannot intervene in a proceeding by the executor to sell land to pay debts.—Strickland v. Strickland, N. Car., 39 S. E. Rep. 735.

71. EXPLOSIVES—Labeling—Negligence Per Se.—Under Code, § 2505, selling gasoline without labeling the vessel constitutes the negligence *per se* towards a third person using the article in the mistaken belief that it is coal oil.—Ives v. Welden, Iowa, 87 N. W. Rep. 408.

72. FALSE PRETENSES—Proof of Offense.—Where defendant is accused of obtaining several articles by false pretenses, he may be convicted if any of such articles were so obtained.—State v. Dexter, Iowa, 87 N. W. Rep. 417.

73. FEDERAL JURISDICTION—Appeal.—It is the settled rule of the federal courts that the action of a trial court in granting or refusing a new trial is not reviewable.—New River Mineral Co. v. Roanoke Coal & Coke Co., U. S. C. C. of App., Fourth Circuit, 110 Fed. Rep. 343.

74. FEDERAL JURISDICTION—Foreign Corporations.—A federal court does not acquire jurisdiction over a corporation of another state domiciled therein, which maintains no regular or established place of business or agent within the district where the suit is brought, by service of process on a person not its agent within the district.—Westinghouse Mach. Co. v. Press Pub. Co., U. S. C. C., W. D. (Pa.), 110 Fed. Rep. 254.

75. FRAUDULENT CONVEYANCES—Organizing Corporation.—Where a debtor organizes a corporation, and transfers his property to it for the stock of such corporation, the transaction is fraudulent as to creditors. Shumaker v. Davidson, Iowa, 87 N. W. Rep. 441.

76. FRAUDULENT CONVEYANCES—Proceeds of Sale.—Where a debtor makes a valid sale of land, and his creditors can trace the proceeds thereof, they may subject the same to their debts.—Shumaker v. Davidson, Iowa, 87 N. W. Rep. 441.

77. FRAUDULENT CONVEYANCES—Purpose.—Where a conveyance was made to avoid any judgment which might be obtained in a certain action, and the evidence showed there was nothing in plaintiff's claim, the purpose of the conveyance will not defeat suit to set aside the deed.—Brant v. Brant, Iowa, 87 N. W. Rep. 406.

78. GARNISHMENT—Bond to Release.—Want of attachable interest in principal, defendant held inadmissible as complete defense to suit on bond given to release garnishment.—McNamara v. Mattie, Conn., 50 Atl. Rep. 35.

79. GARNISHMENT—Execution Outside of State of Residence.—A contention that a judgment cannot be rendered against a garnishee on execution outside the state of his residence held without merit.—Longueville v. May, Iowa, 87 N. W. Rep. 452.

80. GIFTS — Causa Mortis — Delivery.—Deposit of money in bank in name of custodian, coupled two years afterwards with designation of beneficiaries, held sufficient delivery to constitute gift *causa mortis*.—Hogan v. Sullivan, Iowa, 87 N. W. Rep. 447.

81. GRAND JURY—Admission of Proceedings in Evidence.—The clerk of the grand jury may be called to disclose contradictory testimony of a state witness given in his examination before the jury, for the purpose of impeachment.—State v. McPherson, Iowa, 87 N. W. Rep. 421.

82. HIGHWAYS—Assessment for Street Improvements.—The apportionment of the cost of a street pavement on the abutting lots according to their frontage, under Code 1897, § 818, held not unconstitutional as the taking of property without due process of law.—Hackworth v. City of Ottumwa, Iowa, 87 N. W. Rep. 424.

83. HOMESTEAD—Conveyance Without Wife's Signature.—Where, pending procurement of patent under homestead entry, the applicant conveys right of way through homestead, the conveyance is void, unless signed by the wife.—Griffin v. Chattanooga S. R. Co., Ala., 30 South. Rep. 528.

84. HOMESTEAD—Widow and Daughters.—A widow who purchased a house and lived therein with her daughters until they married could not claim the home as her homestead.—Fullerton v. Sherrill, Iowa, 87 N. W. Rep. 419.

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85. HOMICIDE—Killing Wife's Paramour.—Circumstances reasonably inducing belief in present adultery held sufficient to reduce killing of wife's paramour from murder to manslaughter.—State v. Yanz, Conn., 50 Atl. Rep. 87.

86. HOMICIDE—Punishment—Discretion of Jury.—Under Pen. Code, § 190, jury held entitled to use their discretion as to punishment of defendant in murder prosecution, without any instruction from the court.—People v. Ross, Cal., 66 Pac. Rep. 229.

87. HUSBAND AND WIFE—Deed of Wife—Duress.—Where a conveyance was made by a wife to her husband 13 days before her death, and when she was in a weak condition, burden of proof held to be on one claiming under the deed to show that the transaction was fair.—Lewis v. McGrath, Ill., 61 N. E. Rep. 185.

88. HUSBAND AND WIFE—Power to Sign Wife's Name.—Under Code, § 3154, a power of attorney given husband, on separation agreement, to sign wife's name to conveyance of realty allotted to him, held void, notwithstanding sections 2919 and 3161.—Sawyer v. Briggart, Iowa, 87 N. W. Rep. 426.

89. INDICTMENT AND INFORMATION—Manner of Statement.—An indictment sufficiently charging defendant with a crime is not impaired by the manner in which the facts constituting the crime are subsequently stated therein.—People v. Ross, Cal., 66 Pac. Rep. 229.

90. INDICTMENT AND INFORMATION—Waiver of Defects.—On prosecution for felony, accused waives all defects which may be objected to by motion to quash a plea in abatement, when he demurs or pleads.—Reinoehl v. State, Neb., 87 N. Rep. 855.

91. INJUNCTION—Paving Contract.—A taxpayer cannot enjoin a city from letting a paving contract, where his tax is only 40 cents.—City of Detroit v. Wayne Circuit Judges, Mich., 87 N. W. Rep. 876.

92. INSANE PERSONS—Care—Compensation.—Under Code 2883, § 2278, held, that a recovery could be had by the state hospital of compensation for the maintenance of a wealthy insane patient.—State Hospital v. Fountain, N. Car., 39 S. E. Rep. 784.

93. INSANE PERSONS—Deed—Void.—A deed executed by an incompetent is absolutely void.—Daugherty v. Powe, Ala., 30 South. Rep. 524.

94. INSURANCE—Breach of Condition—Waiver.—Where, after knowledge of breach of condition of policy, company treats it as in force, it is a waiver thereof.—Georgia Home Ins. Co. v. Allen, Ala., 30 South. Rep. 587.

95. INSURANCE—Misleading Insured—Waiver.—Any conduct of an insurer which tends to mislead the insured and cause delay in prosecuting his claim beyond the time limited in the policy amounts to a waiver of the condition.—De Farconnet v. Western Ins. Co., U. S. D. C., S. D. (N. Y.), 110 Fed. Rep. 405.

96. INTERNAL REVENUE—Collecting Tax—Estoppel.—The United States, having purchased and removed spirits deposited in a warehouse without retaining all the tax due thereon, held estopped to sue the sureties on the distiller's bond for the tax, though it was not estopped as against the distiller.—United States v. Aiken, U. S. D. C., W. D. (Ky.), 110 Fed. Rep. 370.

97. JUDGMENT—Res Judicata.—A decree in partition, which was relied on in a subsequent suit as *res judicata* by a party claiming under a defendant, acts as an estopped as to all parties to the partition.—Weeks v. McPhail, N. Car., 39 S. E. Rep. 732.

98. JUDGMENT—Vacating—Jurisdiction.—A motion to set aside a judgment, on the ground that it appears on the record that the court had no jurisdiction of the person of the defendant, is a direct attack on the judgment, and is not barred by lapse of time.—Rue v. Quinn, Cal., 66 Pac. Rep. 216.

99. JUDICIAL SALES—Purchaser—Estoppel.—Purchaser at judicial sale, at which certain liens had been certified and deducted from appraisement, held estopped from questioning their validity.—Battelle v. McIntosh, Neb., 87 N. W. Rep. 861.

100. JUSTICES OF THE PEACE—Certiorari.—A writ of *certiorari* will be quashed, and the judgment affirmed, because of a defective certificate of the justice, but a peremptory order will be made on the justice to send up a properly certified record.—St. George's Marsh Co. v. Jefferson, Del., 50 Atl. Rep. 58.

101. JUSTICES OF THE PEACE—Foreign Attachment—Notice.—A record of a justice as to notices in foreign attachment held insufficient, for not stating that the constable posted them according to law.—Money Weight Scale Co. v. Edwards, Del., 50 Atl. Rep. 62.

102. LANDLORD AND TENANT—Forcible Detention—Damages.—Evidence of value of land held not admissible in an action for forcible detention thereof.—Butterfield v. Kirtley, Iowa, 87 N. W. Rep. 407.

103. LANDLORD AND TENANT—Judgment—Two Defendants.—Plaintiff in an action for forcible detention of land held entitled to a judgment against each of the defendants.—Butterfield v. Kirtley, Iowa, 87 N. W. Rep. 407.

104. LANDLORD AND TENANT.—Notice of Removal.—Notice required of tenant as to intention to remove from the premises held not waived by landlord's oral request for a notice at a shorter time and the giving of such notice.—Lewis v. Scanlan, Del., 50 Atl. Rep. 58.

105. LARCENY—Felonious Intent.—Defendants, convicted of grand larceny, held entitled to a charge defining felonious intent.—State v. Shepherd, Kan., 66 Pac. Rep. 286.

106. LIBEL AND SLANDER—Publication.—Where a libelous letter is sent to the secretary of a local board of underwriters, it is immaterial whether such board is a legal organization or not.—Merchants' Ins. Co. of Newark v. Buckner, U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 345.

107. LIBEL AND SLANDER—Revival of Action Against Directors.—Action for libel against corporation may, on its dissolution, be revived against former directors thereof.—Shayne v. Evening Post Pub. Co., N. Y., 61 N. E. Rep. 115.

108. LIFE ESTATES—Agreement Between Husband and Wife.—Verbal agreement between husband and wife that a deed of land of the husband which they had both executed should not be delivered during her lifetime held not to entitle the wife to a life estate in the property on the husband's death after delivery.—Smith v. May, Del., 50 Atl. Rep. 59.

109. LIFE INSURANCE—Incorrect Statements.—Inquiry of applicant for life insurance as to her having ever spit blood held to be limited to such spitting as a reasonable person might suppose to indicate some ill health.—Peterson v. Des Moines Life Assn., Iowa, 87 N. W. Rep. 897.

110. LIFE INSURANCE—Statements—Materiality.—The parties to a contract of life insurance can make the truth of statements in the application material to the risk.—Peterson v. Des Moines Life Assn., Iowa, 87 N. W. Rep. 897.

111. LIMITATION OF ACTIONS—Change of Grade.—In action for change of grade, defense of limitations held unfounded.—Buser v. City of Cedar Rapids, Iowa, 87 N. W. Rep. 404.

112. LIMITATION OF ACTIONS—Vendor's Lien.—Vendor's lien held not lost, though debt evidenced by note is barred by limitations.—Hood v. Hammond, Ala., 30 South. Rep. 540.

113. LIS PENDENS—Necessity of Motive.—Under Code § 4089, notice of filing of petition to set aside conveyance as in fraud of creditors on grantee held not necessary, where he had actual knowledge of the proceedings.—Shumaker v. Davidson, Iowa, 87 N. W. Rep. 441.

114. MANDAMUS—Judicial Action.—Where temporary injunction is granted, and case is submitted to chancellor on motion to dismiss and to dissolve the injunc-

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tion, he will be compelled by *mandamus* to pass on the motions.—*Ex parte* Campbell, Ala., 30 South. Rep. 521.

115. MARINE INSURANCE—General Average and Salvage.—A marine policy insuring petroleum against sea perils, covers the general averages assessible against the petroleum, including a decree for salvage, towage of the vessel, etc.—De Farconnet v. Western Ins. Co., U. S. D. C., S. D. (N. Y.), 110 Fed. Rep. 405.

116. MARINE INSURANCE—Recovery by Insurers.—Marine insurers, having a claim to a part of the proceeds of a recovery for collision by the owner of the insured vessel, may intervene and set up such claim after decree and at any time before distribution of the fund recovered.—Mason v. Marine Ins. Co., U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 452.

117. MARINE INSURANCE—Recovering from Vessel in Fault.—Marine insurers, to whom a ship has been abandoned for a constructive total loss by collision, are entitled to damages recovered from the vessel in fault for loss of prospective earnings.—Mason v. Marine Ins. Co., U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 452.

118. MARINE INSURANCE—Suit for Subrogation.—In an action against a carrier to recover for loss of cargo, brought by a marine insurer, as subrogated to the rights of the shipper by payment of the loss, it is no defense that such insurer might have successfully resisted the claim of the shipper.—Nord-Deutscher Lloyd v. President, etc., of Insurance Co. of North America, U. S. C. C. of App., Fourth Circuit, 110 Fed. Rep. 420.

119. MASTER AND SERVANT—Compensation—Evidence of Neglect of Duty.—In an action for salary due by a discharged servant, testimony of neglect of duty held competent.—Pungs v. American Brake-Beam Co., Mich., 87 N. W. Rep. 864.

120. MASTER AND SERVANT—Defective Machinery.—In an action for damages to a servant caused by the breaking of machinery, defendant's negligence must be shown by a preponderance of the evidence.—Croker v. Pusey & Jones Co., Del., 50 Atl. Rep. 61.

121. MASTER AND SERVANT—Defective Tools.—It is a primary duty of a master to provide suitable tools and machinery for a servant.—Croker v. Pusey & Jones Co., Del., 50 Atl. Rep. 61.

122. MASTER AND SERVANT—Injury to Servant.—If a servant be young, inexperienced, and ignorant of his employment, the master must give him such instructions and warning of the dangerous character of the employment as may reasonably enable him to understand the peril thereof.—Strattner v. Wilmington City Electric Co., Del., 50 Atl. Rep. 57.

123. MECHANICS' LIENS—Judgment on Appeal.—On reversing judgment dismissing contractor's complaint for the price of building and to foreclose mechanic's lien, judgment will not be entered for the amount due plaintiff, but the case will be remanded for retrial.—Brewer v. Hugg, Iowa, 87 N. W. Rep. 409.

124. MONOPOLIES — Constitutionality of Anti-Trust Act.—Anti-monopoly act held not to infringe on personal liberty of persons examined without due process of law.—*In re* Davies, N. Y., 61 N. E. Rep. 118.

125. MORTGAGE—Deed and Defeasance.—A deed with defeasance held a mortgage.—Thompson v. People's Building, Loan & Investment Co., Iowa, 87 N. W. Rep. 848.

126. MORTGAGE—Defense of Usury.—When a lot covered by a mortgage is sold by the mortgagor, the purchaser cannot object to the mortgage on the ground that his grantor paid usurious interest.—Gray v. H. M. Loud & Sons Lumber Co., Mich., 87 N. W. Rep. 876.

127. MORTGAGES—Extension.—Where, on foreclosure by an assignee, the question of an extension was in issue, it was error to exclude evidence thereof, though the assignment had not been recorded, as required by Laws 1897, ch. 160.—Hulme v. Neosho Val. Inv. Co., Kan., 66 Pac. Rep. 239.

128. MORTGAGES—Occupation—Notice.—Occupation of land under claim of ownership held to put one acquiring mortgage on the land made by a third person on notice.—Kent v. Dean, Ala., 30 South. Rep. 543.

129. MORTGAGES—Separate Conveyance of Property.—Where several tracts of land included in a mortgage are sold at different times without reference in the deeds to such mortgage, the tracts last conveyed are first liable for the payment of the mortgage.—Gray v. H. M. Loud & Sons Lumber Co., Mich., 87 N. W. Rep. 876.

130. MUNICIPAL CORPORATIONS—Changing Grade of Street.—Abutting property owner held entitled to damages for change in grade of street.—Buser v. City of Cedar Rapids, Iowa, 87 N. W. Rep. 404.

131. MUNICIPAL CORPORATIONS — Defaulting Treasurer.—A village can sue its defaulting treasurer on his bond to recover liquor license money, though it must ultimately go to school district.—Hrabak v. Village of Dodge, Neb., 87 N. W. Rep. 358.

132. MUNICIPAL CORPORATIONS—Defective Sidewalk.—Slight inequality of surface of brick sidewalk held not a defect rendering defendant city liable to a traveler tripping thereby.—Haggerty v. City of Lewiston, Me., 50 Atl. Rep. 55.

133. MUNICIPAL CORPORATIONS—Defense to Claim.—In action against city, the defense that appropriation was exhausted and that payment of claim would be illegal must be pleaded.—McNulty v. City of New York, N. Y., 61 N. E. Rep. 111.

134. MUNICIPAL CORPORATIONS — Local Self-Government.—Act 1901, abolishing commissioners of parks of Detroit, and providing for a single commissioner, to be appointed by the council, does not take away the right to local self-government.—Oren v. Bolger, Mich., 87 N. W. Rep. 866.

135. MUNICIPAL CORPORATIONS — Street Improvements.—That a street improvement was not made in full compliance with the ordinance authorizing the same did not entitle a taxpayer assessed for the improvement, to object to the same on an application for a judgment for sale against him.—People v. Whidden, Ill., 61 N. E. Rep. 133.

136. MUNICIPAL CORPORATIONS — Unauthorized Expense.—Laws 1899, ch. 700, authorizing payment of legal expenses of public officer in defending charges against him by a city or county, held in violation of Const. art. 8, § 10.—Chapman v. City of New York, N. Y., 61 N. E. Rep. 108.

137. NAVIGABLE WATERS—Locks in a Dam.—Under Const. art. 18, § 4, Laws 1851, Act No. 156, and Pub. Acts 1887, Act No. 202, held not competent to require a water power company, damming a navigable river, to place rocks in the dam.—Valentine v. Berrien Springs Water Power Co., Mich., 87 N. W. Rep. 870.

138. NEGLIGENCE—Jury.—In an action for injuries at railroad crossing, the issues as to the defendant's negligence and plaintiff's contributory negligence are for the jury.—Kowalski v. Chicago G. W. Ry. Co., Iowa, 87 N. W. Rep. 409.

139. NEW TRIAL—Conditional Order of New Trial.—Written notice of conditional order granting new trial cannot be served, so as to limit right of appeal, until performance of condition by the other party.—Swanson v. Andrus, Minn., 87 N. W. Rep. 863.

140. NEW TRIAL—Conflicting Instructions.—Where the instructions on a material point are conflicting, a new trial will be awarded.—Edwards v. Atlantic Coast Line R. Co., N. Car., 39 N. E. Rep. 780.

141. NEW TRIAL—Unjust Verdict.—Where the overwhelming preponderence of evidence shows a verdict in favor of defendant to be unjust, it should be set aside.—Birmingham Nat. Bank v. Bradley, Ala., 30 South. Rep. 546.

142. PARTIES—Misjoinder—Waiver.—Under Civ. Code Prac. Ky. §§ 113, 114, objection, to misjoinder of causes of action or parties is waiver unless made by motion

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before answering.—Merchants' Ins. Co. of Newark v. Buckner, U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 845.

143. PARTNERSHIP—Sale—Mutual Rights.—On sale of one partner of his share in partnership assets, the share can be recovered only in equity.—Leader v. Plante, Me., 50 Atl. Rep. 58.

144. PAYMENT — Partial Payments. — Where partial payments have been made, interest due is first to be paid, and balance applied to principal, under Code, § 2629.—McQueen v. Whetstone, Ala., 30 South. Rep. 548.

145. PLEADING — Failure to Demur — Sufficiency of Pleading.—Acts 25th Gen. Assem. ch. 96 (the last sentence of Code, § 3564), providing that no pleading shall be held sufficient for failure to demur thereto, will not permit a defendant, on exceptions to instructions on the issue, to raise the question as to whether a cause of action is stated.—Enix v. Iowa Cent. Ry. Co., Iowa, 87 N. W. Rep. 417.

146. PLEADING—Waiver of Right to Make Bill More Specific.—Where defendant pleads after plaintiff files his bill of particulars, he waives his right to require the bill to be made more specific.—Mitchell v. Yerger, Del., 50 Atl. Rep. 62.

147. PRESUMPTIONS—Retrospective Effect.—Proof of ownership of a chattel at a certain time is not proof of ownership at a prior time.—State v. Dexter, Iowa, 87 N. W. Rep. 417.

148. PRINCIPAL AND AGENT—Acceptance by Agent.—An inspection and acceptance of merchandise at the place of delivery by an agent binds the principal.—Darby v. Hall, Del., 50 Atl. Rep. 64.

149. PRINCIPAL AND AGENT—Husband as Agent for Wife.—Where there is evidence that defendant's husband was authorized to act as her agent, his letters while so acting are admissible where she denies his agency.—Bird v. Phillips, Iowa, 87 N. W. Rep. 414.

150. PRINCIPAL AND AGENT—Undisclosed Principal.—Where a loan company made a loan for a third party to the plaintiff, who supposed she was dealing only with the company, it having acted for an undisclosed principal, will be liable for overpayments made by the plaintiff.—Thompson v. People's Building, Loan & Investment Co., Iowa, 87 N. W. Rep. 438.

151. PROCESS—Personal Service.—That a resident of Wisconsin was in Illinois to testify in another action does not affect service of process, if his presence in Illinois was not procured by fraud.—Longueville v. May, Iowa, 87 N. W. Rep. 432.

152. PROCESSIONING PROCEEDING— A dispute as to title to land cannot be tried by a processioning proceeding, under Laws 1893, ch. 22.—Midgett v. Midgett, N. Car., 39 S. E. Rep. 722.

153. PUBLIC LANDS—Actual Occupant—Homestead.—One purchasing unearned land from a railroad company is not a *bona fide* purchaser, within the meaning of Act March 3, 1887, as against a claimant under the homestead law who was in actual occupancy when, the purchase was made.—Manley v. Tow, U. S. C. C. N. D. (Iowa), 110 Fed. Rep. 241.

154. PUBLIC LANDS — Field Notes. — A government plat, corrected to correspond with the government field notes, supersedes the original plat.—Harrington v. Boehmer, Cal., 66 Pac. Rep. 214.

155. PUBLIC LANDS— Revolutionary Claims.— Under Resolves 1836, ch. 49, appropriating lands in satisfaction of claims for Revolutionary soldiers, held not necessary to order a new draft each time a claim was proved.—Burleigh v. Mullen, Me., 50 Atl. Rep. 47.

156. PUBLIC LANDS—Timber—Homestead Claimant.—A homestead settler, who has not perfected his right, so as to entitle him to a patent, has no right or authority to cut and remove timber from the land, and can give no title to such timber as against the United States.—Cunningham v. Metropolitan Lumber Co., U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 332.

157. QUO WARRANTO— State and Federal Representation.—Where the state sues to determine the validity of a franchise to build a dam, the state and prosecuting attorney representing the county whose board granted the franchise have no authority to represent the federal government.—Valentine v. Berrien Springs Water Power Co., Mich., 87 N. W. Rep. 870.

158. RAILROADS—Limiting Speed.—Where a town ordinance limited the speed of trains within the corporate limits in action for death at a crossing, held error to charge that, if the train was moving in excess of the prescribed rate at the crossing, such speed was negligent.—Edwards v. Atlantic Coast Line R. Co., N. Car., 39 S. E. Rep. 780.

159. RAILROADS—Mortgages—Lien.—Under the Ohio statute, the lien of mortgages upon railroad property within the state, executed by a corporation of another state whose road is partly within Ohio, is postponed to the lien of judgments recovered against it in the state for personal injuries.—King v. Thompson, U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 319.

160. RAILROADS — Violation of Ordinance. — An engineer and fireman, operating an engine across a graded street whereon no flagman was stationed, held not liable to punishment therefor, under Leavenworth City Ordinance No. 1755, §§ 13, 21.—City of Leavenworth v. Hurdle, Kan., 66 Pac. Rep. 288.

161. RECEIVERS—Attorney's Claim—Failure to Prove.—An attorney having a lien on money collected for a corporation does not lose his right to set off his claims on a motion to compel him to pay over such money, by failing to prove his claim before a receiver of such corporation.—Union Bldg. & Sav. Assn. v. Soderquist, Iowa, 87 N. W. Rep. 438.

162. REFERENCE—Authority.—The legislature can authorize a justice of the supreme court to appoint a referee to take testimony which the judge could take out of court.—*In re* Davies, N. Y., 61 N. E. Rep. 119.

163. RELIGIOUS SOCIETIES—Title to Property.—An unincorporated church society is without capacity to acquire title to property.— Stewart v. White, Ala., 30 South. Rep. 526.

164. REPLEVIN—Mistake of Law.—A defendant in replevin held to have no equity to require the repayment by plaintiff of a sum expended in the purchase of the property recovered, which it bought with knowledge of the facts, but under a mistake of law.—Cunningham v. Metropolitan Lumber Co., U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 332.

165. SEAMEN—Foreign—Right of Congress.—Congress has no power to regulate the domestic concerns of a foreign ship, such as the terms on which she ships her crew or the payment of their wages.—The Eudora, U. S. D. C., E. D. (Pa.), 110 Fed. Rep. 430.

166. SEAMEN—Wages—Foreign Subjects.—Act Cong. December 21, 1898, § 24, prohibiting prepayment of wages of seamen, held constitutional, and to apply to prepayment of seamen who are British subjects shipping in American ports on British merchant vessels.—The Kestor, U. S. D. C., D. (Del.), 110 Fed. Rep. 432.

167. SERVICE OF PROCESS — Publication. — Where a summons has been returned to the office of the clerk the authority of the court to order the service by publication is not thereby taken away.—Rue v. Quinn, Cal., 66 Pac. Rep. 216.

168. SHERIFFS AND CONSTABLES— Deputy— Compensation.—Under Acts 25th Gen. Assem. 1896, ch. 75, § 3, held, that a sheriff, not a salaried officer, was entitled to an allowance for a deputy.—Mentzer v. Marion County, Iowa, 87 N. W. Rep. 440.

169. SHERIFFS AND CONSTABLES—Misconduct of Deputy.—A sheriff is not chargeable in exemplary damages for misconduct of his deputy.—Nixon v. Bauer, Cal., 66 Pac. Rep. 221.

170. SHIPPING— Charterer — Liability. — A charterer held not liable for dispatch money where the ship was delayed in reaching her berth for loading by the rules

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of the port, and the charter provided that lay days should not commence until she was in every respect ready to load.—Bacon v. Ennis, U. S. D. C., E. D. (Pa.), 110 Fed. Rep. 404.

171. SPECIFIC PERFORMANCE — Remedy at Law.—Where action at law will not lie to recover damages for breach of contract, it will not be enforced in equity.—Kent v. Dean, Ala., 30 South. Rep. 543.

172. SPECIFIC PERFORMANCE—Wife against Husband.—Under Civ. Code, §§ 158, 2285, a wife's complaint for specific performance against her husband, which does not negative the presumption of undue influence, is defective.—Stiles v. Cain, Cal., 66 Pac. Rep. 281.

173. STATUTES—Title.—Act 1901, relating to commissioners of parks in Detroit, held not unconstitutional as containing provisions not included in the title.—Oren v. Bolger, Mich., 87 N. W. Rep. 366.

174. TAXATION—Assessment.—Collection of taxes on complainant's property will not be restrained because it was assessed in the name of the predecessor of complainant corporation.—A. Booth & Co. v. Raymond, Ill., 61 N. E. Rep. 129.

175. TAXATION—Bonds of Foreign Corporations.—Bonds deposited with the Ohio insurance commissioner by a foreign insurance company, under Rev. St. Ohio, § 3660, are taxable under section 2731 and Const. Ohio, art. 12, § 2.—Western Assur. Co. of Toronto v. Halliday, U. S. C. C., S. D. (Ohio), 110 Fed. Rep. 259.

176. TAXATION—Necessary Parties.—A judgment in an action enjoining collection of taxes brought against county treasurer alone reversed for lack of necessary parties defendant.—Shearer v. Murphy, Kan., 66 Pac. Rep. 240.

177. TAXATION—Tax Lien—Foreclosing.—In suit to foreclose tax lien, answer held an admission of the issuance and existence of the certificate of tax sale alleged.—Battelle v. McIntosh, Neb., 87 N. W. Rep. 861.

178. TAXATION—Validity of Tax Title.—Where claim is made that a tax title under which a party in a suit to quiet title claims is void, the only way of raising the question is by interposing in the tax proceeding.—Munroe v. Winegar, Mich., 87 N. W. Rep. 896.

179. TENANCY IN COMMON—Conversion.—Where cotenant of a chattel sells the whole of it, his co tenant may maintain trover.—Leader v. Piante, Me., 50 Atl. Rep. 58.

180. TRADE-MARKS AND TRADE-NAMES—"Cascara."—The word "Cascara," which is the name of a drug generally known, cannot be monopolized as a trade-name, but may be used by any one in connection with any preparation of which it is properly descriptive.—Sterling Remedy Co. v. Gorey, U. S. C. C., N. D. (Ohio), 110 Fed. Rep. 872.

181. TRESPASS—Damages.—Measure of damages for entering on plaintiff's property and removing its barn held to be value of barn at time of removal.—Kent County Agricultural Soc. v. Ide, Mich., 87 N. W. Rep. 869.

182. TRESPASS—Removing Barn.—Trespass *quare clausum* held proper form of action by agricultural society against its president for entering on its realty and removing its barn.—Kent County Agricultural Soc. v. Ide, Mich., 87 N. W. Rep. 869.

183. TRIAL—Affidavits—Refusal to Receive.—Where the court, pending a trial, refused to strike certain affidavits from the files, it was not thereby precluded from afterwards refusing to receive them.—Union Bldg. & Sav. Assn. v. Soderquist, Iowa, 87 N. W. Rep. 433.

184. TRIAL—Directing Verdict.—Where petition states cause of action, and answer states no defense, held not error to direct a verdict for plaintiff.—Hrabak v. Village of Dodge, Neb., 87 N. W. Rep. 858.

185. TRIAL—Instructions.—Where, in an action for libel, the charge as to malice was unexceptional as far as it went, the judgment should not be reversed because there was no special charge as to actual and implied malice, in absence of a request for such charges.—Merchants' Ins. Co. of Newark v. Buckner, U. S. C. C. of App., Sixth Circuit, 110 Fed. Rep. 345.

186. TRUSTS—Enforcing Trust.—A person purchasing land under agreement to convey to the other, and refusing to do so, will be compelled by a bill to enforce the trust.—Kent v. Dean, Ala., 30 South. Rep. 548.

187. TRUSTS—Mingling Trust Funds.—Act of trustee mingling trust money with his own, by depositing in bank in his individual name, held not necessarily to prevent identification of the trust money.—Cushman v. Goodwin, Me., 50 Atl. Rep. 50.

188. VENDOR AND PURCHASER—Vendor's Lien.—Failure of vendor to present purchase money notes to vendee's administrator held not to prevent enforcement of lien.—Hood v. Hammond, Ala., 30 South. Rep. 540.

189. VENDOR AND PURCHASER—Waiving Vendor's Lien.—Acceptance by vendor of note as collateral held not a waiver of the vendor's lien.—Hood v. Hammond, Ala., 30 South. Rep. 540.

190. WATERS AND WATER COURSES—Accelerating Stream.—Though a party may not divert the waters of a stream to the damage of another, he may accelerate and increase such waters, though by so doing another is damaged.—Mizell v. McGowan, N. Car., 39 S. E. Rep. 729.

191. WATERS AND WATER COURSES—Flooding Land.—Evidence held insufficient to sustain verdict against irrigation company for flooding plaintiff's land.—Lowery v. San Joaquin & K. R. Canal & Irrigation Co., Cal., 66 Pac. Rep. 225.

192. WATERS AND WATER COURSES—Water Companies—Stockholders.—Purchasers of stock of water power company held entitled to equitable relief against original holders conspiring to defeat the objects for which the company was organized.—Valentine v. Berrien Springs Water Power Co., Mich., 87 N. W. Rep. 870.

193. WILLS—Holographic Will.—The writing of the testator's name in a clause in holographic will is a sufficient signature thereto.—*In re* Camp's Estate, Cal., 66 Pac. Rep. 227.

194. WILLS—Sufficient Proof.—Under Code Civ. Proc. § 1339, where the testimony of two witnesses coincides as to the provisions made in a lost portion of a will, the court is authorized to establish such provisions.—*In re* Camp's Estate, Cal., 66 Pac. Rep. 227.

195. WITNESSES—Absence—Admission of Former Testimony.—Permanent absence of witness from state held to authorize admission of his testimony given on former trial.—Birmingham Nat. Bank v. Bradley, Ala., 30 South. Rep. 546.

196. WITNESSES—County Attorney.—A county attorney, trying a criminal case, can testify in behalf of defendant as to contradictory statements by a state's witness on a former trial.—State v. Tabor, Kan., 66 Pac. Rep. 287.

197. WITNESSES—Impeachment.—Under Pen. Code, § 2051, a question on cross-examination for the purpose of impeaching the witness in a criminal prosecution held incompetent.—People v. Warren, Cal., 66 Pac. Rep. 212.

198. WITNESSES—Impeachment.—Proof of statements contrary to a witness' testimony affect the credibility of the witness.—Smith v. May, Del., 50 Atl. Rep. 59.

199. WITNESSES—Privilege—Attorney.—Statements to an attorney when not employed as attorney held not privileged.—State v. Herbert, Kan., 66 Pac. Rep. 235.

200. WITNESSES—Transactions with Deceased Persons.—Under Code, § 4604, testimony of defendant as to transaction with deceased person held admissible in behalf of interveners.—Hogan v. Sullivan, Iowa, 87 N. W. Rep. 447.

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Central Law Journal.

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What instructions, if any, should be given the jury as to a witness' insanity, when it is offered and attempted to prove, or is proven that he is insane, or has been, to the judge, when the witness is produced? In answering this question we must first determine whether the mere fact of insanity renders a witness incompetent. Under the old rule of common law and the statutes of many of the states persons of unsound mind are said to be incompetent to testify. But whether under such statutes or the rule at common law a lunatic, monomaniac, or other person insane on one or more special subjects could, under any circumstances, be permitted to testify, was not definitely determined until the celebrated English case of Regina v. Hill, 5 Cox, Cr. Cas. 259. In this case Chief Justice Campbell held that if a person be so insane as not to understand the nature of an oath, he is not admissible. "But," the court said, "a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evidence upon the subject-matter under consideration. The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath. The lunatic may be examined himself and his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is. Still, if he can stand the test proposed, the jury must determine all the rest." The rule thus announced was accepted by the United States Supreme Court in the case of District of Columbia v. Armes, 107 U. S. 519, where the court, speaking through Mr. Justice Field, laid down the rule as follows: A person affected with insanity is admissible as a witness, if it appears to the court, upon examining him and competent witnesses, that he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue. This undoubtedly is the settled rule on this subject, indisputable by either reason or authority. Wright v. Express Co., 80 Fed. Rep. 85; Pittsburg, etc. R. R. v. Thompson, 82 Fed. Rep. 720; Tucker v. Shaw, 158 Ill. 326; State v. Hayward, 62 Minn. 475, 65 N. W. Rep. 63; State v. Brown (Del. 1896), 36 Atl. Rep. 458; City of Guthrie v. Shaffer (1898), 7 Okla. 459; Bowdle v. Detroit Street Railway Co. (Mich. 1894), 61 N. W. Rep. 529.

The competency of the witness having been determined at the preliminary hearing of the court, the question of how far the insanity of the witness affects his testimony is one solely for the jury and evidence on that point may be introduced by the opposing counsel and considered by the jury under proper instructions from the court. Bowdle v. Detroit Street Railway Co. (Mich. 1894), 61 N. W. Rep. 529; City of Guthrie v. Shaffer, 7 Okla. 459; State v. Brown, 2 Marvell (Del. 1896), 380, 36 Atl. Rep. 529. In regard to the character of the evidence offered to prove a witness' insanity, it will be instructive to consider carefully the recent case of State v. Hayward, 62 Minn. 474, 65 N. W. Rep. 63, where the court makes a distinction between insanity as a direct issue and as a collateral issue, as in the attempt to impeach the credibility of a witness, and holds that the trial court may refuse to receive any indirect evidence of insanity, as, for instance, of witness' ancestors or relatives, or of his own prior, temporary delusions, until some other evidence is first given of his insanity at the time of the transactions testified to or at the time of the trial.

After the case is closed and evidence of a witness' insanity has been introduced to impeach his testimony, the question of most serious difficulty is the drawing up of the proper instructions for the jury. The authorities are not altogether clear on the question as to the extent to which the trial court may go in interfering with the discretion of the jury. In District of Columbia v. Armes, 107 U. S. 519, 521, very conclusive evidence had been introduced of a witness' insanity, and though the court held the witness to be competent it instructed the jury that his testimony must be taken with some allowance, considering his condition of mind and his incapacity to remember all the circumstances. The United States Supreme Court held this to be a proper instruc-

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tion, and it is safe to affirm that in all cases where the court admits evidence of a witness' insanity at all, such an instruction would be proper. The case of Bowdle v. Railway, *supra*, seems to have gone farther than all other authorities. There the court held that where there is evidence that a witness is demented, it is proper to charge that, if the jury believe from the evidence that the witness is without sufficient mental capacity to understand what is going on, they are not at liberty to consider his testimony. McGrath, C. J., dissented. The court said: "When the preliminary question is passed and the court has determined that the witness is competent to testify, the entire controversy is then transferred to the jury. The court may not say to the jury that the witness is or is not entitled to credence. The jury may reject the testimony entirely or may attach whatever weight to it they choose. We are cited to no authority which holds that it is incorrect to instruct the jury that, if they shall determine from the evidence that a witness is so insane as not to comprehend or be able to understand what he is doing and saying, and to remember what has transpired in regard to the subject about which he is testifying, they should reject his testimony altogether." The court in this case undoubtedly states the correct rule. The trial court has the first right to exclude the witness, and on preliminary examination may decide that the witness is competent to testify. The same or additional evidence, however, may then be given to the jury who hear it along with other evidence in the case and have the same right as the court to exclude, in their discretion, the entire evidence or give it such weight as they think fit; and they must reject it altogether if they find the witness without sufficient mental capacity to understand what is going on.

Probably the most correct and safest construction in such cases is that approved in the very recent case of City of Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. Rep. 698. In are instructed that, in determining the weight to be given to her testimony, you should take into consideration the testimony tending to show the mental condition of the plaintiff at this time, and from such testimony, together with her own statements and evidence as to how the accident occurred, give to her testimony such weight as in your judgment the same is entitled to." The Supreme Court of Oklahoma unanimously approved this instruction.

We have gone so much at length into this subject because of inquiries which we have received and from the further fact also that neither text-books nor digests give any light whatever on the question. In fact, in some of the cases which we have cited the reporter failed to notice in the syllabi the fact that the question of proper instructions in such cases had been passed upon. It would have been easier and probably more appropriate to have prepared an article rather than an editorial on this question, but we thought best to condense the entire subject into the latter form, merely blazing a way for the more exhaustive consideration of the individual cases.

NOTES OF IMPORTANT DECISIONS.

COURTS—HOLDING JUSTICE COURT ON THE SIDEWALK.—Justice Lumpkin of the Supreme Court of Georgia is undoubtedly one of the greatest of legal humorists. Some of the most serious of legal tangles over which the painstaking attorneys have labored into the small hours of the night, are cut and solved by the sharp wit of this unique jurist. His sense of humor is remarkable being only equaled by his keen insight into the merits and equities of the case. In a comparatively recent case the court was called to consider an appeal from the judgment of a justice's court where the court was held on the sidewalk instead of the accustomed place, because the justice had been barred out of his office by his landlord. After stating the facts the court proceeds:

"Representatives in that militia district, the justice of the peace and notary public and *ex*

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the doctrine of *cy pres*,—that is, in plain English, if they could not do the exact thing they desired, they would do the next best thing which they could. They accordingly descended to the foot of the steps, where the stairway debouched upon the sidewalk, and there erected the altar of justice; and lest some stray lamb from the flock of litigants might find his way, by force of habit, to the top of the stairs, the justice of the peace and *ex officio* justice took their seats at the bottom. Thus, no flotsam or jetsam of the law could possibly be cast up unobserved. The litigants were on the sidewalk, the justices in the doorway, and thus was justice done. If the proceedings reminds one of the simple procedure of the courts when the cadi administered justice under the palm tree; or if justice administered on the sidewalk makes one think of the early English court of 'Pied-Poudre,'—it must not be forgotten that substantial justice was often administered in both of those courts.

"The case was thus tried and the judgment rendered. There is no complaint that it was not properly tried, or that any person was misled or absent, or that substantial justice was not reached; but it is contended that the judgment so rendered was void, a mere nullity because the law requires justice courts to be held at 'fixed times and places,' and it is contended that the place fixed was the room upstairs, and that the judgment could not lawfully be rendered elsewhere; in a word, that a judgment upstairs would have been good, but a judgment downstairs was void. I cannot quite agree to this proposition. I do not think that a judgment must needs lose its life in descending a flight of stairs."

RELEASE — CONSIDERATION IN CASE OF PERSONAL INJURY.— The claim agent of a railroad is not a figure-head but rather a head full of figures,—figures of speech as well as figures of Arabic tribe, with which he proves to you that your claim is absolutely worthless, and, therefore, the offer which his company authorizes him to make is an act of pure self-sacrifice and beneficence. If a claim agent possessing these qualifications is not without abundant recognition and compensation from the company he represents, what must be said of one who adds to his many professional virtues, that of being able to convince an injured claimant that to execute a release without a consideration, but under seal so as to import a consideration, would result to his immediate advantage, without uncovering himself to a charge of fraud or undue influence. A case of this kind is disclosed by the recent case of Boutten v. Railroad (N. Car.), 38 S. E. Rep. 920. This was an action against a railroad for injuries, the defense set up being that plaintiff had executed a release from all liability. Plaintiff was illiterate, and had signed the release by making his mark, and it was uncontradicted that no money had ever been paid him. Plaintiff testified that he signed the release because he was informed that it was the means whereby the one who had nursed him while suffering from his injuries could secure money from the railroad company. The scroll following plaintiff's cross-mark was made by some one other than plaintiff. The court held that it was error to nonsuit plaintiff on the ground that, the release being proven, the burden was on the plaintiff to impeach it, and that there was no evidence so to do. The court further held that where one having an action for damages for injuries against a railroad signed a release releasing the railroad from liability, the fact that a scroll was placed after his name did not raise a presumption of consideration which could not be rebutted by evidence that he received no consideration.

The authorities on the question of what is a sufficient consideration to sustain a release are not always easy to reconcile. This much can be said, they are always scrutinized with great care, and must be made upon sufficient consideration. In Hobbs v. Electric Light Co., 75 Mich. 550, it was held that an oral promise to take the injured party again into employment is a sufficient consideration for a release. In a subsequent case in the same state the question whether a promise to re-employ was a sufficient consideration where claimant was still in the employ of the company was answered in the negative. Potter v. Railroad, 81 N. W. Rep. 80. This judgment was, however, reversed on rehearing. 82 N. W. Rep. 245. The court cited Purdy v. Railroad, 125 N. Y. 209, 26 N. E. Rep. 255. To same effect, Texas Midland R. R. v. Sullivan (Tex. Civ. App.), 48 S. W. Rep. 598, where it was held that a railroad company's agreement to re-employ is a sufficient consideration for a release for injuries inflicted by the company on its employee though the term of employment is indefinite, and the company has a right to discharge in a short time. Where one, during his employment, agreed in writing with his employer not to hold him liable for an injury from his negligence, but without agreement as to future employment, or other consideration, this was held not a release. Peterson v. Railroad, 36 Minn. 399; Purdy v. Railroad, 52 Hun (N. Y.), 267. In the case of Missouri Pacific R. R. v. Goodholm, 61 Kan. 758, 60 Pac. Rep. 1066, it was held that if a passenger who is injured in a railroad wreck executes a release of the company from all liability, though the consideration for the release be a trifle in sum, if the same be executed understandingly, he will be bound thereby.

CONVERSION—LIABILITY OF AGENT, AUCTIONEER OR OTHER INTERMEDDLER WITHOUT AUTHORITY.—It was a common saying with Lord Bramwell that he never felt himself on safe ground in dealing with conversion. "I am never very confident," he said, in National Mercantile Bank v. Rymill, 44 L. T. 767, "as to what

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is or is not conversion," and the same feeling usually arises in every lawyer's mind when he has to decide whether, under peculiar circumstances, there has been such a conversion of chattels as to give rise to an action analogous to the old action of trover. A general definition of conversion, of course, it is not hard to give. The eminent judge just referred to spoke of it as "an unauthorized act which deprives another of his property permanently or for an indefinite time" (Hiort v. Bott, L. R. 9 Ex., p. 89), and in ordinary cases this furnishes a sufficient guide. Any intermeddling by a stranger with the goods of another in a manner prejudicial to the rights of that other is a conversion, and it makes no difference whether the stranger has or has not notice of the title of the true owner, or whether he acts on his own account or simply as agent. The case which clearly imposes liability for conversion upon an innocent agent is Stephens v. Elwall, 4 M. & S. 258, which was recognized as good law in Hollins v. Fowler, L. R. 7 H. L. 757. There a clerk had received and dispatched to his employer goods which had been sold by bankrupts after their bankruptcy. "The clerk," said Lord Ellenborough, C. J., "acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under authority from another, who himself had no authority to dispose of it." The case of an action for conversion being brought against a clerk is naturally not of frequent occurrence, but intermediaries in dealing with goods who occupy a responsible position, such as brokers and auctioneers, are recognized as suitable objects of claim. The case of a broker was exhaustively discussed in Hollins v. Fowler, *supra*, and the judgment of Blackburn, J., in advising the house of lords is usually taken as establishing a distinction between intermediaries, such as carriers, packers and warehousemen who, in dealing with goods, do nothing necessarily derogatory to the title of the true owner, and a broker who actively assists in the transfer of possession to an adverse claimant. In that case the defendant broker had in the first instance bought cotton on his own account, expecting, as actually happened, to be able to pass it on at once to one of his customers. The jury found that he purchased as agent in the course of his business as broker, but on the ground that he had assisted in the transfer of the goods to his customer, he was held liable for a conversion He acted, it was pointed out by Cairns, L. C., in a character beyond that of a mere agent. He exercised a volition in favor of the ultimate buyers, the result of which was that he transferred the dominion and property in the goods to the buyers in order that the buyers might dispose of them as their own. This amounted to a conversion, but it is an obvious deduction from the case that, had he acted simply as agent for principals in conducting the negotiations, and not actively intermeddled in passing the dominion over the goods, he would not have been liable. A case where liability for conversion is frequently imposed with harsh results is that of an auctioneer who sells goods on the order of a person who is not the owner. As a general rule the auctioneer not only conducts that sale, but also gives delivery of the goods to the purchaser, and though, as far as the sale goes, he might be treated as a mere agent, yet the sale accompanied by intermeddling with the possession conclusively fixes him with liability for a conversion. Consolidated Co. v. Curtis, 40 W. R. 426 (1892), 1. Q. B. 495. If, however, these two elements are not combined he may escape. Where, to quote the instance put by Bramwell, L. J., in Cochrane v. Rymill, 27 W. R. 776, a man brings a horse into an auctioneer's yard and asks the auctioneer to find a purchaser; if the auctioneer does so and the vendor himself delivers the horse to the purchaser, then the auctioneer would not be liable to the true owner of the horse. So, on the contrary, it was held by the court of appeal in National Mercantile Bank v. Rymill, 44 L. T. 767, that where a sale by private treaty took place before the auction, and the auctioneer delivered possession in pursuance of such sale, he incurred no liability. This last decision, as was pointed out by Collins, J., in Consolidated Co. v. Curtis, is one of great importance in the law of conversion, and its results have not yet probably been fully worked out.—*Solicitor's Journal.*

WHAT IS NECESSARY TO CONSTITUTE ACTUAL ADVERSE POSSESSION.

To constitute actual adverse possession it is only necessary for the person so claiming to show that he has been in actual, continuous, open, notorious, exclusive, hostile possession during the statutory period.[1] The possession must be actual, but any occupation, visible and notorious of which the property is susceptible, and which excludes the true owner, is sufficient.[2] To render such possession adverse, it is not necessary that it be accompanied with a claim of title and with a denial of the opposing title.[3] It is not necessary for one claiming title to land by adverse possession to show that he ever

[1] Peterson v. Townsend, 30 Neb. 876; Beasley v. Howell, 22 South. Rep. 989; Booth v. Small, 26 Iowa, 177; Paldi v. Paldi, 95 Mich. 410, 54 N. W. Rep. 903; Washburn v. Cutter, 17 Minn. 361; Sherin v. Bracket, 36 Minn. 152.

[2] Holtzman v. Douglas, App. D. C. 397; Tiedeman on Real Property, sec. 697.

[3] French v. Pearce, 8 Conn. 439; Bryan v. Atwater, 5 Day, 181; Horbach v. Miller, 4 Neb. 47.

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made claim of title to the land by word of mouth.[4] It is the actual, continuous, open, notorious, exclusive, hostile possession that ripens into an absolute title.[5] It is enough that the party takes possession of the premises, claiming them to be his own,[6] and is notice to all the world, requiring those that would concern themselves in it, or litigate for it, to take notice,[7] not only of the possession itself, but of the right, title, and interest whatsoever it may be of the possession.

As to what manner the party claiming the real estate by right of adverse possession must have come into possession of the same, the rule seems to be well established that the possession must not only have been actual, open and continuous, but it must have been accompanied by an intention on his part to hold the land as owner of it.[8] In the case of Ford v. Wilson, the learned court said: "It is the occupation, with an intention to claim against the world, which renders the entry and possession adverse."[9]

There is no rule of law that requires that a title by adverse possession be gained by any particular methods of occupation, but various methods of use, taken together, may show an exclusive and adverse occupancy; and, where the possession effectually excludes that of others, it is inmaterial by what acts such possession may be accompanied or manifested. Any visible or notorious acts, which clearly evidence the intention to claim ownership and possession, will be sufficient, and if this possession comports with the ordinary management of similar lands by their owners, it furnishes satisfactory evidence of adverse possession.[10] The meaning of the term "notorious," as used here, is that the character of the holding must possess such elements of general publicity that the owner may be presumed to have notice of it and of its extent.[11] Where there is evidence of such overt and notorious acts of adverse possession, such possession is sufficient notice of the character of the claim of ownership, and proof of actual knowledge or positive notice is unnecessary.[12] And one seeking to establish title by adverse possession for the statutory period is entitled to show that it was generally understood in the neighborhood that he was reputed to be the owner.[13] The general rule of law may be said to be that the statute will run and be a sufficient bar where the acts of the one party have notoriously given the other party a cause of action which he has neglected to act upon.[14] A title will not avail against the true owner unless there has been such exclusive possession as amounts to a disseizin.[15] Openness, notoriety, and exclusiveness of possession are shown by such acts as would ordinarily be performed by the true owner in appropriating the land or its avails to his own use,[16] and must be of such unequivocal character as will reasonably indicate to the true owner visiting the premises during the statutory period that, instead of suggesting the probable invasion of a mere occasional trespasser, they will unmistakably show an asserted exclusive appropriation and ownership.[17]

Title to land by adverse possession cannot be shown by disconnected acts of short duration,[18] but the continuity of possession

[4] Barnes v. Light, 116 N. Y. 34, 22 N. E. Rep. 441; Johnson v. Fitz George, 50 N. J. L. 470, 14 Atl. Rep. 762; La Frombois v. Smith, 8 Cow. 589, 603.

[5] Fitzgerald v. Brewster, 31 Neb. 57; Campau v. Dubois, 39 Mich. 274.

[6] Noyes v. Heffernan, 153 Ill. 339, 38 N. E. Rep. 571.

[7] Parks v. Jackson, 11 Wend. 464; Uhl v. May, 5 Neb. 160; Kahre v. Rundle, 38 Neb. 315.

[8] Calvin v. R. V. Land Association, 28 Neb. 75; Kirkman v. Brown, 93 Tenn. 476, 27 S. W. Rep. 709; Wade v. Johnson, 94 Ga. 348, 21 S. E. Rep. 569.

[9] Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Early v. Garland, 13 Gratt. 1; Winn v. Abeles, 35 Kan. 85; Knowlton v. Smith, 36 Mo. 507, 88 Am. Dec. 152; Jackson v. Wheat, 18 Johns. 44; Bradley v. West, 60 Mo. 33; Ayers v. Reidel, 84 Wis. 276, 54 N. W. Rep. 588; Worcester v. Lord, 56 Me. 265, 96 Am. Dec. 456; Ringo v. Woodruff, 43 Ark. 469.

[10] Tiedeman on Real Property, sec. 697; Clark v. Potter, 32 Ohio St. 64; Langworthy v. Myers, 4 Iowa, 18; Ewing v. Burnett, 11 Pet. (U. S.) 41; Blanchard v. Moulton, 63 Me. 434; Cox v. Forrest, 60 Md. 74.

[11] Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 189.

[12] Black v. Tenn. Coal, Iron & R. R. Co., 93 Ala. 109, 9 South. Rep. 537; Warfield v. Lindell, 38 Mo. 561, 90 Am. Dec. 443.

[13] Maxwell Land-Grant Co., v. Dawson, 151 U. S. 586; Sparrow v. Hovey, 44 Mich. 63, 6 N. W. Rep. 93.

[14] Magee v. Magee, 37 Miss. 138.

[15] Sparhawk v. Bullard, 42 Mass. 95; Unger v. Mooney, 63 Cal. 595, 49 Am. St. Rep. 100; McClellan v. Kellogg, 17 Ill. 498; Cahill v. Palmer, 45 N. Y. 478.

[16] Goodson v. Brothers, 111 Ala. 589, 20 South. Rep. 443.

[17] Roberts v. Richards, 84 Me. 1, 24 Atl. Rep. 425; Russell v. Davis, 38 Conn. 562; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Mooney v. Cooledge, 30 Ark. 690; Bartholomew v. Edwards, 1 Houst. (Del.) 17.

[18] Elyton Land Co. v. Denny, 18 South. Rep. 561.

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during the entire statutory period is essential to gain title.[19] It is not, however, necessary that during the whole time the disseizor be in actual occupancy of the land, or have his residence on it.[20] To make out the full term of statutory prescription, the possession of successive occupants must be connected and continuous; but such connection and continuity may be affected by any conveyance, agreement or understanding that has for its object a transfer of the possession, and is accompanied by a tranfer in fact.[21] And, so, if a person enter upon land, and die in the adverse possession of it, leaving a widow and children, one of whom continues in possession and conveys the land to a third person, who goes into immediate possession and continues it to the end of the full statutory period, the several possessions may be tacked, so as to make a good title under the statute of limitations.[22]

An entry upon land by a stranger, under claim of right, is held to be an actual disseizen of the owner, which puts into operation the statute of limitations against him, and is, therefore, a hostile possession.[23] In the case of Ballard v. Hansen the learned court said: "The word 'hostile,' when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that he is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land."[24] Some courts have expressed a doubt as to the application of the rule as to notice of adverse holding where the grantor continues to hold possession after the delivery of the deed, or where a tenant continues to hold possession after the expiration of his tenancy, but in our view there is no reason for a distinction. The question in every case is, by what right is he in possession?[25] The statute is one of repose, and it is safe to assume that any person who claims a title or interest in the land in opposition to the party in possession will assert it within the time fixed by the statute.[26] The doctrine of title by adverse possession, continued for the statutory period, is not founded on any probability of actual grant, but is a positive rule established for quieting titles.[27] "The operation of the statute," says Mr. Washburn, "takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant."[28]

Where adverse possession exists, and the statute of limitations is depended upon as a bar to an action, the statute must be pleaded,[29] and such plea should state that the cause of action did not accrue within the prescribed period next before the commencement of the suit.[30] The plea bringing the statute of limitations into operation as a bar should show all of the essential elements of adverse possession. It has, however, been held by some of the courts that adverse possession may be maintained under a general denial and allegation of ownership.[31] The plea should set forth all of the facts constituting the adverse possession,[32] namely: actual, open, notorious, exclusive and continuous, hostile possession under claim of right of ownership, or color of title.[33]

The party alleging the adverse possession must prove the facts necessary to sustain such

[19] Stonestreet v. Doyle, 75 Va. 356, 40 Am. St. Rep. 731; Bliss v. Johnson, 94 N. Y. 235; Wickliff v. Ensor, 48 Ky. 253; Harrison v. Cachelin, 20 Mo. 117; Claney v. Handlette, 39 Me. 451.

[20] Hopkins on Real Property, p. 466; Downing v. Mayes, 153 Ill. 330, 38 N. E. Rep. 620; Costello v. Edson, 44 Minn. 135; Gary v. Woodham, 103 Ala. 421; Hunton v. Nichols, 55 Tex. 217.

[21] Smith v. Chapin, 31 Conn. 530; Stettniche v. Lamb, 18 Neb. 619, 26 N. W. Rep. 374.

[22] Graffius v. Tottenham, 1 Watts & S. 448, 37 Am.

[25] Hansen v. Berthelsen, 19 Neb. 433; Kahre v. Rundle, 38 Neb. 320; Smith v. Meyers, 76 N. W. Rep. 1064.

[26] Tourtelotte v. Pearce, 27 Neb. 62; Campau v. Dubois, 39 Mich. 281; Faught v. Holway, 50 Me. 24; Ellicott v. Pearl, 10 Pet. 412.

[27] Cannon v. Phillips, 34 Tenn. 211; Melvin v. Waddell, 75 N. Car. 361.

[28] Washburn on Real Property, 164.

[29] McIlhenny v. Fieke, 60 Mo. 329; Raynor v. Timerson, 46 Barb. 518.

[30] Zeilin v. Rogers, 21 Fed. Rep. 103.

[31] Donahue v. Thompson, 60 Wis. 500, 19 N. W. Rep. 520; Sullivan v. Dunphy, 4 Mont. 499, 2 Pac. Rep. 284; Hill v. Bailey, 8 Mo. App. 85; Morss v.

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plea.[34] Adverse possession, to be available, must be clearly proved and not left to mere conjecture.[35]

What constitutes an adverse possession is a question of law for the court;[36] but the facts, necessary to establish that possession, are to be determined by the jury.[37]

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[34] Durham v. Holeman, 30 Ga. 619; Smith v. Powers, 28 Tex. 29; Bolden v. Sherman, 101 Ill. 483; Wilkerson v. Thompson, 82 Mo. 317; Doherty v. Matsell, 119 N. Y. 646; Rowland v. Williams, 23 Oreg. 515; McDermott v. Hoffman, 70 Pa. St. 31.

[35] Weaver v. Wilson, 48 Ill. 125; Ambrose v. Raley, 58 Ill. 506.

[36] Mackiot v. Dubreuil, 9 Mo. 447, 43 Am. Dec. 550; Paxson v. Bailey, 17 Ga. 600; Harper v. Morse, 114 Mo. 317.

[37] Anderson v. Boek, 56 U. S. 323; Gardener v. Gooch, 48 Me. 487; Eaton v. Jacobs, 52 Me. 445; Trufant v. Hudson, 99 Ala. 526; Webb v. Richardson, 42 Vt. 592.

COMMON NUISANCE—ABATEMENT—CHANGE OF VENUE—MISDEMEANOR.

STATE v. STARK.

Supreme Court of Kansas, Division No. 1, October 5, 1901.

1. All places where intoxicating liquors are sold or kept for sale, or places where persons are permitted to resort for the purpose of drinking the same, are declared by statute to be common nuisances. This fact, however, does not justify their abatement by any person or persons without process of law. They can be abated only by a prosecution instituted in behalf of the public by the proper officer. The destruction or injury to property used in aid of the maintenance of such nuisances, except in the manner provided by the statute, is a trespass.

2. A change of venue in a criminal prosecution is a wrong to the public unless the necessities of justice to the accused require it. Prejudice on the part of a judge must clearly appear. A *prima facie* showing of predjudice is insufficient. The case of City of Emporia v. Volmer, 12 Kan. 622, followed.

3. In the commission of a misdemeanor there are no accessories. All persons aiding or counseling are principals.

Balfe H. Stark was convicted of malicious trespass, and he appeals. Affirmed.

The appellant, with Carrie Nation and six others, was charged by information with malicious trespass, under section 2053 of the General Statutes of 1899. The offense alleged was that defendants did, on or about the 17th day of February, 1901, willfully, unlawfully, and maliciously break, destroy, and injure the door and windows of a building at No. 111 East Sixth street, in the city of Topeka, used as a cigar store and billiard hall by F. H. Murphy. Having obtained a separate trial, the appellant moved the court for a change of venue on the ground of the prejudice of the presiding judge against him. This application was based on language used by the judge towards Carrie Nation and three others, who were brought before him upon proceedings wherein they were held to give bond to keep the peace, the charges being substantially the same as those contained in the information against the appellant, to-wit, the destruction of property. The latter, however, was not a party to that prosecution. In addressing Mrs. Nation and the three others, the judge stated that the action of the parties was wholly unwarranted by any construction to be placed on the law, and further said: "I want to say to you people who appear charged with having aided and abetted her that this is a court of law, and not one of sentiment. Having broken the law, you have no more rights in this court than the jointist. Your contempt of the law is as great as his. Mrs. Nation and her followers made an atttack Sunday upon a perfectly legitimate business in which $100,000 is invested. They have repeatedly broken the law, and destroyed property, and gone unhindred and unpunished. The time has come in this community when people are demanding that something be done. I want to say to you that this unwarranted destruction of property must stop. Have people no rights that a crazy woman and her deluded followers are bound to respect? There is not a lawyer in this room who will not tell you that you have no right under the law to do these things. * * * You have no right to attempt to abate a nuisance except through the regular channels. Reputable men in this community have given sanction to a movement that has led to riot, and may lead to bloodshed. I want to say to you people who have been placed under bond that if you go out on any more raids your bondsmen will be compelled to forfeit the amount to the last penny. I want to make this proposition clear to you. Property must and will be defended." The information was filed February 17th, and the case called for hearing February 20th, and thereon passed until February 25th. A motion was then made by appellant for a postponement on account of the sickness of Mr. Stone, one of his counsel, and for the reason that Mr. Martin, his other attorney, had been unable to prepare for trial. The application was made by Mr. Troutman and Mr. Bain, who appeared on behalf of the appellant, and showed that they had made no preparation for the trial. The application was overruled, a jury impaneled, and a verdict of guilty returned, followed by a fine imposed on the defendant of $25, with the costs of the prosecution.

SMITH, J. (after stating the facts): The court did not err in overruling the application for a change of venue. The remarks of the judge were made to Carrie Nation and others in a proceeding to which the appellant was not a party. No personal prejudice towards Stark was shown. From all that appears, the judge might have been kindly disposed towards the defendant. The attack on Sunday, referred to by the judge, related to the conduct of other parties, with whom

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the appellant was not connected. Had the language coming from the bench been directed to Stark, he might have had reason to complain. His case was not, however, before the court at that time. It has been held that a change of venue is a wrong to the public unless the interests of justice to the defendant require it, and that prejudice on the part of a judge towards a defendant must clearly appear. It is not sufficient that a *prima facie* case only be shown. City of Emporia v. Volmer, 12 Kan. 622, 627. The record shows that the district judge tried the case with fairness, and the punishment imposed was exceedingly moderate, considering that the maximum for such offenses is imprisonment in the county jail not exceeding one year, and by fine not exceeding $500, or by both such fine and imprisonment.

The granting a continuance was largely a matter within the discretion of the court. The offense charged was a misdemeanor. We do not think any of the rights of the defendant were prejudically affected by the absence of attorneys who had prepared for the trial. He was represented by counsel of high standing and ability, and we find nothing in the record to indicate that any point favorable to him was overlooked.

There was some confusion in the answers made by the juror Hale Ritchie touching his opinion of the guilt or innocence of the defendant, but his whole examination, taken together, does not show him to have been disqualified.

Complaint is made that several of defendant's witnesses on cross-examination were subjected to rigid inquiries as to the existence of a certain organization formed for the purpose of destroying property. Nothing was extracted by the state from such witnesses than the defendant himself confessed concerning such organization. He admitted that he was a member of a company which assembled on the state house steps, and from there moved to the place where the property in question was injured, and that he took an ax along because he thought he might be called on to use it.

There was no error in the instruction that if the defendant was present, advising, counseling or encouraging the breaking of the doors and windows, he was equally as guilty with those actually committing the offense, although he may not in person have injured said property. In misdemeanors all concerned, if guilty at all, all are principals. State v. Gurnee, 14 Kan. 111; Sharpe v. Williams, 41 Kan. 56, 20 Pac. Rep. 497.

The appellant offered to prove that the prosecuting witness, at the time the trespass was committed and his property injured and destroyed, was the keeper of a place where intoxicating liquors were sold as a beverage in violation of law, and that the property in question was unlawfully used as an accessory thereto. This offer was rejected by the court, and the testimony excluded. Upon this ruling the question arises whether, the owner of the property having employed it as an aid to the maintenance of a common nuisance, the appellant was justified in being a party to its destruction without process of law. Under our statutes all places where intoxicating liquors are sold, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where such liquors are kept for sale, barter or delivery in violation of the prohibitory liquor law, are declared to be common nuisances; and upon the judgment of a court having jurisdiction that such places are nuisances the sheriff or constable or marshal of any city where the same are located shall be directed to shut up and abate such places by taking possession thereof, and of all intoxicating liquor found therein, together with all signs, screens, bars, bottles, glasses and other property used in keeping and maintaining said nuisances, and the same shall be forthwith publicly destroyed by such officer. It is further provided that the attorney general, county attorney, or any citizen of the county where such a nuisance exists may maintain an action in the name of the state to abate and perpetually enjoin it. Here is a complete legal remedy, easy to obtain, which was open to the appellant or any of his associates. Indeed, we believe it to be more drastic and summary in its application to the subject than the law of any other state in the Union. The existence of such common or public nuisance as appellant offered to show was kept by the prosecuting witness, in violation of law, injuriously affected all other persons in the city of Topeka equally with himself. It is not claimed that he was specially injured, or peculiarly or individually hurt, in any other manner or degree than in common with all others in the community. He could not have maintained an action in his own name to abate the nuisance. Jones v. City of Chanute, 62 Kan. —, 65 Pac. Rep. 243. In case of Brown v. Perkins, 12 Gray, 89, the Supreme Court of Massachusetts had before it a similar question. In an action of tort for breaking and entering the plaintiff's shop and carrying away and destroying a barrel of vinegar and other goods, the answer of the defendant alleged that the building was kept for the sale of intoxicating liquors, and was a public nuisance; that a large number of persons assembled to abate the same, and destroyed or injured no article of merchandise, but only spirituous liquor, unlawfully kept for sale, and did no other act and used no more force than was necessary to abate such nuisance. By statute in force in Massachusetts at that time all intoxicating liquors kept for sale, and the vessels and implements actually used in selling and keeping the same, were declared to be common nuisances, and were to be regarded and treated as such. By another statute all buildings or tenements used for the illegal keeping or sale of intoxicating liquors were declared to be common nuisances. The trial court instructed the jury that intoxicating liquors kept for sale, with the vessels con-

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taining them and articles used in their sale, being declared by law to be a common nuisance, it was lawful for any person to destroy them by way of abatement, and that such action would be the exercise of a common and lawful right. This instruction was held to be erroneous. The opinion was delivered by Shaw, C. J., one of the ablest of American jurists, and we extract from it such portions as are most pertinent to the question before us: "It is not lawful by the common law for any and all persons to abate a common nuisance merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this suppositon. This right and power is never intrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance." Page 101. "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge across a navigable water course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law." (Pages 101, 102.) "The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children, or servants of any person do frequent such a place, and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law." (Page 102.) This enunciation of the law finds approval in all the text-books upon the subject, so far as we have examined them. Wood, Nuis. (3d Ed.) pp. 966, 968; Webb's Pol. Torts p. 515, note. See also Corthell v. Holmes, 87 Me. 24, 32 Atl. Rep. 715. In Webb's Pol. Torts, p. 517, it is stated that in England the application of the remedy of abatement by the forcible act of an individual is now in use only as to rights of common rights of way, and sometimes rights of water, "and even in those cases it ought never to be used without good advisement." A fence across a public road is a common nuisance, which a person journeying along the highway may legally abate by removing the obstruction. This is so because his progress is impeded, and particular injury is sustained by him not shared in by the community generally. This right of abatement, however, cannot be lawfully exercised by one living at a distance from the obstructed way, with no immediate occasion to use it, who goes out for the express purpose of removing the impediment in the interest of the traveling public, for fear that he or his neighbors might receive injury from it. The appellant and his associates proceeded on the erroneous belief that, because the prosecuting witness was a violator of the law, they might right the wrongs the public was suffering by his acts, and this in a summary manner, by resort to physical force, guided only by the counsels of a mob. It was a congregation of law-breakers on one side retaliating upon an individual law-breaker on the other for lawless acts of the latter which affected not them alone, but hundreds of others (the public), whom they assumed to represent. Courts of justice cannot approve or countenance such disregard of the law. To do so would create and encourage disrespect for all governmental restraint, which is the beginning of anarchy. The judgment of the district court will be affirmed. All the justices concurring.

NOTE.—*Right of Individual to Abate a Nuisance.*—Carrie Nation's sensational attack upon the saloons of Kansas, and her insistence upon a right to abate them as public nuisances has created widespread discussion in which a variety of opinions have been expressed. However, as the trial court expressed it in the principal case, this question is not one to be looked at from any standpoint of sentiment, but upon clear reason and sound law.

There is much in the old common-law decisions to justify the position taken by Mrs. Nation and her followers as to the right of the individual to abate a nuisance, either public or private. As to private nuisance the rule has been well settled that the individual may abate it if injurious to him, and if he also have the right to bring an action therefor. State v. Parrott, 71 N. Car. 311, 17 Am. Rep. 5; Mayhew v. Burns, 103 Ind. 328; Amoskeag Co. v. Goodale, 46 N. H. 56; Ronayne v. Loranger, 63 Mich. 373; Manhattan Mfg. Co. v. Van Kueven, 23 N. J. Eq. 251; Calef v. Thomas, 81 Ill. 478. In abating a nuisance, however, no more injury must be done to the property than is absolutely necessary to effect the object. Calef v. Thomas. 81 Ill. 478; Heath v. Williams, 25 Me. 209; State v. Moffett, 1 Greene (Iowa), 247; Wright v. Moore, 38 Ala. 593. Thus, an owner of ground in abating a private nuisance, as shocks of corn left incumbering the ground by a tenant, is bound to use reasonable care to avoid unnecessary injury; he has no right to destroy the corn, unless there is no other reasonable way of enjoying the land. Calef v. Thomas, 81 Ill. 478.

Despite the confusion which existed at the old common law on the right of the individual to abate a public nuisance, the modern rule is well settled, the individual has no such right except in cases where the nuisance obstructs his individual right or affects

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his rights to an extent greater than the rest of the public. Brown v. Perkins, 12 Gray (Mass.), 89; Bowden v. Lewis, 13 R. I. 189; Gray v. Ayers, 7 Dana (Ky.), 375; Coast Co. v. Borough of Spring Lake (N. J. 1896), 36 Atl. Rep. 21; Brown v. De Groff, 50 N. J. L. 409; Graves v. Shattuck, 35 N. H. 257; Tissot v. Telegraph Co., 39 La. Ann. 996; Shaubut v. Railroad, 21 Minn. 502; School District v. Neill, 36 Kan. 617; Ruff v. Phillips, 50 Ga. 130; Finley v. Hershey, 41 Iowa, 389; Larson v. Furlong, 63 Wis. 323; Brightman v. Bristol, 65 Me. 426; Jarvis v. Santa Clara R. R., 52 Cal. 438; Turner v. Holtzman, 54 Md. 148. In Dimes v. Petley, 15Q. B. 276, Campbell, C. J., says: "It is fully settled by the recent cases that, if there be a nuisance in a public highway a private individual cannot, of his own authority, abate it, unless it does him a special injury, and then only to the extent necessary to enable him to exercise his right of passing over the highway. And we clearly think he can not justify doing any damage to the property of individuals who have improperly placed the nuisance there, if avoiding it he could have passed on with reasonable convenience." In the very recent case of Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, it was held that a public nuisance, can be abated only by a public officer, except in case of a person having some special interest in the abatement different from and greater than the interest of the community. In the case of Gray v. Ayers, 7 Dana (Ky.), 375, 32 Am. Dec. 107, the defendants set up the defense that the house thrown down by them was a place of resort for felons; but the court held the defendants liable, they not being particularly damaged, and therefore having no right to abate the nuisance. In Brown v. De Groff, 50 N. J. L. 409, the defendant, in fishing for clams, injured the plaintiff's oysters, and when sued, set up the defense that plaintiff's oyster bed was a common nuisance. The court held, however, that the defendants were liable even if their defense were absolutely true. In the recent case of Coast Co. v. Borough of Spring Lake (N. J. 1896), it was held that the power of a municipal officer to abate a public nuisance without statutory or judicial process stands upon the same footing as the power of a citizen.

As the court intimated in the principal case, there are some authorities which in the expressions used, seem to vindicate the right of the defendants in this case, and which hold, generally, that the individual has the right to abate a public nuisance. In nearly all these cases this statement of this rule was pure *dicta*. As was stated by Shaw, C. J., in Brown v. Perkins, 12 Gray (Mass.), 89, some of the earlier cases, in laying down the general proposition that private citizens might abate a common nuisance, did not expressly mark the distinction between private and public nuisances. Thus, in Harvey v. Dewoody, 18 Ark. 255, the court said: "It seems that any person may abate a common nuisance." This same statement was made in Wetmore v. Tracey, 14 Wend. (N. Y.) 250. The case of ferocious beasts or other impending dangers seems to be held an exception by some courts. Thus, in Dunlap v. Snyder, 17 Barb. (N. Y.) 561, it was held that if a dog is so ferocious that of his own disposition he will bite men in the street, and is at large, he is a nuisance, and may be killed by any one. See also Brown v. Carpenter, 26 action thereon, and where no breach of the peace will result. In such cases, however, the abatement must be attended with no more injury than is absolutely necessary to effect the object. There is also a further limitation to this rule, that in cases of nuisances from omission rather than commission, notice of abatement must be given. This limitation, however, does not apply to cases of extreme emergency requiring immediate action. In the case of public nuisances, abatement can only be secured through legal process in the mode designated by law, except in cases where the right of the individual seeking to abate the nuisance have been injured to an extent greater than the rest of the public. In all other cases appeal should be made to the courts.

JETSAM AND FLOTSAM.

A UNIQUE DIVORCE PETITION.

A correspondent from Kansas sends us a copy of a remarkable divorce petition filed at Gas City, Kansas, n which the plaintiff is 72 and the defendant 68. Thompson and Thompson represent the plaintiff and drew up the papers which are certainly unique in text and in the matter which they set forth. Our astonishment would have been greater, had such a thing come out of any other state but Kansas. That state seems to insist on being the state of surprises, and delights in doing what no one else would think of doing. Usage and custom have certainly a hard road in Kansas. The beginning chapters of the petition referred to read thus:

"Comes now the plaintiff to the altar of justice, bearing his burden of sorrow and of woe which he humbly lays down before the Ermine and the Woolsack.

"He declares with solemn truth that he has been for more than one year last passed an actual resident in good faith of the state of Kansas, whose valiant sons swam the Bag Bag; that state pointed out by all the world as being the deserted home of Carrie Nation and Mary Ellen Lease; and that he is now a resident of Allen county, same state, where the roar of natural gas wells and the whistle of great industries have become as familiar to its inhabitants as was the croaking of frogs to the people of Posey county, Indiana, in the days of Auld Lang Syne.

"It was 'back east' in the good old state of Ohio, that has given birth to statesmen and politicians. It was long years ago and in the sultry summer time, when the dog fennel blossomed in the lane and the wood pecker peeked his peck on the decaying trunk of the hollow Sycamore tree. It was at the spring 'neath the hill close by the spreading beech, a youth and maiden met and, meeting, loved and, loving, plighted their troth."

It was in the fall, the melancholy days, the saddest of the year, when they met again, but parted not in love but in anger. He married another girl and lived in Ohio. She married Mr. Walker of Texas and removed there. They were divorced. Then she married a man whose name is unknown to the doctor. He died. Then she married Mr. Baker and moved to California. He died. She had two children by her second marriage.

He early knelt at the feet of Esculapius and learned

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good practice and was prospering and knew many men of note. They moved to Gas City.

But his dreams were not realized. From the altar vows she turned forgetful and showed him a warm time thenceforth. Her supposed honey sweetness of disposition looked to him like a spray of vinegar. She began to knock on Kansas and then knock on him. Among his titles bestowed by her were "bigot, back number, loafer, idiot, crank, fool tyrant, no gentleman, filthy, low, indecent, old curmudgeon." Privately and publicly she hailed him thus. Was she a help mate to him? Nay. Nay. Did she love, honor and obey? Not on your tintype. Nor did she cook, wash or sew, although in good health and mighty spry for a lady of 68 summers. He is not an epicure but likes good things to eat and always provided plenty, but she refused to cook, declaring the house empty and forgetting the text: Rev. XII, 8. Once he went to the cupboard when she declared there was no butter in the house and brought forth a hunk which was not strong enough to walk to the table alone. She was angered by it as a bull flagged with a red flag. Shaking her finger in his face she declared "would shoot him, had she a gun." At other times he showed this improper desire to do murder. And she hobnobbed with evil companions much to his annoyance. She antagonized his religion. He had plenty and she had none, professing a disbelief in heaven and hell and a Creator. He knew there is a hell, but she couldn't see it. She snorted about his politics. He is an American, loyal and true. She is an anarchist and insisted on keeping papers of that breed about the house. And she annoyed him by talking of her religion and political faiths. Then she left him, alone, with none to love and none to caress. He could bear that but she took valuable papers with her, including an autograph letter of John J. Ingalls and a handsome specimen of tape worm, easily 74 feet long. He asks for divorce and possession of what is left of his property. The result will be awaited with interest.

CRIMINAL LIABILITY OF CORPORATIONS IN ENGLAND.

The importance of this subject is quite modern. The old books contained very little about it. Its prominence in modern times is due, no doubt to the enormous growth of joint stock companies, and to the consequent legislation, some of its penal, affecting those corporations. The first decision of importance on the subject is that in Reg. v. Birmingham and Gloucester Railway Company (1842), 3 Q. B. 223, where it was held that at common law an incorporated company might be indicted for non feasance in omitting to perform a duty imposed by statute, such as that of making arches to connect lands severed by the company's railway. There Patteson, J., delivering the judgment of the court, stated on the authority of 1 Hawk. P. C., ch. 66, § 13, that a corporation may be indicted for breach of a duty imposed by law, though not for a felony nor for crimes involving personal violence, as for riots or assaults. Then in Reg. v. Great North of England Railway Company (1846), 9 Q. B. 315, it was further held that an incorporated company could be indicted for a misfeasance, such as cutting through and obstructing a highway by works performed outside of their statutory powers. There Lord Denman, C. J., in delivering the judgment of the court, pointed out that crimes consisting in acts of immorality derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation which as such has no such duties cannot be guilty in these cases, but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large. Individuals who concur in voting the order or in executing the work may be made answerable for it also by criminal proceedings. But there can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority. In 1850, in case of The King of the Two Sicilies v. Wilcox, I Sim. (N. S.) 334. an incorporated company demurred to a bill in equity, on the ground that the discovery thereby sought might subject it to a criminal prosecution under the Foreign Enlistment Act (59 Geo. III., ch. 69), but Shadwell, V. C., overruled the demurrer, holding that the language of the act referred to individuals only. The general rule for the construction of statutes on this point is now laid down by section 2 (1) of the Interpretation Act, 1889 (52 and 53 Vict. ch. 63), re enacting part of 7 and 8 Geo. IV, ch. 28, § 14, that in the construction of every enactment relating to an offense punishable on indictment or on summary conviction whether contained in an act passed before or after the 1st of January, 1890, the expression of "person" shall, unless a contrary intention appears, include a body corporate. Practically the same rule has been laid down for the construction of penal statutes by the house of lords in the case of Pharmaceutical Society v. London and Provincial Supply Association, Limited, 5 App. Cas. 857, where it was held that in sections 1 and 15 of the Pharmacy Act, 1868, prohibiting under penalty any person not being a registered pharmaceutical chemist from keeping a shop for the sale of poisons, the word "person" does not include a corporation. In that case Lord Blackburn said: "I quite agree that a corporation cannot in one sense commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Bramwell, L. J., said, or is reported to have said (5 Q. B. D. at p. 313), upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action be brought against it for a libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case." More recently still, the judgment of Bowen, L. J., in Reg. v. Tyler (1891), 1 Q. B. 588, contains a valuable review of the law, summing it up as follows: "I take it, therefore, to be clear that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by showing that they are a corporation. That seems to me to be common sense and good law." Kay, L. J., in the same case entirely agreed. He puts it even more tersely: "I take it to be clear that where an act imposes upon a company a duty to perform a particular act, the company, though a corporation may be indicted for non-performance."—*Solicitor's Journal.*

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CORRESPONDENCE.

TAXATION OF PERSONAL PROPERTY—EVIDENCE OF DEBT.

To the Editor of the Central Law Journal:

The suggestion of one of your correspondents (in the issue for October 4, 1901), that evidences of debt be stamped by the assessor of taxes showing their rendition for taxes, before they should be collectible by any process of law, is good as far as it goes. But is such a provision sufficient to secure any great increase in the list of this kind of property on the tax-roll? Is it not within the experience of most of us, that by far the major part of evidences of debt are paid voluntarily, without resort to any process of law? And if this is so, would not such a provision become inoperative in a vast majority of cases? Tax-dodgers would continue to avoid the payment of taxes by trusting to the payment of their claim without resort to processes of the law, and without, of course, having their evidences of debt stamped by the assessor of taxes showing their rendition for taxes. This would seem to intensify rather than lessen some of the inequalities of the burden of taxation.

If to your correspondent's suggestion could be added a further provision that a voluntary payment of the evidences of debt which have not been stamped showing their rendition for taxes, would not discharge the same from liability to pay the tax, and an additional sum in the way of a penalty, and all costs made in collecting same, it would appear to go far to remove the objection which is herein indicated. And the right to recover said tax by an appropriate action should continue against the estate of the person who had received payment, without process of law, of his evidence of debt. Perhaps the statute of limitations should not run against the right to recover such tax out of the tax-dodger's estate whenever and wherever found.

DUANE MOWRY.

Milwaukee, Wis.

BOOK REVIEWS.

BISHOP'S DIRECTIONS AND FORMS.

One of the most valuable works of law which ever came from the pen of the late Dr. Joel Prentiss Bishop was that which completed his celebrated Criminal Law Series—"Directions and Forms for Prosecution and Defense." In this book Dr. Bishop attempted to clear up the surplusage and absurdity of common-law indictments and to furnish a set of practical directions and forms for the grand jury room, trial court, and court of appeal in criminal causes, with full citations of precedents from the reports and other sources. This book was published in 1885 and was received by the profession with immediate and universal approval. Mr. Bishop's wonderful power of classification and extraordinary research into the authorities, together with his closely adhered to policy of putting principle before precedent invariably resulted in placing upon a scientific and reasonable basis that subject of the law which he undertook to consider. This work on directions and cient forms which is now regarded as mere surplusage, which enables the pleader to reduce the pleading to a compact and elegant form. The revised edition of this work is edited by the Hon. Winslow Evans of the Peoria bar. Mr. Evans does not undertake to change the text; the thoroughness of Mr. Bishop's work leaving nothing to be desired in that direction. The annotations, however, have been brought down to date with an additional chapter by Mr. Evans on the subject of "Forms of Bills of Exception." We thoroughly commend this work as the highest authority on criminal forms and as quite indispensable to the active practitioner having any business whatever in the criminal court. Printed in one volume of 761 pages and bound in extra fine quality of law sheep. Published by T. H. Flood & Co., Chicago, Ill.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

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on appeal contains correct copies of orders, cannot urge that such orders are not properly authenticated. —Jett v. Sittle, Ind. T., 64 S. W. Rep. 572.

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14. ATTORNEY AND CLIENT—Value of Services Where Unsuccessful.—Where an attorney has been unsuccessful in his efforts for his clients, the court will consider that fact in fixing his fee.—Germania Safety-Vault & Trust Co.'s Assignee v. Hargis, Ky., 64 S. W. Rep. 516.

15. BANKRUPTCY—Avoiding Chattel Mortgage.—A trustee can avoid a chattel mortgage, where the mortgagee has failed to comply with the New York recording statute, only to the extent of the claims of judgment creditors of the bankrupt.—*In re* New York Economical Printing Co., U. S. C. C. of App., Second Circuit, 110 Fed. Rep. 514.

16. BANKRUPTCY—Avoiding Liens.—Under Bankr. Act, 1898, a trustee can avoid liens only when, and to the extent that, they could at the time of the adjudication have been avoided by creditors of the bankrupt. —*In re* New York Economical Printing Co., U. S. C. C. of App., Second Circuit, 110 Fed. Rep. 514.

17. BANKRUPTCY—Lien Where Contract of Sale Not Recorded.—As against creditors of a bankrupt, one who sold to him a chattel, title to remain in seller till purchase price is paid, cannot claim a lien where contract is not recorded as required by statute.—*In re* Tatem, U. S. D. C., E. D. (N. Car.), 110 Fed. Rep. 519.

18. BANKRUPTCY—Mortgage Made but not Filed Within Four Months.—Under Bankr. Act U. S. 1898, § 60b, a mortgage given more than a year before the mortgagor filed a petition in bankruptcy, but which was not recorded until within four months of the filing of the petition, held not voidable.—Asbury Park Building & Loan Assn. v. Shepherd, N. J., 50 Atl. Rep. 65.

19. BANKS AND BANKING—Discount by Unincorporated Bank.—A note discounted by an unincorporated bank was not placed on the footing of a bill of exchange, though payable at an incorporated bank.—Cunningham v. Potter, Ky., 64 S. W. Rep. 498.

20. BANK AND BANKING—Loaning Money to Depositor.—The lending of money on deposit for a customer is within the legitimate business of a bank, unless prohibited by its charter.—Bobb v. Saving Bank, Ky., 64 S. W. Rep. 494.

21. BANKS AND BANKING—Interest on Balance Found Due.—In an action against a bank to recover deposits the balance found due plaintiff should bear interest from the institution of his action.—Bobb v. Savings Bank, Ky., 64 S. W. Rep. 494.

22. BILLS AND NOTES—Transfer of Railroad Voucher. —A railroad company, transmitting a voucher in settlement of claim to creditor, cannot recover in *assumpsit* from one to whom the voucher was assigned by one falsely claiming to represent the creditor after payment of the voucher, on discovery of the forgery of the assignment.—Louisville & N. R. Co. v. Johnson, Ala., 30 South. Rep. 580.

23. BOUNDARIES—Equity Jurisdiction.—Equity has jurisdiction to establish disputed boundary lines, where the confusion as to them has arisen from the fraudulent acts of the owner of adjoining property. —Guice v. Barr, Ala., 30 South. Rep. 563.

24. BOUNDARIES—"Head" of a Stream.—The "head" of a stream, called for in a boundary, is the highest point on that stream which furnishes a continuous stream of water, and not necessarily its longest prong. —Uhl v. Reynolds, Ky., 64 S. W. Rep. 498.

25. CANCELLATION OF INSTRUMENTS—Adequate Remedy at Law.—Where complainant is out of possession at time of suit to cancel deed, he has an adequate remedy at law, and the bill will be dismissed.—Wilkinson v. Wilkinson, Ala., 30 South. Rep. 578.

26. CANCELLATION OF INSTRUMENTS—Seal as Consideration.—The rule that a seal imports consideration does not apply to a suit in equity to cancel a written instrument.—Way v. Union Cent. Life Ins. Co., S. Car., 39 S. E. Rep. 742.

27. CARRIERS—Limitation of Liability.—A clause in a contract limiting the common-law liability of a carrier held void.—Illinois Cent. R. Co. v. Radford, Ky., 64 S. W. Rep. 511.

28. CARRIERS OF GOODS—Action by Consignor for Failure to Deliver.—Action against carrier for failure to deliver goods consigned on commission held properly brought in name of consignor.—Southern Ry. Co. v. Deakins, Tenn., 64 S. W. Rep. 477.

29. CARRIER OF GOODS—Congestion of Freight.—Congestion of freight in defendant carrier's yard, known to defendant's agent, who, notwithstanding, promises delivery of goods, held no defense for failure to make prompt delivery.—Southern Ry. Co. v. Deakins, Tenn., 64 S. W. Rep. 477.

30. CARRIER OF GOODS—Passenger on Freight Train. —Passenger on freight train by carrier's permission held not to assume any risk resulting from management of train.—Southern Ry. Co. v. Crowder, Ala., 30 South. Rep. 592.

31. CARRIERS OF PASSENGERS—Party of Freight Train a Trespasser.—A party, knowing that he is not entitled to ride on a freight train, and paying a brakeman for the privilege, held a trespasser, and the company is not liable for injuries received in alighting

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from the train.—Sands v. Southern Ry. Co., Tenn., 64 S. W. Rep. 478.

32. CARRIERS OF PASSENGERS—Profit of Trip as Damages.—Question as to what plaintiff, a deputy marshal, would have earned, had his injury from defendant railroad company's negligence not terminated his trip, held proper.—Chicago, R. I. & P. Ry. Co. v. Hoover, Ind. T., 64 S. W. Rep. 579.

33. CARRIERS OF PASSENGERS—Protection of Intoxicants.—The fact that a railroad passenger's intoxication is in violation of a statute is immaterial on the question of the railroad's duty to preserve him from injury.—Wheeler v. Grand Trunk Co., N. H., 50 Atl. Rep. 103.

34. CHARITIES—Devise to Unincorporated Charity.—In a devise to an unincorporated charitable society, the heir at law takes the legal title in trust for the society, so that the devise is not void for want of a person in whom the legal estate may vest.—American Bible Soc. v. American Tract Soc., N. J., 50 Atl. Rep. 67.

35. CHARITIES—Unincorporated Charities as Objects of Gifts.—In a devise to an unincorporated charitable society, the objects of the society as expressed in its by-laws are a sufficient designation under the statute of frauds of the object of the gift.—American Bible Soc. v. American Tract Soc., N. J., 50 Atl. Rep. 67.

36. CHATTEL MORTGAGES—Bona Fide Purchaser.—Purchaser in good faith or mortgaged chattels from mortgagor in possession held not liable for conversion without demand or refusal.—Dean v. Cushman, Me., 50 Atl. Rep. 85.

37. CHATTEL MORTGAGES — Creditors Not Entitled to Special Provisions.—A provision of a mortgage that foreclosure shall not be brought within six months after default is for the benefit of the mortgagor, and his general creditors cannot avail themselves of it.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co., U. S. C. C., D. (Mass.), 110 Fed. Rep. 491.

38. CHATTEL MORTGAGE—Priority of Receiver in Possession.—Possession of a receiver appointed in a foreclosure suit is not that of the mortgagee, so as to give him priority over other creditors, where his mortgage was invalid without possession.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co., U. S. C. C., D. (Mass.), 110 Fed. Rep. 491.

39. CHATTEL MORTGAGES—Sale of Right to Redeem.—Mortgagor of chattels, having right to possession, may sell his right to redeem.—Dean v. Cushman, Me., 50 Atl. Rep. 85.

40. COLLISION — Steamer in Course of Sailing Vessel.—A steamer is not relieved from the rule requiring her to keep off the course of a sailing vessel, unless she has resorted to all other practicable means, and cannot comply with the rule without peril to herself or other vessels.—The Devonian, U. S. D. C., D. (Mass.), 110 Fed. Rep. 588.

41. COMMERCE—Creek Grant of Exclusive Telephone Franchise.—The Creek council act granting an exclusive franchise to a telephone company held not repugnant to interstate commerce clause of United States constitution.—Muskogee Nat. Tel. Co. v. Hall, Ind. T., 64 S. W. Rep. 600.

42. CONSTITUTIONAL LAW—Local Legislation.—Act May 23, 1874, making each city of the third class one school district, held not unconstitutional as local legislation regulating affairs of school districts.—Commonwealth v. Hitchens, Pa., 50 Atl. Rep. 91.

43. CONTRACT — Enforcement Where Fraudulently Procured.—Contract will not be enforced as written, it being admitted by demurrer that the action of the agent obtaining it was fraudulent.—Headley v. Pickering, Ky., 64 S. W. Rep. 527.

44. CONTRACT—Strict or Liberal Construction.—A party to a contract who has himself failed to comply with its conditions will not be permitted by a court of equity to insist upon a harsh and strict construction of it as against the other party.—Neal v. Briggs, U. S. C. C., E. D. (N. Car.), 110 Fed. Rep. 477.

45. COPYRIGHTS—Recovering Statutory Penalty.—An action to recover the statutory penalty of one dollar per sheet for the infringement of a copyright for a photograph can only be based upon sheets of the infringing publication which have been found in defendant's possession and seized for the purpose of condemnation and forfeiture.—Child v. New York Times Co., U. S. C. C., S. D. (N. Y.), 110 Fed. Rep. 527.

46. CORPORATIONS — Consent of Stockholders to Mortgage.—The provisions of the stock corporation law of New York, requiring the filing of the consent of stockholders to the execution of a mortgage by the corporation, is for the protection of the stockholders, and only stockholders can take advantage of a failure to comply with it.—*In re* New York Economical Printing Co., U. S. C. C. of App., Second Circuit, 110 Fed. Rep. 514.

47. CORPORATIONS — Employing Attorney.—Where the action of the director of a corporation in employing an attorney was acquiesced in by the president and other directors, his fee must be paid out of the assets of the corporation.—Germania Safety-Vault & Trust Co.'s Assignee v. Hargis, Ky., 64 S. W. Rep. 516.

48. CORPORATIONS—Liability of Stockholder to Judgment Creditor.—The liability of a stockholder to a judgment creditor under the laws of Kansas may be enforced by an assignee of the judgment.—Whitman v. Citizens' Bank, U. S. C. C. of App., Second Circuit. 110 Fed. Rep. 503.

49. COSTS — Petition for Rehearing.—The cost of preparing petition for rehearing refused the prevailing party on appeal.—Young v. Hughes, Oreg., 66 Pac. Rep. 272.

50. COURTS—Amount in Dispute.—Under Mansf. Dig. §§ 4026, 5014, 4124 (Ind. T. Ann. St. 1899, §§ 2706, 8219, 2804), a party joining several causes of action in replevin against the same defendants, each cause being within $300, may take judgment on each cause and consolidate the several sums into one judgment.—Harris v. Castleberry, Ind. T., 64 S. W. Rep. 541.

51. COURTS—Stare Decisis.—A decision which has been repeatedly followed, and upon the faith of which vast property rights have been acquired, will not be overruled.—Uhl v. Reynolds, Ky., 64 S. W. Rep. 498.

52. CRIMINAL EVIDENCE — Election by State of More Than One Offense.—Where, on a prosecution for carrying a pistol, witnesses testified to two offenses at different times and places, the state should have been required to elect.—Holt v. State, Tenn., 64 S. W. Rep. 478.

53. CRIMINAL EVIDENCE—Good Character.—Evidence of general good character in a prosecution for larceny must be confined to defendant's character for honesty and fair dealing.—State v. Conlan, Del., 50 Atl. Rep. 95.

54. CRIMINAL LAW — Good Character of Defendant.—Instructions that good character of defendant in criminal prosecution may generate a reasonable doubt of guilt held properly refused.—Eggleston v. State, Ala., 30 South. Rep. 592.

55. CRIMINAL LAW—Principals in Misdemeanors.—In the commission of a misdemeanor, all persons aiding or counseling are principals.—State v. Stark, Kan., 66 Pac. Rep. 243.

56. CRIMINAL TRIAL—Improper Comment by Attorney.—In a criminal prosecution, after the testimony on both sides had closed, comment of the attorney general in his argument to the jury on the fact that defendant had offered no proof as to his good character was not improper.—State v. Davis, Del., 50 Atl. Rep. 99.

57. CRIMINAL TRIAL—Right of State to Waive Capital Punishment.—State solicitor held to have no authority to waive capital punishment.—Roberts v. State, Ala., 30 South. Rep. 554.

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58. DAMAGES—Injury to Foot.—A verdict for $2,000 is not excessive for a painful injury to plaintiff's foot, which will render him a slight cripple for life.—Bowling Green Stone Co. v. Capshaw, Ky., 64 S. W. Rep. 507.

59. DAMAGES—Killing Minor.—The damages for the negligent killing of a minor are nominal only, when there are no distributees.—Tutwiler Coal, Coke & Iron Co. v. Enslen, Ala., 30 South. Rep. 600.

60. DEATH—Pecuniary Value of Intestate.—Measure of damages for negligent killing of plaintiff's intestate held to be the pecuniary value of life of intestate to his next of kin.—Louisville & N. R. Co. v. Jones, Ala., 30 South. Rep. 596.

61. DEEDS—Compliance With Restrictions.—Grantor of land for town site held barred by laches from compelling compliance with restrictions in deed as to distance of buildings from street, etc.—Ocean City Assn. v. Headley, N. J., 50 Atl. Rep. 78.

62. DEEDS—Construction of Joint Estate.—A deed naming "C and the heirs of her body" as parties of the second part, and conveying land to them, "their heirs and assigns," construed as creating a joint estate in C and her children.—Combs v. Eversole, Ky., 64 S. W. Rep. 524.

63. DEEDS—Presumption of Date of Delivery.—A deed will be presumed to have been delivered on the day of its date.—Williams v. Armstrong, Ala., 30 South. Rep. 553.

64. DISMISSAL AND NONSUIT—Nonsuit After Dismissal.—When a court dismisses action, it is without jurisdiction to entertain a subsequent motion for a nonsuit.—Stephenson v. Osage Coal & Mining Co., Ind. T., 64 S. W. Rep. 588.

65. DIVORCE—Burden of Showing Unchastity.—Burden of showing unchastity of defendant before marriage held to be on plaintiff in an action by him for divorce.—Garcin v. Garcin, N. J., 50 Atl. Rep. 71.

66. DIVORCE—Collateral Attack of Decree Awarding Custody.—A decree of divorce awarding custody of a minor child cannot be collaterally attacked in *habeas corpus* proceeding for possession of the child.—Culwell v. Franks, Ind. T., 64 S. W. Rep. 582.

67. DIVORCE — Corroborative Evidence.—Extreme cruelty as a ground of divorce must be shown by corroborative evidence, whether the divorce asked is a *mensa* or *a vinculo*.—Garcin v. Garcin, N. J., 50 Atl. Rep. 71.

68. EASEMENTS—Deed Does Not Pass Subsequently Created Easements.—A deed to realty, with the appurtenances, will not pass an easement of a stairway, which was not erected when the conveyance was made.—Peters v. Worth, Mo., 64 S. W. Rep. 490.

69. EJECTMENT—Estoppel of Ancestor.—In ejectment, facts showing ancestor, through whom plaintiffs claim title, was estopped during her lifetime, held to constitute no defense.—Williams v. Armstrong, Ala., 30 South. Rep. 553.

70. EJECTMENT—Gift Against Subsequent Grant.—Where plaintiff received land by gift and went into possession, defendant cannot plead a bill of sale made by grantor subsequent to the gift to defeat plaintiff.—Turner v. Gonzales, Ind. T., 64 S. W. Rep. 565.

71. EJECTMENT—Intervener's Title.—Where, in ejectment, after judgment by default, an intervener is permitted to file an answer, and his title was derived from defendant since the action was commenced, such answer should be stricken out.—Merrill v. Martin, Ind. T., 64 S. W. Rep. 539.

72. EMBEZZLEMENT — Agent's Conversion.—One acquiring money as agent, and afterwards conceiving fraudulent intent of converting it, or fraudulently secreting it for such purpose, held guilty of embezzlement.—Eggleston v. State, Ala., 30 South. Rep. 582.

73. EMBEZZLEMENT—Proof of One Article of Many Stolen.—In a prosecution for embezzlement of certain articles, it is sufficient if the embezzlement of any one of the articles described be proved.—State v. Davis, Del., 50 Atl. Rep. 99.

74. EMINENT DOMAIN—Legislative Determination of Public Use.—Where the legislature has determined that the exigency exists for calling into exercise the power of eminent domain, such determination is conclusive both as to the object being a public use and the propriety of exercising the power.—Tuttle v. Moore, Ind. T., 64 S. W. Rep. 585.

75. EQUITY—Cross-Bill for Affirmative Relief.—In order to obtain affirmative relief, a defendant in chancery must file a cross bill.—Hendrix v. Southern Ry. Co., Ala., 30 South. Rep. 596.

76. EQUITY — Decree Contrary to Practice.—Where a cause is submitted to chancellor in vacation, and decree rendered, contrary to the statute and chancery practice, the decree is void, and will not support an appeal.—Adams v. Wright, Ala., 30 South. Rep. 574.

77. EQUITY—Dismissal for Want of Equity.—Motion to dismiss a bill for want of equity should be sustained, if the facts apparent on the face of the bill show complainant without right to equitable relief.—Blackburn v. Fitzgerald, Ala., 30 South. Rep. 568.

78. EQUITY—Effect of Reference.—Where defendant proceeds to trial after reference without insisting on hearing on bill and answer, the cause stands on the uncontroverted allegations in the bill and the referee's findings of fact.—Dudley v. Eastman (N. H.), 50 Atl. Rep. 101.

79. ESTOPPEL—Conduct.—Owner of homestead held estopped by conduct from evicting railroad company from right of way over land, though deed conveying right of way is invalid.—Hendrix v. Southern Ry. Co., Ala., 30 South. Rep. 596.

80. ESTOPPEL—Pleading Estoppel.—Estoppel as a defense to a bill in equity must be pleaded.—Jones v. Peoples, Ala., 88 South. Rep. 564.

81. ESTOPPEL — Pleading Facts Necessary. — Facts showing an estoppel *in pais* must be specially pleaded in order to be of any force.—Newhall v. Hatch, Cal., 66 Pac. Rep. 266.

82. EVIDENCE—Ex Parte Affidavits.—*Ex parte* affidavits, made by strangers, attached to a bill for injunction held not admissible in evidence.—Turner v. Gonzales, Ind. T., 64 S. W. Rep. 565.

83. EVIDENCE—Judicial Notice of Harvest Time.—The courts will take judicial notice of the time of planting and harvesting annual crops.—Payne v. McCormick Harvesting Mach. Co., Okla., 66 Pac. Rep. 287.

84. EXCEPTIONS, BILL OF—Motion to Strike Pleas.—Rulings of trial court on motion to strike pleas will not be reviewed, when they are not shown in the bill of exceptions.—Cottingham v. Greely-Barnham Grocery Co., Ala., 30 South. Rep. 560.

85. EXECUTION — Construction — Notice of Levy.—Where an execution was issued and levied in March, 1895, and then returned to the clerk's office without a sale, the filing of the notice of the execution operated as constructive notice to a subsequent purchaser.—Park v. McReynolds, Ky., 64 S. W. Rep. 517.

86. EXECUTION—Extent or Sale.—Under St. 1821, ch. 60, §§ 27-33, giving a person power to levy execution by extent and the state by sale, the state is confined to a levy by sale.—Banton v. Griswold, Me., 50 Atl. Rep. 89.

87. EXECUTION—Interest of Purchaser of Sale—Purchaser at judicial sale held to acquire no greater interest than that possessed by the original owner, charged with all equities and existing defects in the title.—Gray v. Denson, Ala., 30 South. Rep. 595.

88. EXECUTION—Levy as Constructive Notice.—Where an execution was issued and levied in March, 1895, and then returned to the clerk's office without a sale, the filing of the notice of the execution operated as constructive notice to a subsequent purchaser.—Park v. McReynolds, Ky., 64 S. W. Rep. 517.

89. EXECUTION—Notice Misstating Name.—Under St.

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1893, § 4350, notice of execution sale, stating name of defendant defectively, held not to vitiate sale.—McLain Land & Investment Co. v. Kelly, Okla., 66 Pac. Rep. 282.

90. EXECUTION—Purchaser of Mortgaged Property and Execution Sale.—Under Ky. St., § 1709, the purchaser of mortgaged property at execution sale acquired only a lien for the purchase money and interest at the rate of 10 per cent. subject to the prior incumbrance.—Kennedy v. Weber, Ky., 64 S. W. Rep. 514.

91. EXECUTORS AND ADMINISTRATORS—Contract of Executor Supporting Mechanic's Lien.—An executor cannot make a contract which would give the other party a right to file a mechanic's lien on the estate property without an order of the court.—San Francisco Pav. Co. v. Fairfield, Cal., 66 Pac. Rep. 255.

92. EXECUTORS AND ADMINISTRATORS—Heirs' Action Against Administrator.—Heirs of an intestate cannot proceed in equity to enforce their rights against the administrator until they have sought to obtain relief from him and he fails to grant it.—Blackburn v. Fitzgerald, Ala., 30 South Rep. 568.

93. EXECUTORS AND ADMINISTRATORS—Heirs as Parties to Suit Against Administrator.—Heirs at law of an intestate held to have no right to maintain bill to be made parties to a suit against the administrator of the intestate.—Blackburn v. Fitzgerald, Ala., 30 South. Rep. 568.

94. EXECUTORS AND ADMINISTRATORS—Proof of Debts to Authorize Sale.—In proceeding by administrator to sell lands to pay debts, it is not necessary, under Code, § 164, that debts should be proved by deposition of disinterested witnesses.—Poole v. Daughdrill, Ala., 30 South. Rep. 579.

95. FEDERAL JURISDICTION—Probate Law in Indian Territory.—The United States district court for Indian Territory, sitting in probate, has no jurisdiction of a controversy between two guardians as to money owing by one to the other.—*In re* Frazee, Ind. T., 64 S. W. Rep. 545.

96. FIRE INSURANCE—Ownership of Land.—Provision in fire policy as to ownership of land in fee by insured held waived by agent's knowledge of condition of title.—American Cent. Ins. Co. v. Donlon, Colo., 66 Pac. Rep. 249.

97. FRAUD—Parol Purchase of Land.—An action of deceit by the parol purchaser of land against the vendor held not an action upon a contract for the sale of real estate to which the statute of frauds would be a defense.—Schneider v. Schleutker, Ky., 64 S. W. Rep. 505.

98. FRAUD—Question of Fact.—The existence of fraud is a question of fact for the jury.—Whitehouse v. Bolster, Me., 50 Atl. Rep. 240.

99. FRAUDS, STATUTE OF—Acceptance of Mortgage Surrender.—An agreement of a mortgagee to accept a surrender of the mortgaged premises and to deliver up the note secured by the mortgage held unenforceable, not being in writing.—Borcherdt v. Favor, Colo., 66 Pac. Rep. 251.

100. FRAUDS, STATUTE OF—Consideration of Marriage.—A contract on consideration of marriage, by which the husband agrees to give the wife an allowance, must be in writing and signed by the parties.—Stanley v. Madison, Okla., 66 Pac. Rep. 98.

101. FRAUDULENT CONVEYANCES—Grantee Repaying Fair Value.—Grantee in fraudulent conveyance, held released from liability to creditors, if he pays them the fair value of the property transferred.—Cottingham v. Greely-Barnham Grocery Co., Ala., 30 South. Rep. 560.

102. FRAUDULENT CONVEYANCE — Homestead. — A debtor can convey his homestead.—Steiner v. Berney, Ala., 30 South. Rep. 570.

103. FRAUDLENT CONVEYANCES—Mortgage to Secure Indorsements.—A mortgage given by one brother to another to secure the latter on indorsements made for the former, and not recorded for ever a year, held not to have been given to hinder and delay creditors.—Ashbury Park Building & Loan Assn. v. Shepherd, N. J., 50 Atl. Rep. 65.

104. FRAUDULENT CONVEYANCES—Purchase of Money Before Notice of Fraud.—Purchaser in conveyance, fraudulent as to creditors, held entitled to protection only to the extent of the purchase money paid before notice of the fraud.—McFadyen v. Masters, Okla., 66 Pac. Rep. 284.

105. FRAUDULENT CONVEYANCES—Right of Insolvency.—Where a mortgage made by a corporation is valid as against the corporation and its stockholders, its validity cannot be attacked by an assignee in insolvency, who represents general creditors whose claims arose after its execution.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co., U. S. C. C., D. (Mass.), 110 Fed. Rep. 491.

107. FRAUDULENT CONVEYANCES—Specially Pleading Fraud.—Where plaintiff claims under an execution sale, and defendant offers a deed from the judgment debtor, plaintiff may show fraud, though not specially pleaded.—Clardy v. Wilson, Tex., 64 S. W. Rep. 489.

108. GAMING—Betting on Election.—The hazard of money on the result of a primary election held within the meaning of Shannon's Code, §§ 8159, 8161, so as to authorize a recovery of the money paid in pursuance thereto.—Mitchell v. Orr, Tenn., 64 S. W. Rep. 476.

110. GARNISHMENT—Choses in Action.—Choses in action belonging to defendant, but in possession of garnishee cannot be reached by garnishment.—Cottingham v. Greely-Barnham Grocery Co., Ala., 30 South. Rep. 560.

111. HABEAS CORPUS—Application for Bail at Wrong Term.—Where petitioner, charged with felony, is ordered to furnish bail for an appearance at a wrong term of the court, as he could be admitted to bail by a bail commissioner, a petition for discharge under *habeas corpus* will be dismissed.—Welch v. Sheriff of Franklin County, Me., 50 Atl. Rep. 88.

112. HIGHWAYS—Attorney's Fees as Lien.—In an action for a street assessment, it is proper to make the attorney's fee allowed plaintiff a lien upon the land assessed.—Reid v. Clay, Cal., 66 Pac. Rep. 262.

113. HOMESTEAD — Excess of Exemption. — Where debtor's interest in land claimed as a homestead exceeds the value exempt, the excess only can be subjected to debt.—Steiner v. Berney, Ala., 30 South. Rep. 570.

114. HOMESTEAD—Lands Constituting Dwelling-Place. —A homestead may be claimed in lands constituting dwelling place of family, whether held in fee-simple or for life.—Steiner v. Berney, Ala., 30 South. Rep. 570.

115. HOMICIDE—Leaving State After Homicide as Evidence.—Where the state proved that defendant left the state immediately after the homicide, he may show that he was advised to leave to escape the friends of deceased.—Bradburn v. United States, Ind. T., 64 S. W. Rep. 550.

116. HOMICIDE — Self-Defense. — Where defendant claims self-defense, it is error to charge that two persons cannot engage in mortal combat and each be acting in self-defense.—Bradburn v. United State, Ind. T., 64 S. W. Rep. 550.

117. HUSBAND AND WIFE—Antecedent Debts of Husband.—Where a son purchased land lying partly in Tennessee and partly in Kentucky, and made a cash payment of four-fifths of the price with money furnished by his wife to obtain a home, the vendor will not be allowed to subject to an antecedent debt of the son the land in Kentucky, of less value than the cash payment.—Pitman v. Pitman, Ky., 64 S. W. Rep. 514.

118. HUSBAND AND WIFE—Community Property.—Where during coverture land is conveyed to either spouse, it is presumed to be community property.—Clardy v. Wilson, Tex., 64 S. W. Rep. 489.

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119. HUSBAND AND WIFE—Transaction Between—Burden on Husband to Show Fairness.—In a transaction between husband and wife, whereby husband obtained advantage, the burden is on him to show utmost fairness.—Way v. Union Cent. Life Ins. Co., S. Car., 39 S. E. Rep. 742.

120. INDIANS—Action for Possession of Land.—Action for possession of Indian lands held under void improvement contract held not maintainable by private citizen.—Casteel v. McNeeley, Ind. T., 64 S. W. Rep. 594.

121. INDIANS—Foreclosing Mortgages of Indian Lands.—Act Cong. May 2, 1890, § 31 (26 Stat. 94; Ind. T. Ann. St. 1899, p. 9), held to exclude jurisdiction of federal court for Indian Territory of action to foreclose mortgage covering Indian land.—Crowell v. Young, Ind. T., 64 S. W. Rep. 607.

122. INDIANS—Intestate Indians.—Under Act Cong. June 28, 1898, the property of a member of an Indian nation dying intestate will be distributed in the United States courts according to the statute of Arkansas.—Nivens v. Nivens, Ind. T., 64 S. W. Rep. 604.

123. INDIANS—Pasturing Cattle on Indian Land.—Rev. St. U. S. § 2117 (Ind. T. Ann. St. 1899, § 4327), imposing penalty on any person bringing cattle for pasturage on Indian lands without tribe's consent, held operative within the Creek Nation.—Forsythe v. United States, Ind. T., 64 S. W. Rep. 548.

124. INDIANS—Purchase of Lands.—The purchase of an improved farm from a Choctaw Indian by one not a citizen of the Choctaw Nation held not to give the grantee the right of possession as against a Choctaw Indian subsequently purchasing the land.—Rogers v. Hill, Ind. T., 64 S. W. Rep. 586.

125. INDIANS—Vested Interest of Individual Indians.—An individual of the Greek Nation has no vested interest in any specific tract of the land patented to the nation under treaty.—Tuttle v. Moore, Ind. T., 64 S. W. Rep. 585.

126. INDIAN TERRITORY—Jurisdiction of Foreclosure.—A federal court for the Indian Territory not having jurisdiction of suit to foreclose a mortgage on Indian land, it is proper to dismiss the suit and not retain it for personal judgment on the note secured.—Crowell v. Young, Ind. T., 64 S. W. Rep. 607.

127. INFANTS—Sale Without Guardian Ad Litem.—A judgment for the sale of land in which infant defendants had an interest was probably set aside, where no guardian *ad litem* was appointed, no answer was filed, and their statutory guardian was not made a party.—Thornton v. Thornton, Ky., 64 S. W. Rep. 524.

128. INSANE PERSONS—Execution of Deeds.—A deed by an incompetent is absolutely void.—Wilkinson v. Wilkinson, Ala., 30 South. Rep. 578.

129. INSURANCE—Payment to Agent.—Payment of premium to agent of the insurance company's authorized agent held to bind the company.—Weisman v. Commercial Fire Ins. Co., Del., 50 Atl. Rep. 98.

130. INSURANCE—Recovery of Cash Value for Assignee.—In an action by an administrator to recover the proceeds of a life policy which had been paid to his assignee for creditors, the burden was on defendant to show that at the time assignment was made the policy had a cash surrender value to which insured was entitled, or that he was entitled to a paid-up policy.—Burnsides' Admr. v. National Bank, Ky., 64 S. W. Rep. 520.

131. JUDGMENT—Finding of Identification.—Finding that note and mortgage on which action was founded were identified held sufficient to sustain judgment for plaintiff, where execution had been denied.—Schallehn v. Hibbard, Kan., 66 Pac. Rep. 241.

132. JUDGMENT—Setting Aside Default.—On a motion to set aside a default, affidavits of plaintiff held admissible.—Security Loan & Trust Co. v. Estudillo, Cal., 66 Pac. Rep. 257.

133. JUDICIAL SALES—Judgment of Sale Set Aside.—Where a judgment for the sale of land is properly set aside before the confirmation of the sale made thereunder, it is proper to set aside the sale also.—Thornton v. Thornton, Ky., 64 S. W. Rep. 524.

134. JURY—Commissioner's Court.—A trial before a jury in a commissioner's court is not a trial by jury within Const. U. S. Amend. art. 7.—Luce v. Garrett, Ind. T., 64 S. W. Rep. 613.

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